STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Appeal No. 11 AP 1044

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DALE R. NEUMANN,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

MILLER & MILLER
Attorneys for the Defendant-Appellant
By Steven L. Miller #01005582
P.O. Box 655
River Falls, WI 54022
(715) 425-9780

On appeal from the Circuit Court
of Marathon County, Hon. Vincent K. Howard,
Circuit Judge, presiding.

TABLE OF CONTENTS

CASES CITED

WISCONSIN STATUTES CITED

OTHER AUTHORITY

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Appeal No. 11 AP 1044

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DALE R. NEUMANN,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

ISSUES FOR REVIEW

1. Was defendant's right to due process notice violated when he was charged based upon conduct expressly exempt from prosecution under another criminal statute?

The trial court answered: "No."

2. Was defendant's duty to provide his child with conventional medical care defined by the exemption for faith healing contained in Wis. Stat. § 948.03 or, barring that, a parent's constitutional right to direct a child's medical care?

The trial court answered: "No."

3. Was the real controversy fully tried, or was trial counsel ineffective, when the jury was not properly informed it could consider "faith healing" as a defense to the subjective element of Wis. Stat. § 940.06?

The trial court answered: "Yes, the real controversy was fully tried; and no, trial counsel was not ineffective."

4. Were the jurors objectively biased when the trial court informed them defendant's wife had been previously convicted on the same charge?

The trial court answered: "No."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are both requested.

STATEMENT OF THE CASE

Dale and Leilani Neumann are the parents of Madeline Kara[1] Neumann. They were each charged with one count of second degree reckless homicide (Wis. Stat. § 940.06) when Kara died from undiagnosed diabetes. The charge results from the Neumanns' decision to treat Kara's through prayer and faith healing rather than conventional medical care. They were each tried separately. Leilani was convicted on May 22, 2009, and Dale was convicted on August 1, 2009, after separate jury trials. On October 6, 2009, both were sentenced to 10 years probation, with six months in the county jail stayed. In addition, each parent was required to serve 30 days in jail during the month of March, every other year, for six years. A written judgment of conviction was filed on October 8, 2009. The jail terms were stayed pending appeal.

Dale filed a postconviction motion on January 7, 2011. A motion hearing was held on February 22, 2011. On April 27, 2011, the trial court filed a written decision denying the postconviction motion. (85:1-16; Appendix ("A:") pp. 20-36). A notice of appeal was filed on May 5, 2011. On June 29, 2011, this Court ordered the cases consolidated for decision only.

1 Madeline Neumann is referred to by her middle name "Kara" throughout the record.

STATEMENT OF FACTS

Dale Neumann is a deeply religious man who identifies with the Pentecostalist tradition. (109:132; 111:72, 86, 95). He attended Christian Life College and received a B.A. in theology and missions. (111:89, 91). Together with his wife and family, Dale engaged in community ministry and hosted bible studies and other religious gatherings in his home. (109:32-33, 119, 194, 199; 111:10-11, 17, 87). In addition to their ministry activities, the Neumanns owned and operated a drive-up coffee shop.

One of Dale's fundamental religious precepts is his absolute belief in the casual relationship between sickness and sin, the power of God to heal the sick, and the use of prayer to heal rather than conventional medical treatment. (109:35, 36, 129-133, 142, 208, 213-214, 267, 285; 111:19, 33). Dale has personally witnessed the healing power of God to cure cancer, infertility, and other serious medical conditions. (111:102-103). Dale and his family have foresworn conventional medical care. Seeking medical attention rather than turning to God would have been putting the doctor before God, and would thus constitute "disobedience" to God. (109:111, 130; 111:105-110, 118-119, 154). According to Dale, both his and his family's health improved when they stopped using medical services. (109:143; 111:111, 115). The genuineness of Dale's beliefs was never contradicted nor disputed at trial. (109:287). According to one of his friends, Dale has "great faith" and confidence in his beliefs. (111:33).

Eleven-year-old Kara was the youngest of Dale and Leilani Neumann's four children. (107:10, 11; 109:8). Kara had no past medical history. (107:128). For at least a couple of weeks before her death on March 23, 2008, Kara had been feeling weak and tired, and was often thirsty. She used the bathroom more frequently. (109:37). To the casual observer,

however, Kara would have appeared healthy up to and including Thursday, March 20, 2008. (111:177).

On Friday, March 21, Leilani came home from work around 6 p.m. Kara was sitting at the table trying to do homework. Leilani noticed Kara looked tired, and told her to lay down. (109:39, 40). Dale later came home with two McChickens and a shake from McDonalds. (111:132). Kara ate one McChicken and drank half the shake. (111:134).

On the morning of Saturday, March 22, Leilani spoke with Kara and decided she should stay home and rest rather than working at the family coffee shop. (109:47). Dale later saw Kara and asked her if she was okay and she responded that she was just tired. (111:127). She agreed she was going to lie down, and Dale spent the day working on the family tax return. (111:129). Leilani returned home around 5 p.m. and Kara was on the couch. She was weak and looked pale. She had a blueness in her legs and her breathing was labored. Leilani called for Dale, as she was concerned. They started praying and massaging her. The blueness started to leave. Leilani gave Kara a smoothie, which she drank. (109:54, 55, 59, 66; 111:131, 134, 138). They continued praying for her. (111:131).

Dale was sufficiently concerned that he broadcast an email seeking emergency prayer and assistance from David Ellis, an elder of the church. Ellis called them later that evening and joined them in prayer. (109:62; 111:134, 138). Dale testified: "I didn't know what specifically was wrong with her. It could have been the flu. It could have been the fever. It could have been so many different other things. But whatever it was, she was very sleepy, so it needed attention so we prayed." (111:135-136).

The family was praying for her continuously that evening. (109:65, 68, 75). Friends and family were called to

join in prayer (109:76, 77, 82, 84, 87, 99; 111:22). Eventually, the family took a break from prayer to eat dinner. During that time Kara got up from the bed on her own and went to the bathroom. She fell off the toilet. (109:72). When she was found several minutes later, around 7 or 8, she was carried downstairs to the living room couch where the family could keep a closer eye on her. (109:73). At this point she was very weak. She couldn't walk on her own and did not talk. The family continued to pray on Kara's behalf until they went to bed sometime after midnight. (111:136, 137). Two of Kara's siblings slept next to her that night. (109:84).

At about 5:00 a.m., on March 23, Easter Sunday, the two children sleeping by Kara woke Dale up and told him Kara kept kicking the covers off the couch and thought she needed to go to the bathroom. (109:85). Kara did not appear conscious. (109:90). She was limp, still in a deep sleep, but "she was breathing – what I considered normal breathing. So I just said, well…whatever this is, Lord, it's going to burn out of her, and it's no problem at all." (111:138, 139). Both Dale and Leilani thought her breathing had improved. (*Id.*; 109:120).[2] The Neumanns began making calls to bring people from their bible study to their house. (109:87, 219, 245). They continued praying. (111:139, 140).

Lynn Wilde arrived around 9 a.m. and stayed for 3 to 3½ hours (111:23, 58). She joined Dale, Leilani and the children in prayer. (111:24). According to Lynn, Kara appeared as if she had the flu or something. She was limp, but she would move her head and moan in response to their attempts to communicate with her. (111:32, 49, 53).

Dan and Jennifer Peaslee arrived around 11:30 a.m., just as Lynn Wilde was helping Leilani give Kara a sponge

---

2 The medical testimony was that breathing often "normalized" at end stage, when organ failure occurred. (107:219; 108:13, 19)

bath. (109:93, 95, 204, 205, 222). After the sponge bath, Dan Peaslee carried Kara downstairs to the main floor and placed her on a futon which Dale had prepared in a room just off the kitchen. (109:97, 206, 228, 229). The Peaslees described Kara as pale, not moving, with audible breathing. (109:95, 96, 204, 222, 225, 226). Dale was distraught, his nose and eyes red as if he had been crying. (109:224).

They shared communion at Kara's side and all prayed until around 1:00 p.m., when the Peaslees and Lynn Wilde left. (109:106, 222, 231, 230, 233-234; 111:36-37, 58). Despite Kara's condition, they were all optimistic. Lynn fully expected she would get a call later telling her that Kara "was fine, walking around. I had peace about it. Otherwise, I would not have left." (111:38). The Peaslees also had faith that Kara would be healed. (109:230, 233). When they left, they felt she was going to get better. (109:235).

Shortly after 1:30 p.m., Randall and Althea Wormgoor arrived with their four children. (109:250-251, 277). Kara was unconscious. (109:278). The Neumanns told them, however, that she appeared to be doing better. (109:96, 252, 254). They prayed with the Neumanns. (109:255).

At approximately 2:30-2:40 p.m., Randall led Dale away from the others and told him that if it were his daughter, he would be bringing her to a doctor. (109:279, 280). Dale responded: "don't you think that crossed my mind?" It was a "struggle for him." (109:281). At the same time they were having this discussion, Althea noticed a distinct twitch from Kara's mouth which startled her, and she made the decision she was going to call for help. She started looking for an envelope or anything with an address on it. (109:253, 257; 111:67). As she was looking, Randall handed her the phone. Randall had just heard his daughter say that Kara had stopped breathing, and he had already dialed 911. (109:258, 283). Randall then saw Dale crouched down on

his knees, holding Kara, while crying out "Jesus, Jesus." (109:284).

Dispatch told Althea that someone was already on the way.[3] (109:258). When the ambulance arrived at 2:44 p.m.[4], Kara was pulseless and non-breathing. Dale was performing CPR. (107:87, 139). On the way to the hospital, Kara's blood sugar was checked and found to be 5 times the normal level. (107:130, 131).

All attempts to revive Kara at the hospital failed. At 3:30 p.m., thirty minutes after her arrival, she was declared dead. (107:199). The cause of death was diabetes ketoacidosis. (109:173). Had she been brought to the hospital before she stopped breathing, her prognosis for recovery would have still been good. (107:201; 108:9). Neumanns did not learn the cause of death until two days later. (107:21, 110:42, 54).

Dale never believed Kara would die. "Death was not even on my mind." (111:146). Even after she was pronounced dead at the hospital, Dale was hopeful: "Well, Jesus raised Lazarus from the dead. So I'm hoping. Yeah. I'm trusting. I'm believing that there would be a resurrection. Why? I don't want – I don't want to see Kara gone." (111:149). After Kara's death, Dale was in shock. He was "very sad. Very, very sad." (109:237; 111:173).

---

3 A 911 call had already been made by Ariel Neff, the wife of Dale's brother-in-law, from California. (107:50, 54, 59-64).

4 The ambulance's arrival was not "very much longer" after the Wormgoor's made the 911 call. (107:139; 109:284).

ARGUMENT

I. THE RECKLESS HOMICIDE STATUTE VIOLATES DUE PROCESS BECAUSE IT CRIMINALIZES THE SAME CONDUCT EXPRESSLY AUTHORIZED UNDER WIS. STAT. § 948.03(6).

Wisconsin's child abuse statute, Wis. Stat. § 948.03, prohibits either intentionally or recklessly causing "great bodily harm to a child." The definition of "great bodily harm" includes "bodily injury which creates *a substantial risk of death*,…." (Emphasis added). Wis. Stat. § 939.22(14). Parents engaged in faith healing cannot be prosecuted under Wis. Stat. § 948.03(6)"solely because" they are providing their child "with treatment by spiritual means through prayer alone for healing…." In other words, Wis. Stat. § 948.03 tells faith healing parents that until a child's medical condition progresses to at least some point *beyond* a "substantial risk of death,"[5] they are immune from prosecution.

The second degree reckless homicide statute, on the other hand, punishes a faith healing parent if they "recklessly" cause the death of another human being. Wis. Stat. § 940.06. "Recklessly" means creating an unreasonable and "*substantial risk of death* or great bodily harm," and the defendant is aware of that risk. (Emphasis added) *State v. Chapman*, 175 Wis.2d 231, 242, 499 N.W.2d 222. In other words, the conduct subject to criminal liability under Wis.

---

5 An imminent risk of death—i.e. respiratory failure; severe bleeding; severe trauma; etc.—would arguably lie *beyond* "a substantial risk of death," and would give clear notice to a parent that immunity under Wis. Stat. § 948.03 no longer applies. As 911 was called as soon as Kara stopped breathing, however, that "line" was never crossed.

Stat. § 940.06 is for all practical purposes identical to the conduct expressly immune from prosecution under Wis. Stat. § 948.03—the only difference being the result (i.e. whether the child survives or dies).

For the faith healing parent who would be immune for his or her actions or omissions under Wis. Stat. § 948.03, prosecution under Wis. Stat. § 940.06 violates due process notice. In this case, the only difference between immunity under Wis. Stat. § 948.03 and liability under Wis. Stat. § 940.06 was the happenstance of death.[6] Because of the nearly complete overlap between immune conduct under Wis. Stat. § 948.03 and non-immune conduct under Wis. Stat. § 940.06, Wis. Stat. § 940.06 fails to give "fair warning" as to what *conduct* by the parent is prohibited. *Election Bd. Of State of Wisconsin v. Wisconsin Manufacturers and Commerce*, 227 Wis.2d 650, 676-677, 597 N.W.2d 712 (1999) ("Because we assume that [persons are] free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he [or she] may act accordingly.").

Kara's condition never progressed beyond a "substantial risk of death" until she stopped breathing. At that point, 911 was called immediately. There was no boundary, no line, no clear moment when Dale Neumann was on notice that his "conduct" (i.e. his failure to provide conventional medical care) had crossed a line between immunity under Wis. Stat. § 948.03 and liability under Wis. Stat. § 940.06.

A due process notice violation was found under very similar circumstances in the case of *State v. McKown*, 475 N.W. 2d 63 (Minn. 1991). In *McKown*, the Minnesota

---

6 Again, this is not a circumstance where death was clearly imminent. See footnote 5.

Supreme Court granted relief under a statutory scheme that arguably provided more notice than Wisconsin's. As in this case, the parents were treating their child's undiagnosed diabetes through prayer rather than conventional medicine. ***Id.*** at 63-64. When the child died, the parents were charged with second degree manslaughter, which was defined as causing death by "culpable negligence whereby the person creates an unreasonable risk, and consciously takes chances of causing death or great bodily harm to another." ***Id.*** at 65. Like Wisconsin, the Minnesota manslaughter statute contained no faith healing exception. The child neglect statute, however, did:

> a) A parent, legal guardian, or caretaker who wilfully deprives a child of necessary…health care…and *which deprivation* ***substantially harms*** *the child's physical or emotional health*, is guilty of neglect of a child…
> …
> If a parent, guardian, or caretaker responsible for the child's care in good faith selects and depends upon spiritual means or prayer for treatment or care of disease or remedial care of the child, this treatment shall constitute "health care" as used in clause (a).

(Emphasis added) Id. at 65. The defendant argued he had insufficient notice as to when prayer treatment became illegal. The Minnesota Supreme Court agreed. The prayer treatment exception did not identify "a point at which doing so will expose the parent to criminal liability. The language of the exception therefore does not satisfy the fair notice requirement inherent to the concept of due process." ***Id.*** at 68. In addition, "the indictments issued against respondents violate the long-established rule that a government may not officially inform an individual that certain conduct is permitted and then prosecute the individual for engaging in that same conduct…" ***Id.*** at 68. This is especially so where "the state has clearly expressed its intention to permit good

faith reliance on spiritual treatment and prayer as an alternative to conventional medical treatment, it cannot prosecute respondents for doing so without violating their rights to due process." ***Id.*** at 68-69 (internal citations omitted).

The Florida Supreme Court reached the same result under similar facts. See *Hermanson v. State*, 604 So. 2d 775 (1992). The child also died of diabetic ketoacidosis after her parents unsuccessfully treated her with prayer rather than conventional medicine. *Id.* at 775-776. The defendants were convicted under a homicide statute which created criminal liability for anyone who causes the death of a child and who "willfully or by culpable negligence, deprives a child of, or allows a child to be deprived of,…medical treatment…and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to such child." *Id.* at 776. This statute contained no prayer treatment exception. A separate statute defining the term "abused or neglected child," however, did:

> (7) "Harm" to a child's health or welfare can occur when the parent or other person responsible for the child's welfare:
> …
> (f) Fails to supply the child with adequate... *health care...*; however, a parent or other person responsible for the child's welfare legitimately practicing his religious beliefs, who by reason thereof does not provide specified medical treatment for a child, may not be considered abusive or neglectful for that reason alone.

Id. Because of this prayer treatment exception, the parents did not have sufficient notice as to when prayer treatment was protected:

> …when considered together, [the homicide and child abuse statutes] are ambiguous and result in a denial of due process because the statutes in

> question fail to give parents notice of the point at which their reliance on spiritual treatment loses statutory approval and becomes culpably negligent. We further find that a person of ordinary intelligence cannot be expected to understand the extent to which reliance on spiritual healing is permitted and the point at which this reliance constitutes a criminal offense under the subject statutes. The statutes have created a trap that the legislature should address.

Id.

The argument for lack of notice is even stronger here than either of these two cases. In *McKown*, there was no clear overlap between the child abuse statute (which protects parents up to and including "substantial harm" to the child's physical health) and the manslaughter statute (which requires risk of "death or great bodily harm"). Likewise, in *Hermanson*, there was no clear overlap between the child abuse statute (which protects a parent from liability when her child is "harmed") and the homicide statute at issue (which created liability for "great bodily harm, permanent disability, or permanent disfigurement"). Because of this gap between exempt conduct and conduct subject to liability under the homicide statutes, notice was more prominent in either of these cases than it was here. Even then, the courts found it insufficient.

Other states have rejected the claims of prayer treatment practitioners, but only because the legal context was significantly different. In *Commonwealth v. Barnhart*, 497 A.2d 616 (Pa. 1985) and *Commonwealth v. Nixon*, 761 A.2d 1151 (Pa. 2000), both Pennsylvania cases, for example, there was no express statutory protection for faith healing. In *Hall v. State*, 493 N.E.2d 433, 435 (Ind. 1986), there was an express statutory protection for prayer treatment, but no due process notice claim was actually raised on appeal.

In both *State v. Hays*, 964 P.2d 1042 (Ct. App. 1998) and *Walker v. State*, 763 P. 2d 852 (1988), express statutory protection for prayer treatment and a due process notice claim were present. These cases are distinguishable, however, because there was, in fact, a substantial gap between the exempt conduct and conduct liable under the homicide statute. In these cases, the gap was greater than it was in either *McKown* or *Hermanson,* and *far greater* than it is in this case.

In *Hays*, a faith healing parent was charged with "criminally negligent homicide." 964 P.2d at 1044. A separate statute penalizing "criminal mistreatment" expressly exempted prayer treatment from prosecution. *Id.* at 1045. "Criminal mistreatment" prohibited the maltreatment of dependents, the worst of which was causing "physical injury." *Id*. The Court rejected defendant's notice claim because it was clear the criminal mistreatment statute did not apply to "life threatening" illness. *Id.* at 1046.

Walker also rejected defendant's notice argument because the exemption applied to basic support obligations rather than conduct causing a substantial risk of death. *Id.* at 134. The manslaughter statutes "protect against grievous and immediate physical harm" while the child neglect statute, which includes the prayer treatment exception, covers the routine provision of dependent support. *Id.* at 143-144.

Such is not the case in Wisconsin. The faith healing exemption in Wis. Stat. § 948.03 applies to "great bodily harm," which, as explained above, includes "a substantial risk of death." Here, there is no gap between exempt *conduct* under Wis. Stat. § 948.03, and criminally liable *conduct* under Wis. Stat. § 940.06. In fact, they overlap each other almost entirely.

The trial court's opinion clearly illustrates the notice problem. While the trial court correctly focuses on a parent's ability to conform his or her conduct to what the law requires rather than the result of that conduct, the flaw in the trial court's logic is that it draws the "fair warning" line well within the exemption contained in Wis. Stat. § 948.03:

> It is not the death of the child that makes conduct criminal—only that which makes it a homicide. What makes it criminal is when the parent persists in conduct with the awareness that such conduct might result in death or great bodily harm to their child. *The point where one relying upon the prayer accommodation statute has fair notice that their conduct might 'cross the line' and become criminal* ***is the point where an ordinarily reasonable person would become aware of the risk of death or great bodily harm.*** Once they reach that point, they have also reached the point where they assume the risk of criminal prosecution if they persist in their conduct despite their awareness of that risk.

(Emphasis added) (29:18-19; A:18-19). The very "line" the parents cannot cross, the very line that gives them "fair warning," however, consists of the same conduct expressly authorized under Wis. Stat. § 948.03. Unlike *Hays* and *Walker*, there is no "conduct" gap between Wis. Stat. § 948.03 and Wis. Stat. § 940.06. Thus, the use of Wis. Stat. § 940.06 to prosecute a parent whose conduct is expressly sanctioned under Wis. Stat. § 948.03 violates due process notice requirements. Dale's conviction must be reversed and the charge dismissed.

II. ALTERNATIVELY, THE JURY WAS IMPROPERLY INSTRUCTED AS TO DEFENDANT'S LEGAL DUTY TO PROVIDE MEDICAL CARE TO HIS CHILD.

1. Wis. Stat. § 948.03 defines the legal duty the state must prove in order to convict on a theory of omission under Wis. Stat. § 940.06(1).[7]

The state's theory of liability is that Dale failed to provide his daughter with conventional medical care when he had a legal duty to do so. In general, the law does not impose a duty to protect others from harm. *State v. Williquette*, 129 Wis. 2d 239, 255, 385 N.W.2d 145 (1986). The second degree reckless homicide statute (Wis. Stat. § 940.06), moreover, does not include any language authorizing the prosecution of reckless homicide by omission. Wisconsin appellate courts have held, nonetheless, that one may be found criminally reckless if a failure to act creates an unreasonable and substantial risk of death (or great bodily harm) *and* such a failure violates "a *known duty* to act." (Emphasis added) *State ex rel. Cornellier v. Black*, 144 Wis. 2d 745, 758, 425 N.W.2d 21 (Ct. App. 1988); see also *Williquette*, 129 Wis. 2d at 253 (criminal liability based on an omission may be possible when a "special relationship" between the accused and the victim creates a legal duty to act). Thus, the question of what legal duty Dale had to provide his daughter with conventional medical care is essential to whether he may be criminally liable under Wis. Stat. § 940.06(1).

---

7 The state concedes the issue of defendant's duty to provide medical care, as outlined in pp. 10-15 of defendant's motion for postconviction relief, was preserved for the purposes of appeal. (84:19; 118:3; 24:12).

Wis. Stat. § 940.06(1) itself provides no guidance. It says nothing of duty, much less a parent's duty to provide a sick child with conventional medical attention in lieu of treatment through spiritual means.

Wisconsin's two main cases on criminal omission liability, *Williquette* and *Cornellier*, are not particularly helpful.

In *Cornellier*, the defendant was the operator of a fireworks plant who failed to take various precautions, in violation of safety regulations. 144 Wis. 2d at 750. A fire occurred, killing one of the employees. *Id.* Cornellier moved to dismiss arguing the complaint did not accuse him of any "conduct." In response, this Court held that the defendant could be prosecuted for reckless homicide by omission. *Id.* at 757. Cornellier did not contest whether he had a legal duty, nor did the Court explain the source or extent of such a duty. The most natural reading of the opinion is that, as the operator of the plant, Cornellier had a duty to his employees consistent with the myriad of safety regulations he was required, but failed, to follow. *Id.* at 761. There was also plenty of evidence suggesting actual conduct, as it was Cornellier who created the dangerous conditions in the first place.

In *Williquette*, a mother was prosecuted under a now-repealed statute that criminalized "subjecting a child to cruel maltreatment." *Id.* The allegation was that the mother continued leaving the children in her husband's care and did nothing to stop the abuse. The mother argued she could not be prosecuted for what was an omission. This Court disagreed, for two reasons: First, the defendant's actions constituted more than a mere omission, in that the defendant had acted to place the children in the defendant's care. *Id.* at 250 ("We consider leaving the children in these circumstances to be overt conduct"). Second, the Court concluded that even if there was no overt act, the defendant

could be convicted because she had a duty to protect her children from the abuse. The Court drew this duty from a 40-year-old products liability case, *Cole v. Sears, Roebuck & Co.*, 47 Wis. 2d 629, 634, 177 N.W. 2d 866 (1970).

In *Cole*, the court had to decide if the parents were immune from contributory negligence because the child's activity at the time of injury was related to their basic support obligations. The underlying basis for this immunity exception was:

> …the right and duty of parents under the law of nature as well as the common law and the statutes of many states to protect their children, to care for them in sickness and in health, and to do whatever may be necessary for their care, maintenance, and preservation, including medical attendance, if necessary. An omission to do this is a public wrong which the state, under its police powers, may prevent. The child has the right to call upon the parent for the discharge of this duty, and public policy for the good of society will not permit or allow the parent to divest himself irrevocably of his obligations in this regard or to abandon them at his mere will or pleasure. . . .' *(cites omitted).*

Id. at 256.

It could be argued that *Williquette* improperly relied upon *Cole* as a source of duty for an omission based criminal prosecution, as this was not even close to the issue *Cole* was deciding. Williquette, moreover, never made an issue of it. In addition, the court's omission analysis became irrelevant (at least in terms of the result) once it found "overt conduct."

Whatever legitimacy *Cole* may have had as a source of duty in *Williquette* is clearly superseded in this case by the passage of Wis. Stat. § 948.03(6). Indeed, Wis. Stat. § 948.03(6) is the only criminal statute which specifically

addresses a parent's choice to treat a child by spiritual means in lieu of conventional medical treatment. While Wis. Stat. § 948.03 prohibits either intentionally or recklessly causing bodily harm or great bodily harm to a child, it also creates an exception to criminal liability for treatment by spiritual means:

> **Treatment through prayer**. A person is not guilty of an offense under this section solely because he or she provides a child with treatment by spiritual means through prayer alone for healing in accordance with the religious method of healing permitted under s. 48.981(3)(c)4, or 448.03(6) *in lieu of* medical or surgical treatment.

(Emphasis added). Wis. Stat. § 948.03(6). See also Wis. Stats. §§ 48.981(3)(c)4[8] and other statutory sections[9] which likewise express a similar legislative policy.

The trial court chose to ignore Wis. Stat. § 948.03(6), however, and defined Dale's legal duty based upon the language in *Cole.* The jury was instructed:

> Conduct can be either by an act or omission, when the defendant has a duty to act. One such duty is the duty of a parent to protect their children, to care for them in sickness and in health.

(112:52).

---

8 Wis. Stat. § 48.981(3)(c)4, which pertains to human services investigations, states in relevant part: "A determination that abuse or neglect has occurred *may not be based solely on the fact that the child's parent, guardian, or legal custodian in good faith selects and relies on prayer or other religious means for treatment of disease or for remedial care of the child*." (Emphasis added)

9 Additional Wisconsin statutes which create an exemption for faith healing under a wide variety of circumstances are: Wis. Stats. §§ 448.03(6); 46.90(4)(ae)2; 46.90(7); 48.82(4); 938.505(2)(a)1; 940.285(1m); 102.42; 949.01(4); & 155.01(7).

The trial court's reliance on *Cole* is misplaced. The spiritual treatment privilege contained in Wis. Stat. § 948.03 extends, at a minimum, to any violation under that statute. A privileged violation thus includes causing a child to suffer great bodily harm. Commensurate with the faith healing privilege is the *absence* of any legal duty to provide conventional medical care. In other words, there can be no affirmative legal duty to provide conventional medical care when, under the same circumstances, Wis. Stat. § 948.03(6) grants faith healers immunity from prosecution.

Dale, therefore, had no legal duty to provide conventional medical care until his daughter's condition went *beyond* great bodily harm. The definition of "great bodily harm" includes "bodily injury which creates *a substantial risk of death*,…." (Emphasis added). Wis. Stat. § 939.22(14). Thus, the jury should have been instructed that if it found Dale was providing his daughter "with treatment by spiritual means through prayer alone for healing…in lieu of medical or surgical treatment," he had no legal duty to provide conventional medical care until his daughter's condition went *beyond* great bodily harm.

The State's response in its postconviction brief is that Wis. Stat. § 948.03(6), by its own terms, applies only to prosecutions under Wis. Stat. § 948.03. It does not provide a defense to Wis. Stat. § 940.06. The exemption reads: "A person is not guilty of an offense *under this section* solely because…." (Emphasis original). (26:3). The trial court agreed. (85:2; A:22).

The state misconstrues defendant's argument. Dale is not arguing that Wis. Stat. § 948.03(6) provides a direct defense to Wis. Stat. § 940.06. The state correctly argues that Wis. Stat. § 940.06 is a homicide statute with no explicit statutory privilege for treatment by spiritual means, and that

such a privilege cannot be borrowed from Wis. Stat. § 948.03(6). Rather, Dale argues he cannot be liable under Wis. Stat. § 940.06 unless the state can prove he had a legal duty to act. Wis. Stat. § 948.03(6) defines his legal duty to act.

There are two types of challenges to a jury instruction. One challenges the legal accuracy of the instruction. The other asserts that a legally accurate instruction unconstitutionally misleads the jury. *State v. Gonzalez*, 2011 WI 63, ¶ 21, ---Wis.2d ---, --- N.W.2d ----.

A legally inaccurate jury instruction "warrants reversal and a new trial […] if the error [is] prejudicial.'" *State v. Fonte*, 2005 WI 77, ¶15, 281 Wis. 2d 654, 698 N.W.2d 594 (citation omitted). "'An error is prejudicial if it probably […] misled the jury.'" The beneficiary of the error has the burden of proving lack of prejudice. *State v. Harvey*, 2002 WI 93, ¶40, 254 Wis. 2d 442, 647 N.W.2d 189. Whether an error is harmless is a question of law. *Gonzalez*, 2011 WI 63, ¶ 22; *State v. Gordon*, 2003 WI 69, ¶40, 262 Wis. 2d 380, 663 N.W.2d 765.

When a jury instruction is challenged as confusing or misleading, a new trial is warranted when the defendant carries the burden of establishing that the instruction was ambiguous, and that there was a reasonable likelihood that: 1) the jury applied the instruction in a way that relieved the state of its burden of proving every element of the crime beyond a reasonable doubt; or 2) the jury applied the instruction in a way that denied the defendant "a meaningful opportunity for consideration by the jury of his defense ... to the detriment of the defendant's due process rights." *Gonzalez*, 2011 WI 63, ¶ 23-24, citing, *Waddington v. Sarausad*, 555 U.S. 179, 129 S.Ct. 823, 831 (2009). In making either determination, an appellate court "should view the jury instructions in light of the proceedings as a whole,

instead of viewing a single instruction in artificial isolation." *State v. Lohmeier*, 205 Wis.2d 183, 194, 556 N.W.2d 90 (1996).

The trial court's duty instruction erroneously communicated a broad, absolute parental duty to provide medical attendance whenever necessary to "protect" or "care" for one's children. In fact, a parent has no duty to provide conventional medical care even when a child is suffering great bodily harm, as long as the parent is providing treatment by spiritual means. Wis. Stat. § 948.03(6). The duty to provide conventional medical care begins at some point beyond great bodily harm (e.g. some point beyond "a substantial risk of death.").[10] Under these facts, a properly instructed jury could have reasonably concluded that, as a practical matter, no duty arose at all. No duty arose because Kara's overt medical condition never went beyond "a substantial risk of death" until she stopped breathing, when 911 was immediately called. Even if the jury found Kara's condition went beyond a "a substantial risk of death" before she stopped breathing, it could have also concluded Kara was already so close to death the failure to act was not causal. The instruction given, on the other hand, allowed the jury to find Dale guilty by omission long before he had a duty to act.

This was, moreover, exactly what the state urged the jury to do. The state's theory of liability was that as soon as Dale observed any symptom which met the definition of great bodily harm, guilt was proven. (112:19-22, 48-49; A:40-45). In other words, the state did not have to show an objective "risk" of great bodily harm, because there already *was* great bodily harm. The subjective awareness element

---

10 As stated earlier in this brief, what lies beyond a "substantial risk of death" may include, for example, circumstances where death is clearly imminent—i.e. respiratory failure; severe bleeding; severe trauma; etc.

was met by showing Dale had knowledge of any symptom which met the definition of great bodily harm, such as Kara's unconscious state. (112:20, 22, 48-49).

Had the jury been properly instructed, the State's argument would have failed. Dale's decision to treat Kara by spiritual means while she was suffering great bodily harm was privileged under Wis. Stat. § 948.03(6). Dale had no duty to provide conventional medical care until, at a minimum, Kara's condition progressed *beyond* "great bodily harm." Without a duty to act, there can be no criminal liability. Dale was prejudiced as there is a good likelihood the jury agreed with the State's incorrect theory.

2. Alternatively, the trial court's duty instruction is contrary to constitutional standards.

Apart from any consideration of Wis. Stat. § 948.03(6), the trial court's duty instruction is legally erroneous for the alternative reason that it violates a parent's constitutional right to direct the medical care of his child.

The due process clause of the United States Constitution "protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000). No doubt a "parent's general right to make decisions concerning the care of her child includes, to some extent, a more specific right to make decisions about the child's medical care." *PJ ex rel Jensen v. Wagner*, 603 F.3d 1182, 1197 (10th cir. 2010). See also *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1203 (10th Cir. 2003)("It is not implausible to think that rights invoked here—the right to refuse a medical exam and the parent's right to control the upbringing, including the medical care, of a child—fall within [the Due Process Clause's] sphere of protected liberty.")

While the extent of a parent's constitutional right to substitute faith healing for medical care is not clearly decided, it certainly goes beyond the trial court's instruction in this case. Most cases have addressed the constitutional issue in the context of the state's right to intervene. See e.g. *Custody of a Minor*, 379 N.E.2d 1053, 1062 (Mass. 1978) (Courts which have considered the "natural rights" of the parents have "uniformly decided that State intervention is appropriate where the medical treatment sought *is necessary to save the child's life*." (Emphasis added)). *Muhlenberg Hospital v. Patterson*, 128 N.J.Super. 498, 320 A.2d 518, 521 (1974) (The "power of the State is not exercised beyond the area where treatment is necessary for the sustaining of life or the prevention of grievous bodily injury."); *In re Green*, 448 Pa. 338, 292 A.2d 387 (1972) (the state may intervene only if the child's life is immediately imperiled by his physical condition, at least where the child himself opposes the treatment); *People in Interest of D. L. E.*, 645 P.2d 271, 276 (Colo. 1982) (State intervention does not violate the constitutional provisions protecting the free exercise of religion at least where a minor suffers from a life-threatening medical condition).

The state's right to force a child's medical care in civil court would logically come at a lower threshold than a legal duty for criminal liability purposes.[11] Even if the threshold were the same, a parent's duty to provide conventional medical care for criminal liability purposes comes much later than the instruction the trial court gave. As such, the instruction was not only incorrect, it misled the jury on the legal standard it was required to apply. For the same reasons

---

11 See e.g. Wis. Stat. § 48.981(3)(c)4, which provides broad parental immunity in juvenile cases for healing by spiritual means but allows the state, nonetheless, to order medical services when the child's health "requires it." See also *Winters v. New York*, 333 U.S. 507, 515 (1948) ("The standards of certainty in statutes punishing for offenses is higher than those depending primarily upon civil sanction.")

argued earlier, the error is not harmless.

Alternatively, the instruction given violates due process notice. The duty "to protect their children, to care for them in sickness and in health" is so broad and so vague it merely begs the question of what medical attendance is necessary and when. It provides no discernible standards, and thus fails to give a reasonable person warning of when they have a duty to act in order to avoid criminal liability. *Election Bd. Of State of Wisconsin,* 227 Wis.2d at 676-677. Likewise, the instruction provided no standards for the jury to adjudicate guilt. This relieved the state of having to prove a specific duty to act and a violation of that duty.

III. THE REAL CONSTROVERSY WAS NOT FULLY TRIED BECAUSE THE JURY WAS IMPROPERLY INSTRUCTED.

The contested issue in this case was whether the subjective awareness element of "criminally reckless" conduct was met. The state had to prove that Dale was subjectively aware "*that his conduct* ***created*** the unreasonable and substantial risk of death or great bodily harm." (Emphasis added) (112:52). "Conduct," in this case, means an affirmative duty and a failure to act. The defense, in essence, was that if Dale sincerely believed treatment through prayer was the best means by which to heal his daughter, he could not, at the same time, have been subjectively "aware" his treatment by prayer was *causing* her death. The issue, essentially, is the subjective awareness of *causation*.

The state has acknowledged that a sincerely held belief in treatment by spiritual means may negate the subjective element. When the reckless homicide charge was challenged on constitutional notice grounds, the prosecutor remarked, in defense of the statute:

> I think that every [constitutional] concern that [defense counsel] brings up is addressed *because we have to deal with the subjective component of the crime charged, and if the jury believes those beliefs [in faith healing] were sincere, then the jury shouldn't get to the point of conviction.*
> …
> If[…]they [Neumanns] *think that a doctor would do more harm than good and a jury finds that sincere, then the state ought not meet that subjective element.*

(Emphasis added) (95:31, 40).

Trial counsel believed that treatment-through-spiritual means was the only viable defense. (A:37-39). The problem, however, is that the legal viability of this defense was never effectively communicated to the jury. The result was a jury ill-equipped to decide the true matter in controversy. There are several reasons for this.

First, the "religion" instruction the trial court gave could have easily misled the jury into believing there was *no* treatment through spiritual means defense. The trial court instructed the jury: "The constitutional freedom of religion is absolute as to beliefs *but not as to the conduct, which may be regulated for the protection of society*." (Emphasis added) (112:53). A jury could have easily equated faith healing with religious "conduct," which is "regulated for the protection of society." If so, it may have understood this instruction as preventing *any* defense based upon treatment by spiritual means. The trial court erred when it gave this instruction and trial counsel was deficient when he failed to object.

Second, the trial court's "duty" instruction communicated a broad, absolute parental duty to provide medical attendance whenever necessary to "protect" or "care" for one's children. (111:52). The jury had no reason to believe that treatment by spiritual means was consistent with this alleged duty to provide conventional medical care,

or was available as a defense. The instruction is also wrong, moreover, in that it completely ignores: 1) Wis. Stat. § 948.03, which provides a privilege to the those who treat by spiritual means, up to and including great bodily harm; and, 2) a parent's constitutional right (for religious or other reasons) to direct a child's medical care. (See argument *supra*, pp. 31-32). The trial court erred when it gave this instruction and trial counsel was deficient when he failed to object.

Third, the jury was not properly instructed when it asked during deliberations: "Was Dale's belief in faith-healing something that makes him not liable for not taking Kara to the hospital, even though he was aware to some degree she was not feeling well?" (113:4). The record does not reflect what the Court actually told the jury, but based upon the discussion between counsel and the court, the jury was simply told to re-read the instructions already given. (113:4). The jury requested guidance on this issue for the obvious reason it was confused about the relationship between spiritual healing and the subjective element of the offense. The trial court failed to clarify how treatment by spiritual means *could* constitute a defense to the subjective element because the parent did not believe he was *causing* a risk of great bodily harm or death, but rather, employing the best means at his disposal to prevent it. By not answering the question directly, the jury was effectively told no such defense existed.

Fourth, the jury was never directly instructed that a sincere belief in treatment by spiritual means may negate the subjective awareness element. The standard instruction is that a defendant must be "aware that his conduct created the unreasonable and substantial risk of death or great bodily harm." WIS-JI Criminal 1060. The standard instruction is just not specific enough for the average jury to have understood that Dale's sincere belief in faith healing could be

a complete defense. No juror could realistically be expected to understand, on its own, the relationship between the subjective awareness element and a sincerity of belief in treatment by spiritual means.

A proper jury instruction is a crucial component of the fact-finding process. *State v. Perkins*, 2001 WI 46, ¶41, 243 Wis.2d 141, 626 N.W.2d 762. Jury instructions must do more than simply state the elements of the crime. They must accurately convey the meaning of the statute *as applied to the facts of the case. State v. Ferguson*, 2009 WI 50, ¶¶14, 31, 317 Wis.2d 586, 767 N.W.2d 187. When jury instructions fail to provide a necessary explanation regarding an element of the offense, they effectively preclude a jury from rendering a verdict on that element. *Perkins,* at ¶55 (Wilcox, concurring). A court should reverse when the jury instruction "obfuscates the real issue or arguably caused the real controversy not to be fully tried." *Id*. at ¶12. See also *Gonzalez*, 2011 WI 63, ¶ 23-24 (defendant entitled to a new trial when jury likely applied the instruction in a way that denied the defendant "a meaningful opportunity for consideration by the jury of his defense ... to the detriment of the defendant's due process rights.") (See also pp. ---, *supra*, for additional authorities on jury instruction challenges).

The faith healing defense was the only viable defense Dale had. It was the only defense trial counsel argued in his closing. Trial counsel was deficient, and Dale was prejudiced, because trial counsel did not assure the jury was properly instructed. Alternatively, the real controversy was not fully tried. As the jury's question makes clear, it did not understand how Dale's defense applied to the elements of the offense. At best, the jury was at a loss when it came to whether a faith healing defense was even legally viable.

IV. THE JURORS WERE OBJECTIVELY BIASED WHEN THE TRIAL COURT INFORMED THEM DEFENDANT'S WIFE HAD BEEN PREVIOUSLY CONVICTED OF THE SAME OFFENSE.

Dale and Leilani Neumann were both charged with second degree reckless homicide upon nearly identical facts. At the state's insistence, each were tried separately. Leilani was tried first, and convicted. Prior to voir dire in Dale's case, counsel met in chambers with the trial court to discuss how jury panel knowledge of Leilani's conviction, if any, would be treated. According to trial counsel, he objected to allowing any jurors with outside knowledge of the prior conviction on the panel. (118:7, 9, 10). Trial counsel firmly believed "that knowledge of the prior conviction would *have* to influence [the jurors'] decision," as the circumstances surrounding the two cases were "identical." (118:10). (Emphasis added). Both parents were faced "with the same observations…of their daughter's condition" and made their decisions "together." (118:10). Trial counsel testified it was "always [his] assumption," when discussing Dale's options concerning venue and speedy trial, "that jurors who had knowledge of the prior conviction would have been excused for cause." (118:19).

There is no record of this in-chambers discussion. There is no record of trial counsel's objection. In its postconviction decision, the trial court acknowledged that it probably "remarked off the record that prior knowledge [of Leilani's conviction] alone does not necessarily disqualify a juror." (85:9; A:29). The trial court "felt that an automatic disqualification for prior knowledge of the conviction would not be prior (sic) [proper?] without an individual inquiry of whether they were a reasonable person willing to set aside such prior knowledge…." (85:10; A:30). However stated, trial counsel understood the court's remark as a ruling—a ruling which would allow jurors with knowledge of the prior

conviction to sit on the jury. (118:8). The trial court does not deny trial counsel objected to this "ruling," or make a finding one way or the other.

With the prospect of some jurors having knowledge of the prior conviction and some not, both the prosecutors and defense counsel agreed it would be better to inform all potential jurors upfront rather than risk this fact being revealed during deliberations. As the trial court described it in its written decision:

> …on the first day of trial the attorneys advised the court in chambers, later placed on the record, that they had reached a stipulation. *Since prior knowledge of the case alone would not necessarily disqualify a juror*, both were concerned that there would be a mix of jurors on the panel; some that would have knowledge of the prior conviction and some that would not. Under those circumstances, they were concerned that there would be a realistic probability that during deliberations knowledge of the prior conviction might become known to the jurors that would have no prior knowledge that might then prejudice that juror requiring a mistrial at that late stage. Worse yet, it might cause such prejudice that might not be made known to the court and parties that might result in a tainted conviction. Both felt it would be better to face the challenge head-on and have a known impartial jury that all had the same knowledge concerning the prior conviction and could be questioned about any prejudicial effect it might have.

(Emphasis added) (85:11-12; A:31-32).

Trial counsel testified he did make a blanket objection to jurors being placed on the panel with knowledge of the prior conviction. (118:7, 9, 10). The trial court made no finding to the contrary. The issue, therefore, is preserved for appeal. If not preserved, Dale argues, in the alternative, that trial counsel was ineffective for not so objecting. There was no conceivable strategic or other reason for failing to object in the first instance. Once the decision was made to allow jurors on the panel with outside knowledge of the prior

conviction, however, Dale agrees that trial counsel's consent to inform each juror during voir dire was both strategically and objectively reasonable. His decision was only strategic, however, in the sense that the Court had made an adverse decision, and now he had to minimize the impact on his client:[12]

> I recall agreeing to essentially a limiting instruction *once the decision was made to …allow the jurors who had knowledge of the prior conviction to sit on the jury.* I believe it was appropriate to have a limiting instruction, and I do believe that Attorney Jacobson's representations of the instruction and how we were to address this with the jury was an agreement, was essentially what we decided in chambers to do. However, it was certainly my intention – prior to addressing a limiting instruction, it was my intention *to object to allowing any jurors to sit with such knowledge.* It was my position that that was impermissible – or could lead to impermissible bias against my client.

(118:8).

The trial court's decision to allow jurors with outside knowledge of the prior conviction to sit on the panel was error. The decision created a dilemma for defense counsel which ultimately resulted in his consent to the trial court informing each potential juror that Leilani, the defendant's wife, had already been convicted of the same charge for which the defendant was being tried. (See e.g. 102:71, 83, 92, 110, 123, 154, etc.).

Criminal defendants have a Sixth Amendment right to be tried by impartial and unbiased jurors. *United States v. Frost*, 125 F.3d 346, 379 (6th Cir.1997) (citing *Ross v.*

---

12 See e.g. *State v. Faucher*, 220 Wis.2d 689, 702, 584 N.W.2d 157 (Ct. App. 1998) (When defendant was offered the choice of continuing his trial with a biased juror or having the jury reduced to 11, defendant did not waive his right to appeal by choosing to proceed with 11 jurors.)

Oklahoma, 487 U.S. 81, 85, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988)). That right is compromised when jurors are told of prior convictions or guilty pleas resulting from the same or similar facts, involving the same defendant or his co-defendant(s). See *Leonard v. United States*, 378 U.S. 544, 545 (1964) (Jury panel which heard guilty verdict pronounced on similar charges in defendant's first trial implicitly biased[13] in second); *Quintero v. Bell*, 256 F.3d 409, 412-13 (6th Cir. 2001) (Trial counsel ineffective when he failed to exclude seven jurors in escape prosecution who had convicted co-escapees of same offense, as this violated right to impartial jury, even if jurors attest to their impartiality); *United States v. Maliszewski*, 161 F.3d 992, 1004 (6th Cir.1998) (Plain error when court informs jury that indicted co-defendants have pleaded guilty); see also *United States v. Hansen*, 544 F.2d 778, 780 (5th Cir. 1977) (Juror knowledge of co-conspirator guilty plea prejudicial); *United States v. Gillis*, 942 F.2d 707, 710 (10th Cir.1991) (Jurors who sat on voir dire panel from an earlier case in which the same defendant was tried and convicted on different charges implicitly biased); *Leroy v. Government of Canal Zone*, 81 F.2d 914, 914 (5th Cir. 1936) (Records of conviction against co-defendants, jointly charged with but tried separately from defendant, biased defendant's jury).

In Wisconsin, implied bias is referred to as "objective bias." See *State v. Tody*, 2009 WI 31, ¶ 36, 316 Wis.2d 689, 764 N.W.2d 737 ("A juror is objectively biased when a reasonable person in the juror's position could not be impartial. [FN omitted] 'To be impartial, a juror must be indifferent and capable of basing his or her verdict upon the evidence developed at trial.' [FN omitted]. A juror therefore

---

13 See e.g. *Smith v. Phillips*, 455 U.S. 209, 224 (1982), Justice O'Connor, concurring (U.S. Supreme Court retains the doctrine of implied bias in appropriate circumstances, citing *Leonard* as an example).

should be viewed as objectively biased if a reasonable person in the juror's position *could not avoid basing his or her verdict upon considerations extraneous to evidence put before the jury at trial.")* (Emphasis added). See also *State v. Funk*, 2011 WI 62, ¶¶38, 39 n.18, --- Wis.2d ---, --- N.W.2d --- (three non-exclusive factors articulated in *Delgado* only necessary in "lack of candor" type cases). "Objective bias," moreover, is not subject to harmless error. *Tody,* at ¶44.

The results of Leilani Neuman's trial should not have been made known to the jury. As the trial court noted in its pretrial decision, "the facts of both are the same…." (29:1 (n.1); A:1) The law is the same. The jurors all knew, in other words, that under these same facts, applying the same law, another jury had found Leilani Neuman guilty. This created an impermissible "objective" bias against the defendant before any evidence was heard.

The prejudicial impact is particularly telling in this case as the evidence against both defendants was nearly identical. The state has agreed the facts presented at both Neumann trials "were substantially similar." (84:10). The state also acknowledged that "the prior conviction of Leilani Neumann may well cause somebody to improperly believe that Dale Neumann should just plead guilty, because his wife was already convicted." (102:4-5). The state has repeatedly emphasized, moreover, the intense media coverage these jurors were exposed to beyond the mere fact of Leilani's conviction. At least several jurors admitted their knowledge of the prior case in voir dire. (See e.g. 102:163; 187; 196; 304; 103:74; 173). The state also admits that Leilani "was convicted in a trial that attracted immense media attention," and further, the jury questionnaires in Dale's case "demonstrated significant knowledge of both this and Leilani Neumann's cases by some of the prospective jurors…." (84:9).

Most telling, however, is the nature of the evidence itself. By the time the jurors reached deliberations, there would have been little doubt the case against each of the parents was virtually identical. As trial counsel noted:

> The circumstances surrounding both cases were identical. They were faced – Dale and Leilani were faced with the same observations…of their daughter's condition. They were together during parental decision making – they seemed to have made the decisions together. The cases were extremely, extremely, similar.

(118:10). The evidence as presented made little differentiation between the parents. Both were present at the house during the entire relevant period; both saw the same symptoms and progression of symptoms; both attended to Kara; both were involved in faith healing and contacting other church and family members; and both consulted with each other and made joint decisions. There was no evidence at trial to suggest one had material knowledge the other didn't. By the time the jurors were tasked to determine guilt or innocence, they would have known (or would have reasonably concluded) there was little factual or legal difference in the cases.

Finally, the state presumably will argue that limiting instructions would have cured any prejudice the jury would have had from its knowledge of the prior conviction.[14]

---

14 Although the "cautionary instruction" to each potential juror differed somewhat, they were effectively told that Leilani's conviction could only be used to assess her credibility, assuming she testified; and that it could not be used to conclude Dale was guilty as well. It "may be a somewhat similar case, but the evidence as to this defendant and how he reacted to the situation may be different; therefore, there may be a different result. Do you understand that?" (see e.g. 102:165-166). Further, the jurors were asked if they could make a decision "based solely upon the evidence received during trial in this case?" (see e.g.102:166).

Limiting instructions, however, are a poor substitute for an untainted jury. While the legal presumption is that jurors will follow instructions, the law also recognizes that some information cannot be ignored. *State v. Schulter*, 39 Wis.2d 342, 159 N.W.2d 25 (1968) (Courts have recognized the limits of voir dire and judicial admonition to correct prejudice); *Irvin v. Dowd*, 366 U.S. 717, 728 (1961) (Once an opinion has been formed, statements of impartiality can be given little weight).

In addition, the question here is one of "objective"[15] rather than "subjective" bias. While a "subjective" inquiry looks for bias from the individual juror's point of view, an "objective" inquiry focuses on a "reasonable person in the individual prospective juror's position." *State v. Jimmie R.R.*, 2000 WI App 5, ¶17, 232 Wis.2d 138, 606 N.W.2d 196. In other words, a subjective inquiry decides whether an individual prospective juror possesses a willingness and ability to be impartial, while an objective inquiry would look at that same juror's situation and ask whether a reasonable person in those circumstances *could be* impartial. *Id*. at ¶17. An objective analysis *goes beyond "what the juror asserts* in order to examine whether reasonable jurors could actually act in the manner the jurors stated they would act." *State v. Kiernan*, 227 Wis.2d 736, 747, n. 7, 596 N.W.2d 760 (1999). Cautionary instructions, therefore, are not relevant to an objective inquiry. In this case, the question is whether a "reasonable" person who knows that one of the parents has already been convicted by a local jury of the same charge, upon the same facts, would be capable of putting that knowledge aside. Defendant submits that no person could honestly do so, and many courts under similar circumstances have agreed. (See cases cited pp.38-39, *supra*). Indeed, it would be hard to imagine a case where knowledge of a prior conviction would have a greater impact than it did here.

---

15 "Objective" bias encompasses the previously used terms of "implied" or "inferred" bias. *Faucher*, 220 Wis.2d at 716-17.

In short, Dale's jury was tasked with exactly the same decision the jury made in Leilani's case. Knowledge of Leilani's guilty verdict created an unacceptable risk the jury would not decide the case based *solely* on the evidence at trial. Whether consciously considered or not, no reasonable person in the juror's position could avoid being influenced by the prior result. *Tody*, 2009 WI 31 at ¶ 36. As such, the jury was objectively biased. The conviction should be reversed for a new trial.

CONCLUSION

On the constitutional notice issue, the conviction should be reversed and the information dismissed. Alternatively, on the remaining issues, the conviction should be reversed and the case remanded for a new trial.

Respectfully submitted this 19th day of July, 2011.

MILLER & MILLER
Attorneys for the Defendant-Appellant

By_____
Steven L. Miller #01005582
P.O. Box 655
River Falls, WI 54022
715-425-9780

CERTIFICATION

As to Form and Length

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b)&(c), as modified by the Court's Order, and that the text is: Times Roman proportional serif font, printed at a resolution of 300 dots per inch, 14 point body text and 12 point text for quotes and footnotes, with a minimum leading of 2 points and a maximum of 60 characters per line. The Statement of the Case, Statement of Facts, Argument and Conclusion portions of this brief contain 9980 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that: I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12).
I further certify that: This electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 19th day of July, 2011.

MILLER & MILLER
Attorneys for the Defendant-Appellant

By_____
Steven L. Miller #01005582
P.O. Box 655
River Falls, WI 54022
715-425-9780

CERTIFICATION

As to Compliance with Rule 809.19(2)(b)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 19th day of July, 2011.

MILLER & MILLER
Attorneys for the Defendant-Appellant

By_____
Steven L. Miller #01005582
P.O. Box 655
River Falls, WI 54022

CERTIFICATION OF MAILING

I certify that this brief or appendix was deposited in the United States Mail for delivery to the Clerk of the Court of Appeals by First Class Mail on July 19, 2011. I further certify that the brief or appendix was correctly addressed and postage was prepaid.

Dated this 19th day of July, 2011

MILLER & MILLER
Attorneys for the Defendant-Appellant

By_____
Steven L. Miller #01005582
P.O. Box 655
River Falls, WI 54022
715-425-9780

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(13)

I hereby certify that: I have submitted an electronic copy of this appendix, excluding the brief, which complies with the requirements of s. 809.19(13).
I further certify that: This electronic appendix is identical in content and format to the printed form of the appendix filed as of this date. A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 19th day of July, 2011.

MILLER & MILLER
Attorneys for the Defendant-Appellant

By_____
Steven L. Miller #01005582
P.O. Box 655
River Falls, WI 54022
715-425-9780

APPENDIX OF DEFENDANT-APPELLANT

INDEX TO APPENDIX