

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

August 20, 1997

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

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2499-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEROME P. WIECHERT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County:
DAVID M. BASTIANELLI, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Jerome P. Wiechert appeals from a judgment of conviction of two counts of recklessly causing great bodily harm to a child while being a person responsible for the welfare of the child. See § 948.03(3)(a) & (5), STATS. He argues that the trial court erroneously exercised its discretion in admitting evidence of injuries sustained by another child he resided with. We

conclude that the error, if any, was harmless error and we affirm Wiechert's conviction.

On March 4, 1995, Wiechert's three-month-old daughter, Mina, was treated as a victim of shaken baby syndrome. The child was suffering from a subdural hematoma. During treatment, an older subdural hematoma and an extraordinary number of bone fractures were discovered. Wiechert was charged with three counts of child abuse of his daughter: for causing a subdural hematoma between March 2 and March 4, 1995; for causing a subdural hematoma between February 25 and March 1, 1995; and for causing numerous bone fractures between February 11 and February 25, 1995. The jury found Wiechert guilty of having caused the two subdural hematomas.

Wiechert and his wife, Julia, resided in California prior to moving to Wisconsin in December 1994. During that time, Heidi, Julia's two-year-old daughter from a prior marriage, lived with them. Heidi was removed from the Wiechert household on September 21, 1994, because of suspected neglect and physical abuse.

At trial, Mina's treating physician testified that he reviewed Heidi's medical records, including x-rays. He confirmed that Heidi had suffered bone breakage in her shoulder and leg. He indicated that the fractures Heidi had suffered would not have resulted from a fall and that child abuse would be suspected when injuries such as these present themselves. He further indicated that the shoulder injury could have resulted from twisting the child's arm behind her back. He opined that Heidi suffered from battered child syndrome.

Julia testified that prior to taking up residence with Wiechert, Heidi had not suffered any fractured bones. The following statement from Julia's

interview with police was admitted into evidence, “I raised my first daughter Heidi alone just fine, when Jerome came into the picture, Heidi began getting unexplained bruises and a broken arm.” She described how one day Wiechert was brushing Heidi’s teeth and he pulled her arm behind her back, pinning it between his lower leg and Heidi’s back. The incident occurred four or more days before the discovery of Heidi’s shoulder injury.

James Lowery, a prison inmate who for a short time shared a jail cell with Wiechert, testified that Wiechert admitted that he abused Heidi. Lowery indicated that Wiechert had said he was glad the child was removed from the home because children got in the way with his ability to be alone with Julia. Robert Okray, Wiechert’s friend with whom he, Julia and Mina shared a house, and Wiechert’s mother were also asked about their knowledge of what happened with Heidi or Wiechert’s explanation about it.

Wiechert’s testimony focused on the fact that there were no allegations in the California proceeding that he had caused Heidi’s injuries. Wiechert testified that Heidi’s shoulder injury was discovered when he noticed the swelling a few days after returning from a month-long tour of duty on a naval ship. He told about the explanations Julia gave for Heidi’s injuries and one occurrence where he felt Julia had treated Heidi with unnecessary roughness. Wiechert denied ever hurting Heidi. As an explanation for Lowery’s knowledge of the events, Wiechert indicated that he had made the mistake of allowing Lowery to read the documents related to the case while the two were in jail together. He indicated that he told Lowery that in order to protect Julia and keep Mina with Julia, he had admitted to police that he shook Mina.

Wiechert claims that none of the evidence regarding Heidi should have been admitted and that the trial court misapplied the “doctrine of chances” in ruling on the admissibility of the other acts evidence. Although other acts evidence may not be admitted to show a person’s criminal propensity, it may be admissible on the “question of the improbability of an innocent intent.” *State v. Roberson*, 157 Wis.2d 447, 455, 459 N.W.2d 611, 613 (Ct. App. 1990) (quoted source omitted). The theory is that “the recurrence of a like act lessens by each instance the possibility that a given instance could be the result of inadvertence, accident, or other innocent intent.” *Id.* (quoted source omitted).

We note that Wiechert advanced possible innocent explanations for the injuries Mina sustained. Thus, facially the first prong of the two-pronged test for the admission of other acts evidence regarding Heidi’s injuries was satisfied. We need not, however, address the trial court’s exercise of discretion under the two-pronged test. *See id.* at 452-53, 459 N.W.2d at 612. We conclude that the error, if any, in admitting evidence of Heidi’s injuries was harmless.

An error is harmless in a criminal case if there is no reasonable possibility that the error contributed to the conviction. *See State v. Dyess*, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985). A reasonable possibility is one which is sufficient to undermine confidence in the outcome of the proceeding. *See State v. Patricia A. M.*, 176 Wis.2d 542, 556, 500 N.W.2d 289, 295 (1993). We must look to the totality of the record. *See id.* at 556-57, 500 N.W.2d at 295.

Wiechert admitted to police that a few days before Mina was taken to the hospital, he shook her when she would not stop crying as he tried to dress her. He also admitted that he was not “in control” during the incident. Wiechert also admitted that there was an earlier instance when he was dressing Mina on the

floor and she “fell out of my hand.” The medical evidence supports a finding that Mina sustained the injuries during a period of time when Wiechert had access to her and was responsible for her care.

Lowery testified that Wiechert said Mina had started to cry and it got on his nerves. Wiechert said he picked up the child, pulled her to his face and told her to “shut up.” When the child cried even more, Wiechert shook her and hit her over and over again. Lowery also explained how Wiechert planned to change his story upon hearing from his mother that Julia was possibly in a relationship with another man. Wiechert told Lowery that he would say his confession was only to protect Julia.

Although Lowery suffers from a multiple personality disorder, the effect of the disorder on his ability to recollect the conversation with Wiechert was fully explored during Lowery’s testimony. Lowery testified that since receiving treatment for the disorder, his ability to recall was not affected. Additionally, Lowery’s testimony was corroborated by the dates he and Wiechert were in jail, the jail visitation log of visits by Wiechert’s mother, the mother’s admission that she may have suggested to Wiechert that Julia was seeing another man, and Wiechert’s letters to Julia demanding to know if she was seeing someone else.

Julia testified that although she never observed any abusive behavior, a couple of times Wiechert became frustrated with Mina’s crying or fussy behavior and had “practically dumped her in my arms,” whereby Mina would fall into Julia’s arms. Julia confirmed that Wiechert would yell at Mina to “shut up.” Julia described the incident when Mina fell while Wiechert was changing her. She said Mina “fell backwards off his hand and hit her head on the blankets that I had on the floor.” She indicated that Mina’s head fell five or six

inches. Several weeks before Mina's hospitalization, Julia noticed a red mark above Mina's eye after Wiechert had bathed Mina.

It is for the jury, not this court, to resolve conflicts in testimony and determine the credibility of witnesses. *See State v. Fettig*, 172 Wis.2d 428, 448, 493 N.W.2d 254, 262 (Ct. App. 1992). It is obvious that the jury rejected Wiechert's explanation for his admission to the police that he shook Mina. That determination, coupled with the evidence of Wiechert's inappropriate behavior towards Mina and of his opportunity and reason to shake Mina, supports the conviction without any consideration of the evidence about Heidi's injuries. We acknowledge that the evidence regarding the timing and perpetrator of Heidi's injuries was somewhat inconclusive and that there was a recurrent theme in the record that Wiechert had abused Heidi. However, the jury acquitted Wiechert of the charge that he caused numerous bone fractures to Mina. The jury did not draw the inference that because Heidi suffered unexplained bone fractures that Wiechert was the source of Mina's unexplained bone fractures. Our confidence in the outcome is not undermined by the possible error in the admission of evidence regarding Heidi's injuries.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

