COURT OF APPEALS
DECISION
DATED AND FILED

January 20, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3011

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

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

LORI B.,

PETITIONER-RESPONDENT,

V.

STEVEN B.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Sheboygan County: GARY LANGHOFF, Judge. *Affirmed.*

NETTESHEIM, J. Steven B. appeals from a juvenile court order terminating his parental rights (TPR) to Kristin B. The order was entered following a jury verdict finding that Lori B., Steven's former wife, had established

grounds for the termination of Steven's parental rights.[1] On appeal, Steven contends that the court erred by modifying the standard TPR instruction for child abuse and that the court incorrectly responded to a question from the jury. In addition, Steven contends that the evidence is insufficient to support the jury's findings that he had exhibited a pattern of physically abusive behavior which constituted a substantial threat to Kristin's health and that the offense underlying his prior felony conviction resulted in injury to a child. Finally, Steven requests a new trial on the ground that the real controversy has not been fully tried. We reject each of Steven's arguments. Accordingly, we affirm the TPR order.

FACTS AND PROCEDURAL HISTORY

Lori and Steven were married in 1977. Kristin was born twelve years later on March 4, 1989. In 1992, Steven was convicted of second-degree sexual assault of a child and was placed on probation. The victim of the sexual assault was Lori's fifteen-year-old niece who had been babysitting for Kristin. In 1993, Lori filed for a divorce from Steven. Until June 1995, she and Steven had joint custody of Kristin.

In January 1996, the State revoked Steven's probation and he was sentenced to prison. Lori subsequently filed this TPR action seeking the termination of Steven's parental rights on grounds of "child abuse." In an addendum to the TPR petition, Lori alleged that Steven had been convicted of two counts of second-degree sexual assault of a child; that at Steven's revocation hearing Kristin had testified that she was afraid of her father and was afraid that he would harm her mother because he had threatened her mother's life in her

[1] The termination action was filed privately by Steven's former wife, Lori B. Sheboygan county was not a party to the action.

presence on several occasions; and that Steven had solicited a fellow inmate to kill Lori.

Prior to the trial, Steven filed a motion to dismiss the petition, arguing that the allegations did not constitute child abuse pursuant to § 48.415(5), STATS. Specifically, Steven contended that § 48.415 required an allegation of physical or sexual abuse to the child and that the petition failed to allege that Kristin suffered anything but emotional harm. Lori responded that the statute encompassed harm to the emotional health of the child and that the petition alleged a pattern of abuse that had caused such harm. As a further ground for dismissal, Steven contended that the allegations of the petition did not demonstrate that his felony conviction had caused injury to a child. The juvenile court denied Steven's motion. Steven renews these arguments on appeal, except his challenges are directed not at the petition, but rather at the juvenile court's jury instructions and the sufficiency of the evidence.

At a pretrial jury instruction conference, the juvenile court considered proposed instructions submitted by both Steven and Lori. Steven requested that the jury be instructed pursuant to WIS J I—CHILDREN 340, the standard instruction for involuntary termination of parental rights based on child abuse under § 48.415(5), STATS. Because Lori was not alleging that Kristin had ever been the object of Steven's physically abusive behavior, Lori argued for a modified instruction which stated that child abuse included emotional harm. The court declined to rule on the parties' proposed instructions until the close of testimony. Therefore, the matter was held in abeyance.

At the jury trial, Lori testified to a series of incidents during which Steven engaged in threatening and violent physical conduct towards her in

Kristin's presence, but which never directly inflicted physical harm on her or Kristin. The jury additionally heard testimony from Kristin's counselors, babysitter and Steven's probation officer.

At the close of the testimony, the juvenile court addressed the pending jury instruction issue. The court informed the parties that it had modified the language of WIS J I—CHILDREN 340 covering child abuse. Over Steven's objection, the court's instruction included the standard language but also recited the following definition of "physically abusive behavior": "any conduct by Steven [] which entails actual personal violence or harm; or emotional, psychological or mental harm coupled with physical acts or accompanied by physical acts."

The first verdict question inquired, pursuant to § 48.415(5)(a), STATS., whether Steven had caused the injury of a child which had resulted in a felony conviction. The jury answered "yes." The second question inquired, pursuant to § 48.415(5) whether Steven had exhibited a pattern of physically abusive behavior which is a substantial threat to the health of Kristin. Again, the jury answered in the affirmative.[2] Following a dispositional hearing, the juvenile court entered an order finding that Steven is an unfit parent and terminating his parental rights to Kristin. Steven appeals.

[2] Two jurors dissented from the verdict stating that Lori had failed to prove a pattern of physical abuse and that Lori had failed to prove that Steven is a substantial threat to Kristin's health.

DISCUSSION

The TPR Child Abuse Statute

Lori's TPR petition was based on § 48.415(5), STATS., which sets out child abuse as a ground for termination of parental rights. The statute provides:

> At the fact-finding hearing the court or jury may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:
>
> ….
>
> **(5)** CHILD ABUSE. Child abuse, which shall be established by proving that the parent has exhibited a pattern of physically or sexually abusive behavior which is a substantial threat to the health of the child who is the subject of the petition and proving either of the following:
>
> (a) That the parent has caused death or injury to a child or children resulting in a felony conviction.
>
> (b) That a child has previously been removed from the parent's home pursuant to a court order under s. 48.345 after an adjudication that the child is in need of protection or services under s. 48.13(3) or (3m).

Based upon her TPR petition which invoked subsec. (5)(a) of the statute, Lori was required to prove: (1) a pattern of physically abusive behavior which was a substantial threat to the health of Kristin; and (2) that Steven had caused injury to a child resulting in a felony conviction. *See* ***Monroe County v. Jennifer V.***, 200 Wis.2d 678, 683, 548 N.W.2d 837, 840 (Ct. App. 1996).

Before we address Steven's arguments, we make the following observations about § 48.415(5), STATS. As to the first element, the statute does not require that the pattern of physically abusive behavior be directed at the child who is the subject of the petition. Rather, the behavior must produce a substantial threat to the health of the child. *See* WIS J I—CHILDREN 340. As to the second

element under para. (a), the felony conviction need not relate to the child who is the subject of the action. Rather, the conviction may relate to *any* child.

We now turn to Steven's arguments.

1. Jury Instructions

Steven first argues that the trial court erroneously modified the standard instruction for child abuse, WIS J I—CHILDREN 340, under § 48.415, STATS. In reviewing Steven's claim, we bear in mind that a trial court has broad discretion in developing the language of the jury instructions given at trial. *See* ***State v. Foster***, 191 Wis.2d 14, 26, 528 N.W.2d 22, 27 (Ct. App. 1995). The instructions do not have to conform exactly to the standard jury instructions. *See* ***id***. "Because the standard instructions are not infallible, it is appropriate for a trial court to modify them when necessary to fully and fairly state the law." ***Id***. at 27, 528 N.W.2d at 27. We will not find an erroneous exercise of discretion if the instructions, as given, correctly stated the law and were supported by the facts properly before the jury. *See* ***State v. Selders***, 163 Wis.2d 607, 620, 472 N.W.2d 526, 531 (Ct. App. 1991).

The language of WIS J I—CHILDREN 340 describes "abusive behavior" as follows:

> "Abusive behavior"… means any conduct by [the parent] which causes abuse to another person. A "pattern of abusive behavior" requires more than a single instance of abusive behavior. In determining whether a pattern has been shown, you may consider the number and frequency of incidents, the nature of the parent's behavior, the nature and seriousness of any injuries, and all of the circumstances surrounding any incidents of abusive behavior.
>
> While it is not required that the abusive behavior be directed at [the child], it is required that the pattern of abusive behavior constitutes a substantial threat to the

> health of [the child]. "Health" includes physical, emotional, or mental health.

In addressing the verdict question whether Steven had exhibited a pattern of physically abusive behavior which was a substantial threat to the health of Kristin, the juvenile court utilized the language of the standard instruction, which we have quoted, but also added the following language: "'physically abusive behavior' … means any conduct by Steven [] which entails actual personal violence or harm; or emotional, psychological or mental harm coupled with physical acts or accompanied by physical acts." Steven argues that § 48.415(5), STATS., is limited to physical or sexual abuse, and therefore the court improperly broadened the instruction to include emotional abuse. We disagree.

Steven focuses on the "physically abusive" language of the statute. As such, we understand Steven to argue that the juvenile court instructed the jury that it could find child abuse if Steven had engaged in "emotionally abusive behavior" which caused harm to Kristin. But Steven focuses on the wrong portion of the statute. The court's additional language spoke to the portion of the statute that addresses *the effect of Steven's conduct on Kristin.* This is a subtle, but important, distinction. Therefore, we measure the court's instruction against the statutory language which requires that the "physically abusive behavior" cause a "substantial threat to the *health* of the child." Section 48.415(5), STATS. (emphasis added).

Pursuant to the standard instruction, the juvenile court told the jury that "health" includes "emotional, or mental health." Thus, the jury was correctly instructed that before it could answer "yes" to this question of the special verdict, it had to find not only that Steven had engaged in a pattern of physically abusive behavior but also that such conduct resulted in emotional harm to Kristin. This

was in keeping with the statute. The court's additional language merely clarified what the standard instruction already stated—that emotional harm to Kristin was a component of child abuse. Therefore, the court did not misuse its discretion when instructing the jury. *See* ***Selders***, 163 Wis.2d at 620, 472 N.W.2d at 531.

2. Judicial Response to the Jury's Question

The special verdict also included a question asking whether Steven had caused harm to a child which resulted in a felony conviction. Steven argues that the juvenile court erroneously answered an inquiry from the jury regarding this question. During deliberations, the jury inquired whether Steven's conviction for the felony charges required a finding that he had caused harm to a child.[3] Kristin's GAL told the court that she believed "[the jury] may need to be advised what an injury can consist of as to whether or not it must be physical in nature or if [it] could include emotional harm." The court agreed with this observation and informed the jury in its response that an "'[i]njury, includes physical or emotional harm."

Steven argues that the juvenile court erroneously extended the meaning of "injury" in § 48.415(5)(a), STATS., to include emotional injury. The interpretation of a statute is a question of law which we review de novo. *See* ***State v. Setagord***, 211 Wis.2d 397, 405-06, 565 N.W.2d 506, 509 (1997). The goal of statutory interpretation is to ascertain the legislature's intent, and to do so, we first consider the statute's language. *See* ***id***. at 406, 565 N.W.2d at 509. If the statute's language clearly and unambiguously sets forth the legislative intent, we apply that

[3] The jury's question was as follows: "Could you please verify that Question No. 1 is answered yes because Steven was convicted of the felony charges. It seems to be the consensus of most of the jurors that just because he was convicted already, that answers that question as yes. Is that right?"

language to the case before us and do not look beyond the language to ascertain its meaning. *See* ***id***. However, if a statute is ambiguous, we look to the scope, history, context, subject matter and object of the statute to ascertain legislative intent. *See* ***id.*** at 406, 565 N.W.2d at 510. A statute is ambiguous when it is capable of being understood in two or more different ways by reasonably well-informed persons. *See* ***id***.

Section 48.415(5)(a), STATS., requires the petitioner to prove "[t]hat the parent has caused death or injury to a child or children resulting in a felony conviction." Reasonable persons could differ as to whether "injury" includes emotional harm. Thus, we hold that the statute is ambiguous.

It is the nature of a sexual assault that physical injury does not always result. The criminal law recognizes that a sexual assault can cause "mental anguish" to a victim and, when such a result occurs, the level of the crime is increased. *See* § 940.225(2)(b), STATS. Case law recognizes that in cases of sexual assault of minors, emotional harm is "practically certain" to result even if the abuse was not accomplished through violence or threats of violence. *See* ***Doe v. Archdiocese of Milwaukee***, 211 Wis.2d 312, 343, 565 N.W.2d 94, 106 (1997).

We also note that "injure" is defined, in part, as: "To do harm to, damage, or impair. To hurt or wound, as the person; to impair the soundness of, *as health*; to damage." BLACK'S LAW DICTIONARY 785 (6th ed. 1990) (emphasis added). As we have already noted, the standard instruction defines "health" as including "emotional, or mental health." WIS J I—CHILDREN 340. Although this definition applies to the meaning of "abuse" for purposes of the second element of child abuse, we see no reason why the concept of "injury" for purposes of the first element of child abuse should exclude emotional harm.

Felony convictions for sexual assaults, while not always causing actual physical injury, are no less egregious and injurious than those for actual physical abuse. For these reasons, we conclude that the term "injury" as used in § 48.415(5)(a), STATS., includes emotional harm. Therefore, the juvenile court's answer to the jury's question was in accord with the law.

3. Sufficiency of Evidence

Steven raises challenges to the sufficiency of evidence in this case. First, he contends that there was insufficient evidence to support a finding of child abuse under § 48.415(5), STATS., because Lori failed to prove a pattern of physically abusive behavior that constituted a substantial threat to Kristin's health. In addition, he argues that there was insufficient evidence to prove that his felony conviction for sexual assault caused injury to the child victim of the offense.

Section 805.14(1), STATS., provides that a motion challenging the sufficiency of the evidence to support a verdict, or an answer in a verdict, will be granted if "the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party." Our review of a challenged jury verdict is limited to a search for credible evidence to support the jury's verdict; we do not search for evidence that might sustain a verdict the jury could have reached but did not. *See* ***Richards v. Mendivil***, 200 Wis.2d 665, 671, 548 N.W.2d 85, 88 (Ct. App. 1996). If more than one inference can be drawn from the evidence, we will follow the inference that supports the jury's finding "unless the evidence on which that inference is based is incredible as a matter of law." ***State v. Poellinger***, 153 Wis.2d 493, 506-07, 451 N.W.2d 752, 757 (1990). Finally, we give special weight to the jury's finding where, as here, it has the specific approval of the trial court. *See*

Nieuwendorp v. American Family Ins. Co., 191 Wis.2d 462, 472, 529 N.W.2d 594, 598 (1995).

Steven first contends that Lori has failed to demonstrate a pattern of physically abusive behavior that constitutes a substantial threat to Kristin's health because there is no evidence that Steven ever physically abused either Lori or Kristin. However, Lori testified to several incidents during which Steven exhibited physical and violent behavior that, although not resulting in direct injury to Lori or Kristin, was abusive. Lori testified that in the spring of 1993, Steven had threatened to "blow his head off" by putting a gun up to his head in front of Kristin and that Steven had attempted to run Lori off the road while Kristin was riding with him in his truck and had later locked Kristin in the truck. That same evening, Steven had entered Lori's home and in front of Kristin had ripped the phones out of the wall and had shattered a lamp. Lori testified that in the fall of 1993, Steven had entered her home with a gas can and matches and told her he was "going to burn the house down with [her] in it." Lori testified that in 1994, Steven threw a butcher knife at her and that in 1995, Steven told Kristin directly that he was going to kill Lori. Finally, both Steven's probation officer and Lori testified that Steven had attempted to hire another inmate to harm Lori.

We disagree with Steven's argument that these episodes do not establish a pattern of physically abusive conduct. Section 48.415(5), STATS., does not require proof of direct physical injury or the actual laying on of hands. Steven would have us hold that because the butcher knife he threw at Lori did not strike her, or because he did not actually burn down the house with her in it while brandishing gasoline and matches and threatening to do so, or because he did not actually run her off the road while trying to do so, his conduct does not qualify as physically abusive. That argument represents an unreasonable interpretation of

the statute. We reject such interpretations. *See* ***State ex rel. Reimann v. Circuit Court for Dane County***, 214 Wis.2d 605, 622, 571 N.W.2d 385, 391 (1997).

Based on Lori's testimony, we cannot conclude that the evidence, viewed most favorably to the verdict, is so lacking in probative force that no reasonable person could have found that Steven exhibited a pattern of physically abusive behavior. *See* ***Poellinger***, 153 Wis.2d at 507, 451 N.W.2d at 757-58. The evidence satisfied the statute and we affirm the jury's finding.

Steven also contends that there was insufficient evidence to prove that his behavior posed a substantial threat to Kristin's health. As we have noted, WIS J I—CHILDREN 340 instructs that "health" includes physical, emotional or mental health. Lori testified that during the time period of the abuse, Kristin was very concerned about Lori's safety and was not acting normally. In addition to testifying as to the incidents witnessed by Kristin, Lori testified that Kristin was "out of control," "totally confused" and was afraid and upset about Steven's threats to hurt Lori. As a result, Kristin feared that something would happen to Lori while she was at school or while Lori was asleep.

Steven relies upon the testimony of Kristin's counselors as evidence that Kristin's emotional health was not substantially threatened by his behavior. Neither of Kristin's counselors could testify that Steven's behavior posed a substantial threat to Kristin's health. While this absence of testimony would arguably support Steven's position, neither of the counselors was seeing Kristin during the period of abuse. Rather, both counselors began meeting with Kristin

after Steven had been imprisoned following his parole revocation.[4] Lori testified that Steven's imprisonment stopped Kristin from feeling frightened about Lori's safety. We conclude that there was sufficient evidence that Steven's behavior posed a substantial threat to Kristin's emotional health.

Finally, Steven contends that there was insufficient evidence to prove that he caused injury to a child which resulted in a felony conviction. *See* § 48.415(5)(a), STATS. Specifically, Steven argues that the record is void of evidence that Steven's sexual contact with Lori's fifteen-year-old niece caused "injury."

We view this as a close question, but we nonetheless affirm the jury's finding. Steven was convicted of sexually assaulting Lori's fifteen-year-old niece who had been babysitting for Kristin. Lori testified that the sexual assault took place in the living room of their home while she was out with friends. Steven, who was also planning to go out, decided to stay home. Steven was the victim's uncle. Steven testified that the contact between him and Lori's niece consisted of "touching her butt" and of "putting her hand on [him]." The victim of the offense did not testify.

Steven correctly argues on appeal that the jury did not hear direct evidence that Steven's conduct actually injured Lori's niece. However, as we have already held, § 48.415(5)(a), STATS., takes in emotional harm. And, as we have also noted, emotional harm is "practically certain" to result when a minor is sexually assaulted. *See* ***Doe v. Archdiocese of Milwaukee***, 211 Wis.2d at 343,

[4] Kristin's counselor, Cheryl Taylor, testified that she first met Kristin in November 1995. Steven's probation was revoked that same month. Kristin's other counselor, Jodi Mundigler, testified that she did not meet Kristin until the spring of 1996.

565 N.W.2d at 106. Moreover, "Wisconsin courts have already inferred an intent to injure as a matter of law where an adult engages in sexual molestation of a minor because such conduct is 'so certain to result in injury to that minor' regardless of the actor's claimed intent." ***C.L. v. School Dist. of Menomonee Falls***, 221 Wis.2d 692, 703, 585 N.W.2d 826, 830 (Ct. App. 1998). Based on this law, we conclude that a reasonable jury could infer from the evidence in this case that the victim of Steven's sexual assault suffered, at a minimum, emotional harm. We uphold the jury's finding.

4. Discretionary Reversal

Finally, Steven requests this court to reverse the juvenile court's TPR order under § 752.35, STATS., because the real controversy has not been fully tried. In support, Steven contends that "the court erred in handling this case from the motion to dismiss through instructing the jury because it continually interpreted sec. 48.415(5), STATS., broadly to include emotional harm and abuse when that statute requires physical harm or abuse." This argument simply restates Steven's earlier arguments which we have already rejected.[5] We therefore deny Steven's request for a new trial.

CONCLUSION

We conclude that the juvenile court did not erroneously broaden § 48.415(5), STATS., to include emotional abuse when it instructed the jury that physically abusive behavior included emotional abuse coupled with physical acts of violence. We further conclude that the court did not erroneously instruct the

[5] To the extent that this argument challenges the juvenile court's ruling denying Steven's motion to dismiss the petition, we observe that Steven develops no appellate argument in support of this claim.

jury that the term "injury" as used in § 48.415(5)(a) includes emotional injury. We also reject Steven's contention that the evidence is insufficient to support the jury's finding that grounds existed for the termination of his parental rights. As such, the real controversy was fully tried. We therefore affirm the TPR order.

By the Court.—Order affirmed.

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