

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 2, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See Wis. Stat. § 808.10 and RULE 809.62.

No. 00-0469-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JACK L. B.,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Monroe County: STEVEN L. ABBOTT, Judge. *Affirmed.*

Before Dykman, Deininger and Lundsten, JJ.

¶1 PER CURIAM. Jack B. appeals from a judgment of conviction and an order denying his postconviction motion. The issues are whether the court erred by excluding certain evidence, and by denying his motion for a new trial based on newly discovered evidence. We affirm.

¶2 Jack was convicted of one count of first-degree sexual assault of a child as a habitual criminal. The victim was Jack's son, whose name we decline to use here. The main evidence against Jack consisted of statements that his son made to a social worker and police investigator.

¶3 Jack's first argument is that the court erred by denying his motion to admit evidence of certain conduct by the mother of Jack's son. Jack sought to introduce evidence of the bad relationship between Jack and the mother, including evidence that she had falsely told another that Jack had committed misdeeds against her and the son, that Jack had obtained a court order requiring the mother to pay child support, and that the mother had vowed to another person that she would take the son away from Jack. However, Jack did not offer direct evidence that the son was aware of any of this conduct by the mother, or that it occurred in the son's presence.

¶4 In the trial court, Jack did not fully articulate a theory as to how this evidence was relevant, but apparently his theory was that this conduct by the mother was evidence of her motive to influence the son into making false allegations against Jack, or was evidence suggesting that the son may have overheard some of these things about Jack while in the mother's presence. The trial court denied the motion, ruling in part that Jack could introduce this evidence of the mother's conduct only if there was also evidence showing that the son heard or was aware of it.

¶5 On appeal, Jack argues that the court erroneously exercised its discretion in excluding this evidence. His argument is that the jury should have been informed that Jack and the mother were having a custody dispute. He argues

that, although the mother denied discussing sexual abuse with her son, the circumstances show that she “must” have done so.

¶6 We conclude that even if the trial court erred by excluding the evidence, the error was harmless. The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction. *State v. Dyess*, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985). We are satisfied that there is no reasonable possibility that admission of the evidence would have changed the outcome at trial. As we noted above, Jack did not offer any evidence that his son heard or was aware of the alleged conduct by the mother. The absence of this evidentiary link reduces the probative value of the proffered evidence because the jury could only speculate that the son was exposed to the alleged behavior.

¶7 In addition, it is significant that it was not the mother who sparked the investigation which led to these charges. Although there was conflicting testimony about whether the mother had raised similar concerns with social service workers at an earlier time, there was no indication that the current charges arose at her instigation. The fact that the mother was not involved in bringing these charges tends to undercut Jack’s argument that the proffered evidence would have shown that the mother deliberately encouraged the son to falsify allegations. To the extent that the evidence was intended to establish simply that she had the motivation to encourage false allegations, we are satisfied that establishing this motive, without more, would not have led to a different result at trial.

¶8 Jack also argues that the court erred by denying his postconviction motion based on newly discovered evidence. The evidence consisted of testimony by two witnesses. This testimony, which we need not describe in detail here, also was intended to show the mother’s conduct. The trial court found the testimony

by these witnesses “incredible,” and denied the motion. On appeal, the parties agree on the factors that are required to grant a motion based on newly discovered evidence. Two of those factors are that the evidence is material to an issue in the case, and that it creates a reasonable probability that a different result would be reached at a new trial.

¶9 The trial court concluded that Jack’s new evidence was not material because it still did not show that the son was aware of the mother’s conduct. For the same reason, the court concluded that the evidence was not likely to change the result at a new trial. Jack’s arguments on this issue are essentially the same as on the previous issue. We affirm for the same reasons, as well. Given the trial court’s finding as to the credibility of the witnesses, and the continued lack of a connection to the son, we are satisfied that there is no reasonable probability of a different result at a new trial.

By the Court.—Judgment and order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).

