COURT OF APPEALS
DECISION
DATED AND FILED

November 6, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0646

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

PENNY M. Z.,

PETITIONER-RESPONDENT,

V.

JOHN D. R.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: RICHARD T. WERNER, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Deininger, J.

EICH, C.J. John R.[1] appeals from a "child abuse injunction" issued November 4, 1996, under § 813.122, STATS. The order enjoins him from having

[1] We use the parties' initials throughout this opinion to protect the identity of members of the family referred to here.

any contact with his three minor children based upon a finding by the trial court that "there are reasonable grounds to believe that [he] has engaged in, or threatened to engage in abuse to the child[ren]."

John R. raises several challenges to the order: (1) the principles of *res judicata* invalidate the order because it was obtained on the same facts contained in a petition for an injunction that was denied by another branch of the court only a short time earlier; (2) the order violates applicable provisions of § 813.122, STATS., imposing a strict two-year limitation on child-abuse injunctions, because it was issued on the same facts on which a similar injunction was issued in 1994; (3) the trial court improperly allowed evidence at the hearing that John R. had been convicted of abusing the child; and (4) the court erroneously exercised its discretion in denying John R.'s request for a continuance of the hearing.

The first two issues are not properly before us. The appellate record is limited to the proceedings leading up to the order on appeal—the injunction issued on November 4, 1996. There is nothing in the record relating to either the 1994 injunction or the alleged dismissal of a similar petition just prior to the filing of the instant petition. It is, of course, the appellant's responsibility to ensure that evidence and other materials pertinent to the appeal are in the record, and failure to so constitutes grounds for dismissal of the appeal. ***State v. Smith***, 55 Wis.2d 451, 459, 198 N.W.2d 588, 593 (1972). It certainly constitutes grounds to ignore any arguments based on non-record facts, for our review is limited to those portions of

the record available to us. ***In re Ryde***, 76 Wis.2d 558, 563, 251 N.W.2d 791, 793 (1977).[2]

The issues before us, then, relate only to the trial court's admission of evidence relating to John R.'s child-abuse conviction and the court's denial of his motion for a continuance. We conclude that the trial court properly exercised its discretion with respect to both rulings and affirm the order.

John R. had three children with Penny Z. On October 29, 1996, Penny Z. filed a petition under § 813.122, STATS., alleging that John R. had engaged or might engage in (1) sexual contact with the children; and (2) conduct causing them emotional damage. The statute provides that if the court finds, on such a petition, that reasonable grounds exist to believe that "the respondent has engaged in, or based upon prior conduct of the child victim and the respondent may engage in, abuse of the child victim," an injunction prohibiting any and all contact with the child may issue. Section 813.122(5)(a)3. As indicated, the trial court so found in this case. Other facts will be discussed below.

I. Admission of Evidence of John R.'s Conviction

At the hearing on Penny Z.'s petition for the injunction, her attorney called John R. as a witness. When John R. gave his address as the Rock County Jail, explaining that he was there "finishing a sentence on bail jumping," counsel asked whether the charge underlying the bail-jumping conviction "was a sexual assault of [his] oldest child." John R.'s attorney objected on grounds that John R.

[2] We note that John R.'s brief included an appendix, cited throughout his statement of facts and argument, containing purported copies of various documents relating to the 1994 proceedings and 1996 dismissal of a substantially identical petition. On July 10, 1997, we granted Penny Z.'s motion to strike the appendix and all references to it in John R.'s brief.

had pleaded no contest to the charge which was "no[t an] adjudication of guilt in itself," and further, that the conviction was not "really relevant to this [proceeding]." The trial court overruled the objection, noting that an adjudication of guilt on a no-contest plea is nonetheless an adjudication of guilt. Eventually, when asked whether he had been convicted of the assault, he answered: "Alleged sexual assault." Later, in response to a question from his own attorney, John R. acknowledged that he had been sentenced for the sexual assault in 1994 after entering a plea of no contest. He stated that he pled no contest to the assault and later refused to cooperate in sexual counseling, because he "believed … [he] had not sexually assaulted the child."

On appeal, John R. argues that the evidence of his conviction was hearsay, citing § 908.03(22), STATS., which provides generally that evidence of a prior conviction is not hearsay as long as the conviction was the result of a trial or a guilty plea, "but not [based] upon a plea of no contest." The evidence indicates that John R.'s conviction was indeed based on his no-contest plea, and Penny Z. concedes that the evidence was erroneously allowed, arguing instead that its admission was harmless error. Error that is *de minimis* does not constitute grounds for reversal. ***Laribee v. Laribee***, 138 Wis.2d 46, 51, 405 N.W.2d 679, 681 (Ct. App. 1987). Trial court error is prejudicial only when it reasonably could be expected to affect the outcome of the case. Thus, we "will not reverse for error unless it appears probable from the entire evidence that the result would have been different had the error not occurred." ***McCrossen v. Nekoosa Edwards Paper Co.***, 59 Wis.2d 245, 264, 208 N.W.2d 148, 159 (1973).

"Abuse" within the meaning of § 813.122, STATS., is defined to include "emotional damage," which, in turn, is defined as harm—or a threat of harm

> to a child's psychological or intellectual functioning. "Emotional damage" shall be evidenced by one or more of the following characteristics exhibited to a severe degree: anxiety; depression; withdrawal; outward aggressive behavior; or a substantial and observable change in behavior, emotional response or cognition that is not within the normal range for the child's age and stage of development.

Section 813.122(1)(a) (adopting § 48.02(1), STATS.).

A professional child therapist/counselor, appearing as an expert witness for Penny Z., testified that, in her opinion, John R.'s contact with the children would be "emotionally harmful" to them. At one point, counsel read to the witness the statutory definition of "emotional damage" and asked if she had an opinion, to a reasonable degree of professional certainty, whether the "harm" she was discussing met that definition. John R.'s counsel did not object to the question, and the witness responded in the affirmative. In light of that testimony, which is uncontradicted in the record, we are satisfied that, in this trial to the court, admission of evidence that John R. had been convicted of fourth-degree sexual assault of one of the children was harmless. We do not believe it affected the outcome of the proceeding in any respect.

II. Failure to Grant a Continuance

As the hearing began, the attorney appearing for John R. stated:

> And I'd like to point out, your Honor, that I'm here kind of on an emergency basis for [Atty.] Gary Heiber, who is handling this case. We just got wind of this this morning at about 10:00 o'clock, and Mr. Heiber was in Rockford at court.
>
> So at this time I would like to ask for this to be continued.

Counsel for Penny Z., pointing to various time limitations in the child-abuse injunction statutes—and to his own inability to return to court in the

reasonably near future—stated that he could not agree to a postponement. John R.'s counsel stated that the absent lawyer was "familiar with the facts.… with [John R.] and the situation," and possibly could be in court the following day. The court, noting that it was to begin a jury trial the following morning, denied the motion, and the hearing proceeded.

Acknowledging at the outset that whether to grant or deny a request for a continuance is within the trial court's discretion, John R. doesn't argue the point. Instead, he casts his argument in terms of "notice." Citing ***Bachowski v. Salamone,*** 139 Wis.2d 397, 407 N.W.2d 533 (1987), for the proposition that due process requires reasonably adequate notice of the proceedings, he argues that the trial court's denial of a continuance abridged that right. ***Bachowski*** involved several constitutional challenges to the harassment injunction statute, § 813.125, STATS. One was whether the "summary procedures" set forth in the statute violated the notice requirements of the due process clause. The statute authorizes the issuance of an *ex parte* temporary restraining order and requires the court to hold a hearing on the final injunction within seven days thereafter. Because, however, the statute does not provide a "minimum notice period" for service of the restraining order and notice of the hearing date for the final injunction, the challengers argued that it was constitutionally defective. ***Id***. at 405, 407 N.W.2d at 536. The supreme court, recognizing that, to meet due process requirements, a notice "must be 'reasonably calculated to inform the person of the pending proceeding and to afford him or her an opportunity to object and defend his or her rights,'" nonetheless upheld the statute against the constitutional challenge. ***Id***. at 405-06, 407 N.W.2d at 536-37 (quoted source omitted).

We think John R.'s ***Bachowski*** argument is misplaced. This case does not involve a constitutional question of the adequacy of the notice of the

hearing on Penny Z.'s request for an injunction. It involves the discretionary decision of a trial court in response to a request to continue an adequately noticed proceeding[3] because the lead lawyer on the case was busy elsewhere at the scheduled time. The test is not one of constitutional dimension; it is the familiar test for evaluating a trial court's discretionary determination.

We have said on many occasions, "We will not reverse a discretionary determination by the trial court if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision." ***Prahl v. Brosamle***, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987) (citation omitted). "[W]here the record shows that the [trial] court looked to and considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable judge could reach and (b) consistent with applicable law, we will affirm the decision even if it is not one with which we ourselves would agree." ***Burkes v. Hales***, 165 Wis.2d 585, 590, 478 N.W.2d 37, 39 (Ct. App. 1991) (citation omitted). Indeed, "we generally look for reasons to sustain discretionary decisions." ***Id***. at 591, 478 N.W.2d at 39 (citations omitted). While it is true that the rule contemplates an on-the-record explanation of the reasoning underlying the court's decision, where, as here, the trial court "fails to adequately explain the reasons for its [discretionary] decision, we will independently review the record to determine whether it provides a reasonable basis for the trial court's ... ruling." ***State v. Clark***, 179 Wis.2d 484, 490, 507 N.W.2d 172, 174 (Ct. App. 1993) (citation omitted).

[3] Unlike ***Bachowski***, no constitutional challenge is raised in this case as to either the notice provision in § 812.122(4)(c), STATS., or the notice of the injunction hearing served on John R.

John R.'s request for a continuance came at the eleventh hour—as the testimony was about to begin—and there was no indication that John R. was unable to call any witnesses, expert or otherwise, because of lead counsel's absence. And, both the court and opposing counsel had schedule conflicts precluding a prompt reconvening of the hearing. Finally, we note that the "fill-in" counsel, despite his professed unfamiliarity with the case, conducted a vigorous cross-examination of the petitioner's primary witness and effectively argued his client's cause to the court.

As we have noted above, whether we agree with the trial court's discretionary decision is immaterial. Discretionary determinations are not tested by a subjective standard, or even by our own sense of what might be a "right" or "wrong" decision in the case, but rather will stand unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion. ***State v. Jeske***, 197 Wis.2d 905, 913, 541 N.W.2d 225, 228 (Ct. App. 1995). That cannot be said in this case.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.