COURT OF APPEALS
DECISION
DATED AND FILED

October 10, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1484

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

IN THE INTEREST OF TERANIKA H., A PERSON UNDER THE AGE OF 18:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

TERANIKA H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: KAREN E. CHRISTENSON, Judge. *Reversed.*

¶1 SCHUDSON, J.[1] Teranika H. appeals from the juvenile court dispositional order adjudicating her delinquent of disorderly conduct. She argues that the court erred in amending the charge of battery to disorderly conduct, following the presentation of all the evidence at the trial. She is correct and, accordingly, this court reverses.

¶2 The State filed a delinquency petition charging Teranika with battery. Teranika contested the petition and the case was tried to the court. The prosecutor, in his closing argument, asserted that the evidence was "adequate for battery," but then stated, "Another option that the Court could have would be based upon the facts of this case find a disorderly conduct." Following defense counsel's argument, the prosecutor moved the court "to amend the petition to reflect the facts adduced at trial and … find the juvenile guilty of disorderly conduct." The defense objected, but the court granted the State's motion and adjudicated Teranika delinquent of disorderly conduct.

¶3 Teranika argues that, under ***State v. Tawanna H.***, 223 Wis. 2d 572, 590 N.W.2d 276 (Ct. App. 1998), the court erred. The State responds that it is in "substantial agreement with the appellant's position regarding the current state of the law," and that "[t]he facts in the instant case are so similar to the facts in [***Tawanna H.***] that the [S]tate is unable to offer any argument in good faith to suggest a different result." *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted argument deemed admitted).

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e), (3) (1997-98).

¶4 The parties are correct; this court's decision in ***Tawanna H.*** controls. The procedural circumstances of ***Tawanna H.*** were substantially the same as those of the instant case, the only distinction being that, in ***Tawanna H.***, the court amended the battery charge to disorderly conduct *sua sponte*, *see* ***Tawanna H.***, 223 Wis. 2d at 575, whereas the court in the instant case did so in response to the State's motion. That distinction, however, makes no difference. Here, as in ***Tawanna H.***, "[b]ecause the amended charge occurred without proper notice, it unfairly prejudiced [the juvenile's] statutory and due process rights." ***Id.*** at 574.

By the Court.—Order reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4 (1997-98).