COURT OF APPEALS
DECISION
DATED AND FILED

August 5, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3606

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

IN THE INTEREST OF ISAAC L.G.,
A PERSON UNDER THE AGE OF 18:

LA CROSSE COUNTY
HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

HEATHER Z.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for La Crosse County: JAMES W. RICE, Judge. *Affirmed.*

DEININGER, J.[1] Heather Z. appeals a dispositional order finding her son, Isaac L.G., to be a child in need of protection or services (CHIPS) under

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

§ 48.13(10m), STATS.[2] A jury found Heather to be "at substantial risk of neglecting, refusing or being unable for reasons other than poverty to provide necessary care for Isaac G[] so as to seriously endanger his physical health" based on "reliable and credible information" that Heather had previously neglected another child in the home.

Heather claims that the trial court erred by admitting evidence of her conduct following the filing of the CHIPS petition because it was not relevant to the issues being tried. In the alternative, she argues that if the evidence was relevant, its probative value was outweighed by the danger of unfair prejudice. Finally, Heather also contends that even if the evidence of her post-petition conduct was properly admitted, it warranted a cautionary jury instruction which the trial court declined to give. We disagree with Heather's contentions, and therefore affirm the appealed order.

BACKGROUND

The La Crosse County Human Services Department took temporary physical custody of Isaac on April 24, 1998, the day he was born. Several days later, the department filed a petition alleging that Isaac's

> parent, guardian or legal custodian is at substantial risk of neglecting, refusing or being unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to endanger seriously the physical health of the child, based on reliable and credible information that the child's parent, guardian or legal custodian has neglected, refused or been unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care or shelter so as to endanger seriously the physical health of another child in the home.

[2] Section 48.13(10m), STATS., is quoted and discussed below, in the text of this opinion.

Section 48.13(10m), STATS. A court had previously determined that Heather's older child, Moria Z., was in need of protection or services because Heather had "neglect[ed], refuse[d], or was … unable for reasons other than poverty to provide necessary care, food, clothing, medical or dental care, or shelter [so as to seriously endanger] Moria Z.'s physical health." *See* § 48.13(10), STATS. Moria had been placed in foster care pursuant to a CHIPS dispositional order entered on January 8, 1998, and she remained in that placement at the time of Isaac's birth.

Heather filed a motion in limine to preclude the department from introducing "any testimony or other evidence regarding events that occurred after April 24, 1998, the date the child was removed from the home." Specifically, Heather objected to the introduction of evidence regarding her interactions with Isaac after he was removed from her care. She argued that those events were not relevant to the allegations of the petition, which focused on Heather's previous neglect of Moria. The motion was denied. At the conclusion of the fact-finding hearing, the jury answered "yes" to both of the following questions:

> Question #1: Does reliable and credible information exist that Heather Z[] neglected, refused, or was unable for reasons other than poverty to provide necessary care for Moria Z[] in her home so as to seriously endanger the physical health of Moria Z[]?
>
> Question #2: Based upon that information, is Heather Z[] at substantial risk of neglecting, refusing, or being unable for reasons other than poverty to provide necessary care for Isaac G[] so as to seriously endanger his physical health?

Based on the jury verdict, the court entered a CHIPS dispositional order transferring Isaac's custody to the department for one year. Heather appeals the order.

ANALYSIS

A trial court's decision to admit or exclude evidence is discretionary. *See* ***State v. Alsteen***, 108 Wis.2d 723, 727, 324 N.W.2d 426, 428 (1982). If a trial court rationally applies the correct law to the relevant facts, an appellate court will not disturb its discretionary decision. *See* ***Loy v. Bunderson***, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982). "Upon review, we will not set aside a discretionary order unless it is apparent that it was exercised arbitrarily or on the basis of completely irrelevant factors." ***Carlson Heating, Inc. v. Onchuck***, 104 Wis.2d 175, 181, 311 N.W.2d 673, 676 (Ct. App. 1981).

Heather contends that evidence of her post-petition conduct should not have been admitted at the fact-finding hearing because it was not relevant to the issue being tried. *See* § 904.02, STATS. ("Evidence which is not relevant is not admissible."). In making this claim, Heather faces a heavy burden because Wisconsin courts define relevance broadly. *See* ***State v. Richardson***, 210 Wis.2d 694, 707, 563 N.W.2d 899, 904 (1997). "'Relevant evidence' means evidence having *any tendency* to make the existence of *any fact* that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Section 904.01, STATS. (emphasis added). The phrase 'any tendency' reflects the "low threshold for the introduction of evidence that the relevancy statute creates." *See* ***id.*** at 707, 563 N.W.2d at 904.

In support of her contention that events occurring after Isaac was removed from her care were not relevant to the allegations of the department's petition, Heather cites ***In the Interest of T.M.S.***, 152 Wis.2d 345, 448 N.W.2d 282 (Ct. App. 1989), a termination of parental rights (TPR) case. She asserts that, because we concluded in ***T.M.S.*** that post-petition conduct was relevant based on a

statutory TPR element requiring an evaluation of the likelihood of a parent's future conduct, the absence of a similar element in the CHIPS grounds alleged by the department in this case renders post-petition events inadmissible. Heather argues that § 48.13(10m), STATS., concerns only past conduct because the sole basis for CHIPS jurisdiction under this subsection is a parent's past treatment of another child. We disagree.

We acknowledge that we held the proffered post-petition evidence admissible in ***T.M.S.*** because it was relevant to the element of § 48.415(2)(c), STATS., 1987-88, which required a TPR petitioner to show that "there is a substantial likelihood that the parent will not meet … conditions [for return of the child to the home] in the future." *See* ***T.M.S.***, 152 Wis.2d at 359, 448 N.W.2d at 288. We did not indicate, however, that absent the expressly forward-looking element of the grounds for TPR at issue in ***T.M.S.***, post-petition conduct would *not* be admissible. *See* ***id***. Moreover, as we discuss below, § 48.13(10m), STATS., also encompasses an element that is, at least implicitly, forward-looking: the probability that a given child will be neglected in the future. Thus, ***T.M.S.*** provides but tenuous support for the exclusion of post-petition conduct in the present case.

Here, the department was required to prove not only that there was "reliable and credible information" that another child in Heather's home had been neglected in the past, but also that Heather was "at substantial risk of neglecting" Isaac. *See* § 48.13(10m), STATS. The neglect of children is generally not a one-time event, but a continuing series of acts and omissions. Evaluating whether a child is presently at risk of being neglected necessarily involves a prediction of what is likely to occur in the future. The evidence of Heather's negative interactions with Isaac following his removal from her care had a tendency to

make the existence of a risk that she would neglect Isaac more probable than it would be without that evidence. *See* § 904.01, STATS. We thus conclude that the trial court did not erroneously exercise its discretion in deeming the evidence of post-petition events relevant to the allegations of the CHIPS petition and therefore admissible at the fact-finding hearing.

Heather argues next that, even if the evidence of her post-petition interactions with Isaac were relevant, the evidence should have been excluded under § 904.03, STATS. ("although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice …."). The balancing of the probative value of proffered evidence against its potential for unfair prejudice is committed to the sound discretion of the trial court. *See* ***State v. Spraggin***, 77 Wis.2d 89, 95, 252 N.W.2d 94, 97 (1977). Heather asserts that the trial court failed to conduct the balancing required under § 904.03, STATS., and that the evidence of her post-petition conduct should have been excluded because its unfair prejudice to her outweighed its probative value.

Heather cited § 904.03, STATS., as a grounds for excluding evidence of her post-petition conduct in the motion in limine she filed prior to the fact-finding hearing. However, during argument on the motion on the morning of the hearing, Heather's counsel emphasized her claim that the evidence of post-petition conduct was not relevant to the facts the jury would be asked to find, but did not ask the court to evaluate the potential for unfair prejudice to her client if the jury considered that evidence. We conclude that although Heather has preserved an argument based on § 904.03, STATS., for purposes of appeal, we will not entertain a claim of error premised on the lack of explicit findings by the trial court regarding the probative value of the evidence and its potential for unfair prejudice. *See* ***State v. Gollon***, 115 Wis.2d 592, 604, 340 N.W.2d 912, 918 (Ct. App. 1983).

We thus undertake an independent review to determine whether the record provides a basis for the trial court's discretionary decision to admit the post-petition conduct into evidence. *See* ***State v. Pharr***, 115 Wis.2d 334, 343, 340 N.W.2d 498, 502 (1983).[3] While Heather catalogues the testimony she found objectionable,[4] she does not persuade us that individually or collectively, it amounts to the type of shocking, inflammatory, or scandalous information that would excite the jury's passions against her. *Cf.* ***State v. Gulrud***, 140 Wis.2d 721, 736, 412 N.W.2d 139, 145 (Ct. App. 1987). It is true that the evidence is unfavorable to Heather's position in this litigation, but that does not render it unfairly prejudicial. *See* ***State v. Alexander***, 214 Wis.2d 628, 642, 571 N.W.2d 662, 668 (1997).

The probative value of the challenged evidence was considerable in that the events in question were near in "time, place and circumstances" to the fact to be proven, namely, the risk that Heather would neglect Isaac. *See* ***State v. Speer***, 176 Wis.2d 1101, 1118, 501 N.W.2d 429, 434 (1993). The testimony regarding Heather's conduct during supervised visits, and the other evidence to which Heather objects, relates to events which took place within the narrow two-month window between the date Isaac was removed from Heather's custody and

[3] If a "trial court fails to set forth its reasoning in exercising its discretion to admit evidence, the appellate court should independently review the record to determine whether it provides a basis for the trial court's exercise of discretion." ***State v. Pharr***, 115 Wis.2d 334, 343, 340 N.W.2d 498, 502 (1983).

[4] While categorically objecting to all evidence of her post-petition conduct, Heather specifically cites testimony regarding the following events as irrelevant and prejudicial: Heather's eviction from low-income housing; her falling asleep while feeding Isaac; her not responding to Moria's rough treatment of Isaac; her not knowing how to insert a liner into a baby bottle, heat the bottle, or install a child car seat; her being distracted by friends during the visits with Isaac and Moria; her comment during a visit with Isaac that she wished the time would go by faster; and her statement that she wanted her children back because she was lonely.

the date of the fact-finding hearing. Moreover, many of the events took place during Heather's visits with both Moria and Isaac. The events in question are thus not from a distant time, nor do they involve Heather's care of other children. The evidence objected to, for the most part, speaks directly to the issue of whether Heather was at risk of neglecting Isaac.

Thus, we conclude the trial court did not erroneously exercise its discretion in admitting the evidence, because the probative value of the evidence regarding Heather's post-petition conduct was not substantially outweighed by the danger of unfair prejudice.[5]

Finally, Heather argues that had the jury been given an instruction she requested, "the prejudicial effect of the post-removal evidence might have been mitigated." Heather requested the court to give WIS J I—CHILDREN 180, which reads as follows:

> In answering the question in the special verdict, you must consider the facts and circumstances as they existed on _____, which was [the date on which the petition was filed] [the date on which the child was removed from the home by the Department of Social Services]. Your answer must reflect your finding as of that date.

The decision to give or not to give a requested jury instruction is also one which lies within the trial court's discretion. *See* ***State v. McCoy***, 143 Wis.2d 274, 289, 421 N.W.2d 107, 112 (1988). The instruction requested by Heather would have essentially informed the jury that the evidence of her post-petition conduct was

[5] Heather also asserts that the post-petition evidence about her interactions with Isaac was admitted for an improper purpose: to prove her bad character as a mother. *See* § 904.04(2), STATS. We disagree. As the County points out, such evidence speaks not to Heather's character but to her ongoing inability to parent Isaac. That is, the present evidentiary dispute involves the relevance of the proffered evidence and its possible prejudicial effect under §§ 904.01-904.03, STATS., but not the use of "other acts" to prove character as addressed by § 904.04(2).

irrelevant to their decision. As we have discussed, however, evidence of Heather's interactions with Isaac was relevant to an assessment of the risk that Heather would neglect Isaac, just as she had previously neglected Moria. Once the court determined that Heather's post-petition conduct was relevant to a material disputed fact, it was not error for the court to decline to instruct the jury otherwise. [6]

CONCLUSION

For the reasons discussed above, we affirm the dispositional order determining Isaac to be in need of protection and services.

By the Court.—Order affirmed.

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

[6] Heather also notes that in its comment to WIS J I—CHILDREN 180, the Juvenile Jury Instruction Committee expresses its "opinion that [as a general rule] the intent and purpose of the Children's Code are best served by addressing the jurisdictional issue as of the date of removal of the child or the filing of the petition." The committee's concern appears to be most directed at certain jurisdictional grounds which a parent might defeat with "last minute provisions for a child's care," just before a fact-finding hearing. The committee also notes, however, that "[t]here is no statutory or case law guidance on this question of timing," and we agree with its conclusion that "when the issue does arise, it must be resolved by the court in the context of the particular jurisdictional ground at issue." As we have discussed in this opinion, we conclude that the trial court did not erroneously exercise its discretion in permitting the jury to consider Heather's post-petition conduct bearing on the question of whether she was at risk of neglecting Isaac under § 48.13(10m), STATS.