STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2011AP1044-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DALE R. NEUMANN,

Defendant-Appellant.

ON APPEAL FROM JUDGMENT OF CONVICTION AND SENTENCE AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR MARATHON COUNTY, THE HONORABLE VINCENT K. HOWARD PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. In view of Wis. Stat. § 948.03(6), does the application of the reckless homicide statute to Kara Neumann's death violate Dale Neumann's due process right to fair notice? (The circuit court answered: no.)

2. Was the "duty" instruction given to the jury unconstitutional as applied to the facts of this case? (The circuit court answered: no.)

3. Was the real controversy fully tried? (The circuit court answered: no.).

4. Was the jury objectively biased? (The circuit court answered: no.).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary because the issues presented are fully briefed and may be resolved by applying well-established legal principles to undisputed facts. Publication is warranted because the application of these well-established legal principles to the present factual setting is novel in Wisconsin law.

STATEMENT OF THE CASE

Untreated diabetes leads to diabetic ketoacidosis ("DKA") (107:231-32). Signs of advanced DKA include extreme weakness and thirst, decreased appetite, and sweet "acetone breath" (107:196; 108:4). Another "significant symptom" is "rapid and deep breathing," which is "prominent … alarming … and very concerning" (107:233). The advanced DKA sufferer appears dehydrated, is "cold to touch, … very weak, … unable to walk typically, or, if the person walks, will not have good balance" (108:5). The skin may appear white or blue (108:6). DKA eventually leads to coma, which "is defined as a state of unresponsiveness" or limpness (107:234; 108:8). End stage DKA is "without question" "noticeable" (108:12-13).

According to expert witness Dr. Ivan Zador, "severe DKA … untreated … invariably results in death," but the overall survival rate for treated DKA is 99.8 percent (107:233). DKA's effects are reversible even for comatose patients (108:9).

Defendant-appellant Dale Neumann[1] noticed that Madeline Kara Neumann ("Kara") was tired on the Saturday morning before she died; he invited her to rest in the master bedroom (111:127-28). She apparently slept all day (111:130).

Early Saturday evening, Leilani came home and found Kara extremely weak, pale, and cold (109:54). Frightened, Leilani immediately alerted Dale (109:59; 111:131). Dale noticed that Kara's legs were blue (111:131). At 4:58 p.m., Dale sent out an email to ubmadmin@americaslastdays.com stating: "We need agreement in prayer over our youngest daughter, who is very weak and pale at the moment with hardly any strength" (111:157). Kara's breathing became labored (109:70-71). At 7 or 8 p.m., Kara went to the bathroom unattended and collapsed on the floor (111:161-63). Dale had to carry her downstairs (*id.*; 109:73). Dale testified that Kara stopped walking and talking after that (111:165-68). The Neumanns stayed up late "non-stop praying and just continually trusting in the Lord" (111:137). According to her brother Luke, Kara was in a coma by Saturday's end (107:47).

At 5:00 a.m. on Sunday morning, Kara was silent and still except for her deep breathing (109:86). Dale thought her breathing was "normal" compared to Saturday night (111:138). Dale admitted that Kara was limp (111:139). He refused to acknowledge that she was unconscious, preferring to call it "a deep sleep" (111:164). Leilani said Kara was unconscious all day (109:90). Kara's sister Ariel thought she was in a coma (109:89). Leilani told her mother-in-law that Kara was in a coma (110:21). After a telephone conversation with Leilani that morning, Dan Peaslee had the impression that Kara was in a coma (109:220). Leilani told Althea Wormgoor that Kara was not eating, drinking, or talking, and was lying on the floor (109:245-46).

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[1]The State will refer to defendant-appellant as "Dale," and his wife, Leilani Neumann, as "Leilani."

Jennifer and Dan Peaslee arrived at the Neumanns' at noon on Sunday (109:203). Dan said Dale "was visibly upset. His eyes were red. He had been crying" (109:224). Kara was lying on the bathroom floor unmoving and unconscious (109:204, 225-26). Jennifer described her breathing as "deep labored," not "normal" (109:204). Dan described it as "wheezing" (109:226). Dan said Kara appeared "ashen" (109:226). They were "shocked" by Kara's condition (109:205, 227). Dan remembered "that a coma-like situation was conveyed to me [but] … I wasn't prepared for her to really be laying there and not responding" (109:227). Leilani's attempts to give Kara water were unsuccessful because Kara was unable to swallow (109:209). Dan picked Kara up; she was very light and "limp" (109:228).

The Wormgoors arrived after the Peaslees left. When they arrived, Kara's eyes were open, but she "wasn't seeing anybody" (109:252). She was breathing heavily, but not "overly" so (109:253). Her lip "twitched but in a very almost scary way, like she was gasping for air" (*id.*). Randall Wormgoor called 911 (109:258).

Kara was pulseless and non-breathing when the police arrived (107:88-90, 164). Dale was performing CPR on Kara when they got there (107:87).

People who knew Kara before she died agreed that she was naturally thin. But those who observed Kara on that Sunday saw something more extreme.

Everest Metro Police Officer Scott Martens said Kara was "extremely skinny" and "extremely light" (107:88, 92). EMT Jason Russ said she had a "bluish-gray color," looked "malnourished," and had "pronounced" eye sockets and cheekbones (107:113). "Every rib" and her "[p]elvic bone [were] very visible" (107:114). EMT Hyden Prausa said Kara appeared

> malnourished, very skinny, pale, white. She looked very sickly.
>
> ….

> … [H]er jaw was sunken in and defined. She was white and extremely skinny, beyond just normal skinny child. She was … bone-like, skeleton-like.

(107:165-66). EMT Russ and his colleagues noticed a sweet "fruity odor" on Kara's breath, which they recognized as a diabetes symptom (107:130).

Choon P'ng, the emergency room doctor who examined Kara, described her as "cachetic," which describes the appearance of a "cancer patient, very malnourished, thin, and smaller than you expect of the age" (107:187-88). She also looked "very dehydrated. Eyes [were] sunken. Skin turgor was poor" (107:190). Pediatrician Joseph Monaco, assisting Dr. P'ng, described Kara as "very emaciated," "wasted," and "shrunk" (110:37, 55). Pathologist Michael Stier, who performed Kara's autopsy, said Kara had a "wasted appearance … very thin, apparently malnourished" (109:173).

Kara died from "uncontrolled diabetes mellitus" (109:173). Dr. P'ng said Kara's was the most advanced case of juvenile DKA he had ever seen (107:208-09, 214). Dr. Zador, reviewing the case records, concluded that Kara was in the advanced stages of DKA by Saturday (108:14). At death, Kara's blood sugar, blood acid, and Hemoglobin A(1c) levels were abnormally elevated, indicating to Dr. P'ng that her "sugar control [had] been poor for an estimated amount of time, could be several weeks" (107:194-95).

The doctors agreed that DKA is survivable. Dr. P'ng called the prognosis for a still-breathing DKA patient with a heartbeat "very good" (107:201). Dr. Monaco said that the recovery rate for someone in an "entry state" of DKA is "virtually 100 percent," and "about 80 percent" for someone in an advanced stage (110:44). Dr. Zador believed that Kara's DKA was treatable and that her chances of survival were high until "well into the day of her death" (108:10-11). To the last moment, there was some "chance of survival" (108:11).

Kara was declared dead at 3:30 p.m. on Easter Sunday (110:41).

Dale testified at length about his religious beliefs (111:101-19, 133-42). He talked about miraculous cures he had witnessed (111:102-03). He compared using modern medicine to drinking alcohol—both are "socially acceptable" and "just the way we do things in our culture" (111:104).

> So you are going to go to doctors, because it's culturally accepted, but when there is a standard higher than going to doctors which is culturally accepted, you have the word of God, and then in knowing him we have got to learn to submit ourselves to his word. That's obedience. That is faith in action.
>
> You cannot separate faith from your works. Faith without works is dead …. [I]f I go to a doctor and I said, well, I'm praying, too. Well, my work is what? I'm putting the doctor before God. I'm not believing what he said he will do….
>
> If I go to any other source, that's idolatry. I'm putting something else in the place of God. That is idolatry. That is sin. Why? Because it's disobedience. Sin is disobedience.

(111:109-10; *accord* 111:118-19). Dale believed that the family's health improved after they gave up doctors (111:111).

On the day of Kara's death, Leilani told police that Dale thought about taking Kara to the doctor, but Leilani dissuaded him (88:exhs.28:44; 29:2). She retracted this statement in her trial testimony (109:151-52).

Dale said if he could relive Kara's final days he would do nothing differently (107:46; *see also* 88:exh.32:60-62).

Defense counsel Jay Kronenwetter emphasized Dale's religious beliefs in closing. The reckless-homicide statute requires proof that the defendant was aware that his

conduct created an unreasonable and substantial risk of death or great bodily harm to another person. Kronenwetter argued that Dale's belief in healing through prayer prevented him from forming the subjective awareness necessary for reckless-homicide liability.

> The State is arguing that he was criminally reckless in attempting faith-healing and following his beliefs on what would work … to heal his daughter. They didn't bring in one witness, not one that said Dale is a phoney, not one that said he is putting on an act here, he doesn't believe all he is saying….
>
> ….
>
> But then they say the reason he failed to take her to the doctor is irrelevant in this case. Well, of course it's relevant….
>
> The Judge is going to read you those elements … and as part of criminally reckless conduct, they must prove that the defendant was aware that not taking Kara to the doctor created the unreasonable and substantial risk of death or great bodily harm. I don't think they have offered a shred of evidence on that.

(112:39-40; *accord* 112:42, 44-47).

The State analyzed the evidence differently (112:6-9, 16, 22-36). The jury found Dale guilty of second-degree reckless homicide (70).

ARGUMENT

I. NOTWITHSTANDING WIS. STAT. § 948.03(6), THE APPLICATION OF THE RECKLESS HOMICIDE STATUTE TO KARA'S DEATH DOES NOT VIOLATE DALE'S DUE PROCESS RIGHT TO FAIR NOTICE.

A. Wisconsin Law Provides Fair Notice to Prayer-Treating Parents that They May Be Liable for Reckless Homicide if a Child Dies.

1. Applicable Statutes.

Second-degree reckless homicide.

Under Wis. Stat. § 940.06(1), "[w]hoever recklessly causes the death of another human being is guilty of a Class D felony." "[R]ecklessly" is defined by Wis. Stat. § 939.24, which applies to most statutes requiring proof of a reckless state of mind. *See* Wis. Stat. § 939.24(2). Under § 939.24(1), "'criminal recklessness' means that the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk …."

The reckless-homicide statute requires the State to prove three things. First, "the actor create[d] an *unreasonable and substantial risk of death or great bodily harm* to another …." That is the conduct that triggers liability. Second, the actor was "*aware* of that risk." That is the required mental state. Third, the actor "cause[d] the *death* of another." That is the required result of the reckless conduct. *Id.*

Criminal child abuse.

Wisconsin Stat. § 948.03 is the "[p]hysical abuse of a child" statute. It provides in pertinent part:

> (1) DEFINITIONS. In this section, "recklessly" means conduct which creates a situation of unreasonable risk of harm to and demonstrates a conscious disregard for the safety of the child.
>
> ….
>
> (3) RECKLESS CAUSATION OF BODILY HARM. (a) Whoever recklessly causes great bodily harm to a child is guilty of a Class E felony.
>
> (b) Whoever recklessly causes bodily harm to a child is guilty of a Class I felony.
>
> (c) Whoever recklessly causes bodily harm to a child by conduct which creates a high probability of great bodily harm is guilty of a Class H felony.

Subsections 948.03(3)(a) and (b) require he State to prove three things. First, the actor "create[d] a situation of *unreasonable risk of harm* to … the child." That is the conduct triggering liability. Second, the creation of that risk "demonstrate[d] a *conscious disregard*" for the child's safety. That is the required mental state. Third, the actor "cause[d] *great bodily harm*" or "*bodily harm*" to the child. That is the required result of the reckless conduct.

Subsection (c) requires the State to prove three things. First, the actor's conduct was not only reckless as defined by the statute, but that it "create[d] a *high probability of great bodily harm*." The actor's mental state is the same as the other subsections, *i.e.*, "*conscious disregard*" for the child's safety. The required result of the reckless conduct is "*bodily harm.*"

The child-abuse statute differs from the reckless-homicide statute in three important respects. First, the recklessness provisions of the child-abuse statute do not

include conduct that creates "an unreasonable and substantial risk of death." Second, the actor's mental state is "conscious disregard" for the child's safety, not "aware[ness]" that he is creating an unreasonable and substantial risk of death or great bodily harm. Third, the punishable consequences of the actor's reckless conduct are limited to bodily harm and great bodily harm; they do not include death.

Prayer-treatment exception.

The child-abuse statute also differs from the reckless-homicide statute because it contains an exception for "[t]reatment 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.

Wis. Stat. § 948.03(6). Wisconsin Stat. § 48.981(3)(c)4. is a Children's Code provision that a child-abuse or neglect determination may not be based solely on a parent's choice of prayer in lieu of medical treatment. Wisconsin Stat. § 448.03(6) refers specifically to "the Practice of Christian Science," and is therefore inapplicable to this case because Dale is not a Christian Scientist.[2]

2. The Due Process notice doctrine.

Due process requires that criminal statutes provide citizens with fair notice. "[A] criminal statute does not provide fair notice if it does not 'sufficiently warn people who wish to obey the law that their conduct comes near

[2]Dale cites several other prayer-related statutes. "These accommodative provisions … evince no legislative sanction of prayer for the treatment of children in life-threatening circumstances." *Walker v. Superior Court*, 763 P.2d 852, 863 (Cal. 1988) (in bank).

the proscribed area.'" *State v. Nelson*, 2006 WI App 124, ¶36, 294 Wis.2d 578, 718 N.W.2d 168 (citation omitted). However, it

> "'need not define with absolute clarity and precision what is and what is not unlawful conduct.'" "A statute … is not void for vagueness because in some instances certain conduct may create a question about its impact under the statute," or because "'there may exist particular instances of conduct the legal or illegal nature of which may not be ascertainable with ease.'"

Nelson, 294 Wis.2d 578, ¶36 (citations omitted). Only a "'fair degree of definiteness'" is required. *State v. Courtney*, 74 Wis.2d 705, 710, 247 N.W.2d 714 (1976) (citations omitted).

A statute is not unconstitutional merely "'because the boundaries of the prohibited conduct are somewhat hazy.'" *State v. McCoy*, 143 Wis.2d 274, 286, 421 N.W.2d 107 (1988) (citation omitted). Justice Holmes famously noted that the law sometimes requires individuals to assume the risk that their conduct may cross the line from permissible to prosecutable.

> Wherever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so, it is familiar to the criminal law to make him take the risk.

United States v. Wurzbach, 280 U.S. 396, 399 (1930).

Every day, our statutes require us to moderate generally permissible behavior in order to stay within the law. We are allowed to consume alcohol, but if we reach a state of intoxication that injures others, we are criminally liable. *See*, *e.g.*, Wis. Stat. § 940.09. We are allowed to spank our children, but if our use of corporal punishment becomes injurious and "unreasonable," we are criminally liable. *See* Wis. Stat. § 939.45(5)(b). We are allowed sexual intimacy with young people, but if they are

under eighteen, we suffer strict criminal liability. *See* Wis. Stat. § 948.02. We are expected to recognize the line between permissible and prosecutable behavior. If the line is sometimes hard to see, the assumption of risk is ours.

3. Construed together, Wis. Stat. § 940.06(1) and § 948.03 provide fair notice.

Dale does not argue that the treatment-through-prayer privilege applies to the reckless-homicide statute. Nor could he. *See* Wis. Stat. § 948.03(6) (privilege applies to "offense[s] under *this section*"). He argues instead that the two statutes' directives overlap, thereby depriving him of "fair notice." In Dale's view, a prayer-treating parent cannot tell when the conduct protected by § 948.03(6) ends and the conduct punishable under § 940.06(1) begins. This lack of a discernible line between permissible and impermissible conduct, he concludes, violates his right to fair notice. Dale is wrong.

The centerpiece of Dale's argument is the phrase "great bodily harm." He contends that there is really no legal difference between "great bodily harm" and "death." He bases his theory on the statutory definition of "great bodily harm," as "bodily injury which creates *a substantial risk of death*, or" other enumerated injuries. Wis. Stat. § 939.22(14). He concludes that conduct that threatens "great bodily harm" is no different from conduct that threatens "death" since "great bodily harm" includes an injury that "creates a substantial risk of death." Therefore, there is no discernible line between the reckless homicide and child abuse statutes. The argument fails.

First, the reckless-homicide statute penalizes the reckless infliction of *death* on another person—not "great bodily harm." The child-abuse statute does not reach the infliction of death and does not purport to immunize the infliction of death. For this reason alone, the line between the two statutes is clearly discernible.

Second, the definition of recklessness applicable to § 940.06(1) punishes conduct that "creates an unreasonable and substantial risk of death *or* great bodily harm to another." Wis. Stat. § 939.24(1). If Dale is correct that conduct creating a "substantial risk of death" is no different from conduct creating a "substantial risk of … great bodily harm," the "death" language in § 939.24(1) is superfluous. Such a reading is contrary to the rules of statutory construction. *See State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶46, 271 Wis.2d 633, 681 N.W.2d 110. There is no justification for reading the alternative "death" basis for reckless conduct out of the definition of "recklessness." In this case, there was substantial evidence to support a jury conclusion that Dale's conduct created an unreasonable and substantial risk of death to Kara, not simply great bodily harm.

Third, the standards of criminal recklessness in the two statutes are explicitly different.

> [R]eckless child abuse requires [that] defendant's actions *demonstrate* a conscious disregard for the safety of a child, not that the defendant was subjectively aware of that risk. Wis. Stat. § 948.03(1). In contrast, "criminal recklessness" is defined as when "the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk." Wis. Stat. § 939.24(1). Thus, "recklessly" causing harm to a child under § 948.03(b) [sic] is distinguished from "criminal recklessness," because only the latter includes a subjective component. We therefore conclude that recklessly causing harm to a child, unlike criminal recklessness, does not contain a subjective component.

State v. Williams, 2006 WI App 212, ¶26, 296 Wis.2d 834, 723 N.W.2d 719 (parenthetical omitted); *accord State v. Hemphill*, 2006 WI App 185, ¶¶9-11, 296 Wis.2d 198, 722 N.W.2d 393.

In other words, the recklessness standard in the child-abuse statute is much lower than the general

standard of recklessness applicable to the reckless-homicide statute.

The treatment-through-prayer privilege must be understood in the context of this relatively low standard of recklessness. The privilege was inserted into the statute to protect parents like Dale from criminal liability for conduct that may appear to "demonstrate[] a conscious disregard for the safety of the child" to those who do not share their religious beliefs. The exception balances the interests of parents who believe that prayer, rather than medicine, is the best hope for healing with the State's police power interest in the protection of all children from bodily harm. Because of this legislative accommodation, a parent immunized by the treatment-through-prayer privilege is not liable for criminal child abuse even if he was "reckless" under the terms of the child abuse statute. *See* Wis. Stat. § 948.03(6).

In contrast, when a parent "creates an unreasonable and substantial risk of death or great bodily harm" to his child, is "aware" of that grave risk, and causes death, the treatment-through-prayer privilege is unavailable. Wis. Stat. §§ 939.24(1); 940.06(1). That is clear on the face of the statutes. There is no ambiguity. This is not simply because the privilege by its terms is applicable only to criminal child abuse. *See* Wis. Stat. § 948.03(6). It is also because the level of recklessness that the State must prove under the reckless-homicide statute is qualitatively higher than the level of recklessness envisioned by the child-abuse statute. A parent who is "aware" that his conduct may cause death or great bodily harm has no statutory protection.

A parent like Dale has ample notice of when his conduct crosses the line from protected to unprotected activity. For example, if a child is lethargic, excessively thirsty, and urinating frequently, the use of prayer instead of medical treatment may be privileged even if the risk of harm to the child is unreasonable and even if the child suffers great bodily harm and even if the parent consciously disregarded the risk. However, if that same

child lapses into a coma, turns cold and blue in her extremities, and has serious trouble breathing, the privilege is no longer available where the parent is "aware" that the "risk of death or great bodily harm" to the child is "unreasonable and substantial." If the child dies, the parent may be found guilty of reckless homicide.

4. The limitations of Wis. Stat. § 948.03(6).

Dale's fair-notice argument also fails because § 948.03(6)'s protections are narrower than he suggests.

Wisconsin Stat. § 948.03(6) refers to § 48.981(3)(c)4., the Children's Code provision outlining the duties of county departments in child-abuse and neglect cases. Under this section:

> A determination that abuse or neglect has occurred may not be based solely on the fact that the child's parent … selects and relies on prayer or other religious means for treatment of disease or for remedial care of the child…. This subdivision does not prohibit a court from ordering medical services for the child if the child's health requires it.

This section represents a legislative accommodation between prayer-treating parents and the State's police power. A parent who "relies on prayer … for treatment of disease" cannot be found abusive or negligent on that ground alone. As a consequence, such a parent is spared an investigation into whether his child is abused or neglected, *see generally* Wis. Stat. § 49.981(3)(c), which could otherwise bring about a finding that the child is in need of protection or services, *see id.*, which would lead in turn to the juvenile court's assertion of jurisdiction over the child, *see* Wis. Stat. § 48.13, which could result in any number of dispositions, including the child's removal from the parent. *See* Wis. Stat. § 48.345. However, the court, "if the child's health requires it," may nevertheless "order[] medical services for the child." Wis. Stat. § 48.981(3)(c)4. Thus, although the parent may avoid the consequences of an abuse or

neglect determination, the protection of his choice to treat his child with prayer is limited by the child's health needs. The court may order medical intervention in appropriate circumstances.

It is this limited protection of a parent's choice to rely on prayer that is imported into the criminal child-abuse statute. If the Children's Code privilege is limited by the child's health requirements, the Wis. Stat. § 948.03(6) privilege is similarly limited by the reckless-homicide statute's sanction against reckless conduct causing death.

In both statutes, the prayer privilege is limited by the word "solely." Section 948.03(6) provides that a person is not guilty of criminal child abuse "*solely* because he or she provides a child with treatment by spiritual means through prayer alone." Section 48.981(3)(c)4. provides that an abuse or neglect determination "may not be based *solely* on the fact that the child's parent … relies on prayer … for treatment of disease." In this context, "solely" means that the prayer privilege does not apply where some additional aggravating circumstance exists. For example, a criminal child-abuse prosecution or a civil child neglect/abuse proceeding where a parent relied on prayer alone *and* was aware that doing so placed his child in a life-threatening condition would not be based "solely" on the parent's reliance on prayer. It would also be based on the life-threatening condition created by the parent.

The California and Colorado Supreme Courts reached this conclusion in construing child-welfare statutes providing that, where a parent relies on prayer in lieu of medical treatment, a child-neglect finding cannot be made "for that reason alone."

The Colorado Court found that

> the statutory language, "for that reason alone," is quite clear. It allows a finding of dependency and neglect for other "reasons," such as where the child's life is in imminent danger, despite any

> treatment by spiritual means. In other words, a child who is treated solely by spiritual means is not, for that reason alone, dependent or neglected, but if there is an additional reason, such as where the child is deprived of medical care necessary to prevent a life-endangering condition, the child may be adjudicated dependent and neglected under the statutory scheme.

In re D.L.E., 645 P.2d 271, 274-75 (Colo. 1982) (footnote omitted).

The California court agreed that this language "must be construed to signify that treatment by prayer will not constitute neglect for purposes of the child welfare services chapter except in those instances when such treatment, coupled with a sufficiently grave health condition, present 'a specific danger to the physical … safety of the child.'" *Walker v. Superior Court*, 763 P.2d 852, 864 (Cal. 1988) (in bank). The court noted that California's Welfare & Institutions Code, while generally deferring to a parent's choice of prayer treatment, allowed the juvenile court to "'assume jurisdiction [if] *necessary to protect the minor from suffering serious physical harm or illness.*'" *Id.* at 865 (citation omitted). The same is true under the Wisconsin Children's Code. *See* Wis. Stat. § 48.981(3)(c)4.

In sum, Dale's foundational assumption that a parent's choice of prayer over medicine is absolutely protected by § 948.03(6) is questionable. Under both § 948.03(6) and § 48.981(3)(c)4., the legislature's willingness to accommodate religious healing ends when the child's health is endangered. This is consistent with the State's public policy interest in protecting the health and lives of children. See *In re R.W.S.*, 162 Wis.2d 862, 873 n.5, 471 N.W.2d 16 (1991) ("Public policy considerations exert a significant influence on the process of statutory interpretation by the courts."). Exclusive reliance on prayer for medical treatment is beyond statutory protection where the parent is aware that his conduct is creating a life-threatening situation for his child.

5. Homicide is different.

An obvious difference between the child-abuse and homicide statutes is the result of the actor's recklessness. The abuse statute punishes the actor when bodily harm or great bodily harm results. Wis. Stat. § 948.03(3). The homicide statute punishes the actor when death results. Wis. Stat. § 940.06(1). The prayer-treatment privilege is available in the first case but not the second. In balancing parental interests with the State's police power interest, the legislature essentially said "this far and no further." It was willing to accommodate prayer-treating parents if their children suffered great bodily harm, but not if their children died. At that point, the State's police power interest in protecting the lives of all the State's children trumps some parents' interest in relying on prayer alone. *See R.W.S.*, 162 Wis.2d at 873 n.5.

The differential legislative treatment of criminal conduct on the basis of whether or not death results is not unique to these statutes. The legislature has decided time and again that homicide is different.

Certain affirmative statutory defenses to criminal liability are either unavailable or restricted in cases of homicide. Coercion and necessity supply an absolute defense to *any crime* "except that if the prosecution is for first-degree intentional homicide, the degree of the crime is reduced to 2nd-degree intentional homicide." Wis. Stat. §§ 939.46(1), 939.47. The self-defense privilege is available even in cases of homicide, and "extends … to the unintended infliction of harm upon a 3rd person." Wis. Stat. § 939.48(3). However,

> if the unintended infliction of harm amounts to the crime of first-degree or 2nd-degree reckless homicide, homicide by negligent handling of dangerous weapon, explosives or fire … the actor is liable for whichever one of those crimes is committed.

Id.

These affirmative defenses provide blanket immunity to persons who reasonably believe they must violate the criminal law under certain extreme circumstances. However, such persons must calibrate their response to those circumstances in order to enjoy this immunity. They may commit any crime with impunity except for homicide. Similarly, a parent treating his child with prayer in lieu of medicine must calibrate his conduct. If his reliance on prayer creates an "unreasonable risk of harm to" his child and the child suffers "bodily harm" or "great bodily harm," the parent is immune. Wis. Stat. § 948.03(1), (3), (6). However, if that same reliance creates an "unreasonable and substantial risk of death or great bodily harm to" the child *and the child dies*, he has no immunity. Wis. Stat. §§ 939.24(1), 940.06(1).

6. Foreign case law supports the State's interpretation.

Other courts have addressed this fair-notice argument. Although there is a split in authority, the better-reasoned opinions support the State's position.

Laurie Walker was convicted of involuntary manslaughter and felony child endangerment when her choice of prayer over medicine caused her daughter's death. The California Penal Code exempts prayer-treating parents from misdemeanor liability for failing to provide medical treatment (among other necessities) to their children. *Walker*, 763 P.2d at 856. Walker claimed she had no notice of where the exemption ended and criminal liability began.

Quoting Justice Holmes, the California Supreme Court rejected Walker's contention:

> "[T]he law is full of instances where a man's fate depends on his estimating rightly … some matter of degree…. 'An act causing death may be murder, manslaughter, or misadventure according to the degree of danger attending it' by common experience in the circumstances known to the actor."

> The "matter of degree" that persons relying on prayer treatment must estimate rightly is the point at which their course of conduct becomes criminally negligent. In terms of notice, due process requires no more.

Id. at 872 (quoting *Nash v. United States*, 229 U.S. 373, 377 (1913)) (other citations omitted).

The court explained that the statutes revealed a deliberate balancing of the prayer-treating parents' interests and the State's police power interest.

> The … legislative intent is clear: when a child's health is seriously jeopardized, the right of a parent to rely exclusively on prayer must yield….
>
> ….
>
> … The legislative design appears consistent: prayer treatment will be accommodated as an acceptable means of attending to the needs of a child only insofar as serious physical harm or illness is not at risk. When a child's life is placed in danger, we discern no intent to shield parents from the chastening prospect of felony liability.

Walker, 763 P.2d at 866. "California's statutory scheme reflects not an endorsement of the efficacy or reasonableness of prayer treatment for children battling life-threatening diseases but rather a willingness to accommodate religious practice when children do not face serious physical harm." *Id.* at 868.

The fair-notice argument in *State v. Hays*, 964 P.2d 1042 (Or. Ct. App. 1998), was based on the line between the negligent-homicide and criminal-mistreatment statutes. The latter exempts parents relying on treatment by prayer or other spiritual means from the general duty to provide necessary medical care to their children. *Id.* at 1045. The court held that the statutes were not "legally ambiguous." *Id.* at 1046.

> [T]he statutes permit a parent to treat a child by prayer or other spiritual means so long as the illness is not life threatening. However, once a reasonable

> person should know that there is a substantial risk that the child will die without medical care, the parent must provide that care, or allow it to be provided, at the risk of criminal sanctions if the child does die.

Id. The *Hays* court acknowledged that although "it may be impossible to define in advance all the ways in which a person's actions can be a gross deviation from the standard of care of a reasonable person," the legislature may nevertheless "penalize such a gross deviation." *Id.*

Commonwealth v. Twitchell, 617 N.E.2d 609 (Mass. 1993), arose from involuntary-manslaughter convictions following the death of the Twitchells' son. Massachusetts' child-neglect statute recognizes a spiritual-treatment exemption from the general requirement that parents provide medical care to their children. *Id.* at 612 & n.4. The Twitchells argued they "lacked 'fair warning'" that spiritual treatment could result in a manslaughter prosecution. *Id.* at 616. The court disagreed.

> There is no mixed signal from the coexistence of the spiritual treatment provision and the common law definition of involuntary manslaughter. The spiritual treatment provision protects against criminal charges of neglect and of willful failure to provide proper medical care and says nothing about protection against criminal charges based on wanton or reckless conduct. The fact that at some point in a given case a parent's conduct may lose the protection of the spiritual treatment provision and may become subject to the application of the common law of homicide is not a circumstance that presents a due process of law "fair warning" violation.

Id. at 617 (citations omitted).

Commonwealth v. Nixon, 718 A.2d 311, 314 (Pa. Super. Ct. 1998), *aff'd*, 761 A.2d 1151 (2000), involved the line between the child-abuse statute (containing a "seriously held religious belief" exception in medical-care

cases) and the involuntary-manslaughter statute. The court concluded:

> A plain reading of the statutes shows that an act which does not qualify as child abuse may still be done in a manner which causes death and thus qualifies as involuntary manslaughter. This precise situation occurred in this case. While the Nixons were not considered child abusers for treating their children through spiritual healing, when their otherwise lawful course of conduct led to a child's death, they were guilty of involuntary manslaughter.

Id.

As the State argued above, these cases hold that a statutory structure granting a prayer exemption in a child-neglect or abuse statute does not deprive a prayer-treating parent of fair notice that he may be criminally liable under the homicide statutes if his child dies. Further, as argued above, these cases recognize that such a statutory structure is a legislative accommodation between the interests of parents who choose to provide prayer treatment and the interest of the State in protecting all children from death or great bodily harm. As one court wrote, prayer is "an acceptable means of attending to the needs of a child only insofar as serious physical harm or illness is not at risk. When a child's life is placed in danger, we discern no intent to shield parents from the chastening prospect of felony liability." *Walker*, 763 P.2d at 866.

Dale argues that these cases are distinguishable and relies instead on *State v. McKown*, 475 N.W.2d 63 (Minn. 1991), and *Hermanson v. State*, 604 So.2d 775 (Fla. 1992). These cases are inapposite.

The Minnesota statute analyzed in *McKown* provides that a parent "who willfully deprives a child of necessary … health care" is guilty of child neglect, but if she "in good faith selects and depends upon spiritual means or prayer for treatment or care of disease … this treatment shall constitute 'health care.'" Minn. Stat. § 609.378 (1988). Unlike Minnesota, Wisconsin does not

equate prayer treatment with health care. The court did not focus on this aspect of the Minnesota exception. Instead, it concluded that the language was too broad to give prayer-treating parents fair notice that they could be prosecuted for second-degree manslaughter (based on "culpable negligence" and the creation of an "unreasonable risk") if their child died. *McKown*, 475 N.W.2d at 65 n.4, 68. As the dissent explained, the court failed to address the fact that the two statutes at issue (like those here) provided distinct mens rea standards to guide parents in their health-treatment decisions. *See id.* at 69 (Coyne, J., dissenting).

Hermanson involved the interplay of three statutes. First was the child-dependency statute, defining an abused or neglected child in part as one harmed by a parent's acts or omissions. 604 So.2d at 776. The statute defines "harm" as failure to supply, *inter alia*, "health care."

> "[H]owever, a parent … 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. (citation and emphasis omitted). The second statute was a child abuse provision making it a crime to deprive a child of medical treatment. *Id.* The third was a statute "provid[ing] that the killing of a human being while engaged in the commission of child abuse constitutes murder in the third degree." *Id.*

The Hermansons' daughter died from DKA when her parents chose to combat her condition with prayer. They were convicted of felony child abuse and third-degree murder. The court agreed with the Hermansons that Florida's statutes denied them due process by failing to "give them fair warning of the consequences of practicing their religious belief." *Id.* at 780, 783.

The statutes construed in *Hermanson* are very different from those at issue here. In combination, the child-dependency and criminal child-abuse statutes

essentially removed prayer treatment from the definition of child abuse and "raised spiritual intervention to a level equal to that of medical treatment." *Nixon*, 718 A.2d at 314. The third-degree murder statute explicitly based liability on "child abuse," which the child-abuse statute explicitly defined as withholding medical care, which the child-dependency statute explicitly permitted prayer-treating parents to do. In contrast, Wisconsin's reckless-homicide statute is based on a generic definition of recklessness, and does not invoke any specific criminal act such as child abuse. A definition of child abuse from elsewhere in the Wisconsin Statutes is not even arguably incorporated into the reckless-homicide statute.

Although appellate courts have split on the fair-notice issue, this court should follow the decisions of California, Oregon, Massachusetts, and Pennsylvania. The statutes considered there are parallel to those involved here and the courts' analyses are thoughtful and germane to the present case. The Minnesota and Florida decisions provide little guidance because the statutes they analyze are critically distinguishable from the applicable Wisconsin statutes.

B. Analysis.

As shown, the statutes draw a clear line between privileged and unprivileged "reckless" behavior. The question for the parent is whether he is creating an "unreasonable risk of harm" in "conscious disregard" of his child's safety, or whether he is "aware" that he is creating an "unreasonable and substantial risk of death or great bodily harm" to his child. Wis. Stat. §§ 948.03(1), 939.24(1), 940.06(1). The trial evidence demonstrates that Dale had sufficient warning that he had crossed the border from protected into unprotected conduct hours before Kara died.

By Saturday night, Kara's condition was sufficiently grave that Dale's decision to withhold medical care created an "unreasonable and substantial risk of death or great bodily harm" to Kara—and Dale knew it. At 4:58

p.m., he sent a mass email alerting others to the gravity of Kara's condition (111:157). Dale saw that Kara was pale and cold and that her legs were blue (109:59; 111:131). Kara stopped walking and talking and her breathing was labored (109:70-71; 111:165-68). After she collapsed in the bathroom, Dale had to carry her (111:161-63). Kara lapsed into a coma that night (107:47). At the very least, these symptoms informed Dale that Kara was in "substantial risk of … great bodily harm"; at most, they informed him that Kara was in "substantial risk of death."

Any doubt that Kara was at death's door was gone by Sunday morning. During trial, Leilani backed away from the word "coma," but admitted that Kara was unconscious *all day* (109:90). Dale preferred to call her state a "deep sleep," but admitted that her body was "limp" (111:139, 164). The description of Kara's condition by Althea Wormgoor and the Peaslees confirm the coma assessment. All three said Kara was nonresponsive (109:204, 225, 227, 252). Althea noticed that her eyes were open, but unseeing (109:252). Leilani's efforts to hydrate Kara were unsuccessful because of Kara's inability to swallow (109:209). When the Peaslees arrived, Dale was weeping over Kara's condition (109:224).

If Kara had died on Friday, Dale's fair-notice argument might have some plausibility. However, by late Saturday—*and certainly by Sunday morning*—it was clear that Dale's choice of prayer posed an "unreasonable and substantial risk of *death* or great bodily harm" to Kara and that Dale was aware of that risk. Wis. Stat. § 939.24(1). The stage at which Dale's choice posed only a protected "unreasonable risk of harm" in "conscious disregard of [Kara's] safety" was over by the time Kara turned cold and blue, suffered labored breathing, and lapsed into a coma. Wis. Stat. § 948.03(1). The Wisconsin Statutes unquestionably provided fair notice to Dale Neumann.

II. THE "DUTY" INSTRUCTION WAS PROPER AND CONSTITUTIONAL.

The circuit court instructed the jury on the first element of reckless homicide as follows:

> First, the defendant caused the death of Madeline Kara Neumann.
>
> Cause means that the defendant's conduct was a substantial factor in producing the death. 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).

As originally proposed, the instruction ended with the phrase: "and to do whatever may be necessary for the care, maintenance, and preservation, including medical attendance, if necessary'" (112:64). On Kronenwetter's objection, the court removed that language (112:65).

Dale contends that the instruction given was improper. His arguments fail.

First, although Dale quotes the instruction actually given, his argument appears to rely on the language originally proposed and ultimately removed by the court. Dale says the "duty instruction erroneously communicated a broad, absolute parental duty to provide medical attendance whenever necessary to 'protect' or 'care' for one's children." Dale's Brief at 29. But that critique makes sense only against the original version of the instruction—the one containing the words "medical attendance" and "necessary" (112:64). Further, Dale repeatedly complains that the instruction said he had a "legal duty" "to provide" Kara "with conventional medical care." Dale's Brief at 23, 27, 29, 30, 33. But, again, that complaint is not relevant to the instruction actually given.

The instruction actually given says nothing about providing Kara with "conventional medical care." On the contrary, it told the jury that Dale had a more general duty to protect Kara "in sickness and in health" (112:52). The instruction was broad enough to embrace both the State's theory (that medical intervention was necessary to protect Kara's health) and Dale's (that prayer provided the appropriate means for protecting Kara's health). It is not surprising that Kronenwetter endorsed this language, as it was consistent with his defense theory (112:39-47).

Second, Dale argues that the scope of parental duty articulated in *State v. Williquette*, 129 Wis.2d 239, 385 N.W.2d 145 (1986), "is clearly superseded" by § 948.03(6), and the instruction was therefore improper. Dale's Brief at 25. The argument is puzzling because the instruction does not conflict with the statutory language. The instruction says that a parent has a duty to care for his child "in sickness and in health" (112:52). The statute says that a parent who "provides a child with treatment by spiritual means through prayer alone for healing … in lieu of medical or surgical treatment" is not guilty of criminal child abuse. Wis. Stat. § 948.03(6). Without the originally-proposed "medical attendance" language, there is not even an arguable conflict between the instruction and the statutory language.

Moreover, Dale's premise, that § 948.03(6) defines the limits of a parent's duty to provide his child with medical care, is mistaken. Section 948.03(6) provides prayer-treating parents with a limited privilege to be free from prosecution for criminal child abuse under certain limited conditions. *See supra* at 15-17. It does not release them from the duty common to all Wisconsin parents to provide their children with the medical treatment necessary to preserve their lives. That duty is broadly defined under Wisconsin law. *See Williquette*, 129 Wis.2d at 256. A parent's limited immunity under the child-abuse statute does not exempt him from his broader legal duty.

Third, Dale's contention that the "duty instruction … violates a parent's [C]onstitutional right to direct the medical care of his child" has no basis. Dale's Brief at 30. Neither the federal nor the Wisconsin Constitution precludes the State from imposing medical obligations on a parent necessary to preserve his child's life. But even under Dale's view of his constitutional rights, the broad instruction—referring to the obligation to care for children "in sickness and in health" but not mentioning "medical care" (112:52)—is unobjectionable.

Finally, in an undeveloped argument, Dale asserts that the instruction provides "no discernible standards." Dale's Brief at 32. This argument is a non-starter. If the instruction is standardless, that is because Kronenwetter successfully eliminated the more specific language about providing "medical attendance" (112:64). Dale cannot claim error for an instruction he requested. Moreover, the instruction allowed both the prosecutor and Kronenwetter to argue their interpretations of the facts and law (112:6-9, 16, 22-36, 39-47). *See supra* at 26. The instruction was not standardless.

Even a legally correct instruction may warrant a new trial if a defendant can prove that it was "'ambiguous and that there was a reasonable likelihood that 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 "denied the defendant 'a meaningful opportunity for consideration by the jury of his defense.'" *State v. Gonzalez*, 2011 WI 63, ¶24, 802 N.W.2d 454 (citations omitted). Dale has not shown a reasonable likelihood that the challenged instruction relieved the State of its burden of proof. Considered with the other instructions, it directed the jury to find Dale guilty only if it found he had a subjective awareness that his conduct constituted a failure to care for Kara "in sickness and in health." Nor has Dale shown that the instruction denied him a meaningful opportunity to have the jury consider his sincere-belief defense. The instruction allowed Kronenwetter to argue that defense, and permitted the jury

to find Dale not guilty if it found that his reliance on prayer satisfied his duty of caring for Kara "in sickness and in health" (112:39-47).

The duty instruction was neither erroneous nor ambiguous. Dale's contention that it conveyed a conventional-medical-care requirement is unreasonable on its face. A new trial is unwarranted.

III. THE REAL CONTROVERSY WAS FULLY TRIED.

A. Law.

To prove an ineffective assistance of counsel claim, the defendant must show that counsel's performance was deficient and prejudicial to the defense. *See Strickland v. Washington,* 466 U.S. 668 (1984). The defendant must prove both elements. *See State v. Moats,* 156 Wis.2d 74, 100-01, 457 N.W.2d 299 (1990). If the defendant fails on one prong, the court need not consider the other. *See Strickland*, 466 U.S. at 697.

To establish deficient performance, the defendant must demonstrate serious attorney errors that cannot be justified under an *objective* standard of reasonable professional judgment. *See Strickland*, 466 U.S. at 688. A lawyer's strategic decisions are "virtually invulnerable to second-guessing." *State v. Westmoreland*, 2008 WI App 15, ¶20, 307 Wis.2d 429, 744 N.W.2d 919.

An attorney does not perform deficiently by foregoing a meritless argument. *State v. Toliver*, 187 Wis.2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994). Further, ""the rule that an attorney is not liable for an error of judgment on an unsettled proposition of law is universally recognized…."" *State v. Maloney*, 2005 WI 74, ¶23, 281 Wis.2d 595, 698 N.W.2d 583 (citations omitted). Instead, counsel can be ineffective only "where the law or duty is clear such that reasonable counsel should know enough to raise the issue." *State v.*

McMahon, 186 Wis.2d 68, 85, 519 N.W.2d 621 (Ct. App. 1994). This rule is consistent with *Strickland*'s objective standard of performance. *State v. Van Buren*, 2008 WI App 26, ¶19, 307 Wis.2d 447, 746 N.W.2d 545.

The defendant must "offer more than rank speculation to satisfy the prejudice prong." *State v. Erickson*, 227 Wis.2d 758, 774, 596 N.W.2d 749 (1999). The test is whether "counsel's errors were so serious as to deprive the [client] of a fair trial, a trial whose result is reliable." *Strickland,* 466 U.S. at 687. The defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

This court may grant a new trial in the interest of justice "if it appears from the record that the real controversy has not been fully tried." Wis. Stat. § 752.35. A "real controversy" claim may be based on erroneous jury instructions. *See State v. Grobstick*, 200 Wis.2d 242, 253, 546 N.W.2d 187 (Ct. App. 1996). Where a "real controversy" claim is based on errors by counsel, "the *Strickland* test is the proper test to apply." *State v. Mayo*, 2007 WI 78, ¶60, 301 Wis.2d 642, 734 N.W.2d 115.

B. Analysis.

Dale makes a hybrid claim that the real controversy was not fully tried and that defense counsel was ineffective. His failure to cite the legal basis for this claim violates the Rules of Appellate Procedure. *See* Wis. Stat. § (Rule) 809.19(1)(e).

Dale's claim is based on Kronenwetter's alleged failure to insure proper instruction on Dale's defense, *i.e.*,

> 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.

Dale's Brief at 32.

The court instructed the jury that it could find Dale guilty of second-degree reckless homicide only if it found that he "was aware that his conduct created the unreasonable and substantial risk of death or great bodily harm" (112:52). Kronenwetter argued in closing that Dale's religious beliefs precluded the subjective awareness necessary for a guilty verdict (112:39-47). The State argued that Dale did have the subjective awareness of the risk created by his conduct (112:6-9, 16, 22-36). The jury agreed with the State's interpretation of the evidence and rejected Dale's (70; 113:12).

Dale fails to identify the legal basis of a specific defense instruction that goes beyond the subjective-awareness language of the standard reckless-homicide instruction. He cites pretrial comments made by the prosecution as part of its argument that § 940.06(1) is constitutional as applied to this case (95). Dale's Brief at 33. The State was not suggesting that Dale was entitled to a prayer-specific instruction in addition to the standard instruction (95:31-34). Indeed, two pages after the first sentence quoted by Dale, the prosecutor denied that he was suggesting "that the jury should be instructed on affirmative defense of good-faith religious beliefs" (95:33).[3]

The instructions, the trial evidence, and Kronenwetter's closing effectively put Dale's defense before the jury. *See State v. McDowell*, 2003 WI App 168, ¶76, 266 Wis.2d 599, 669 N.W.2d 204 (court reviews challenged "instruction in the context of the entire trial").

[3]Dale mischaracterizes the second sentence of the prosecutor's remarks, which follows a hypothetical about a parent with "a non-religious belief that just all doctors are quacks; therefore, I'm not going to take someone to a doctor" (95:40). Dale's insertion of the word "Neumanns" in the quotation is misleading.

The jury was clearly informed that, if Dale's religious beliefs prevented him from being subjectively aware of the risk to Kara caused by his conduct, it must find him not guilty. The real controversy was fully tried.

The State now responds to each of the individual instructional "errors" identified by Dale.

Religion instruction: The court instructed the jury that "[t]he constitutional freedom of religion is absolute as to beliefs but not as to the conduct, which may be regulated for the protection of society" (112:53). Kronenwetter did not object (112:67).

The instruction correctly states the law. *See Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963). Dale does not dispute this, but contends that the instruction

> could have easily misled the jury into believing there was *no* treatment through spiritual means defense.… A jury could have easily equated faith healing with religious "conduct," which is "regulated for the protections of society." If so, it may have understood this instruction as preventing *any* defense based upon treatment by spiritual means.

Dale's Brief at 33.

Each sentence in this three-sentence argument is fallacious. First, there *is no* "treatment through spiritual means defense." The State knows of none, and Dale cites no legal authority recognizing one. Therefore, the instruction could not "misle[a]d" the jury to a false conclusion. Second, faith healing *is* "religious 'conduct,' which is 'regulated for the protections of society.'" *See Walker*, 763 P.2d at 869-71. Therefore, the instruction could not have led the jury to a false "equat[ion]." Third, Dale's conclusion that the instruction could have prevented the jury from considering *any* spiritual-treatment defense is baseless. There is no reason to conclude that this instruction would have precluded the jury from finding Dale not guilty if it found that his religious beliefs prevented him from having a subjective

awareness that his conduct created an unreasonable and substantial risk to Kara. To reach this conclusion, the jury would have had to ignore the subjective-awareness instruction and Kronenwetter's argument based on that instruction.

Kronenwetter did not perform deficiently because there was no legal basis for objecting to the religion instruction. *See McMahon*, 186 Wis.2d at 85. Dale fails to show that the non-objection was prejudicial. Kronenwetter was not ineffective and the instruction did not prevent the real controversy from being tried. *See Mayo*, 301 Wis.2d 642, ¶60.

Duty instruction: The duty instruction was not erroneous. *See supra* at 26-29. Therefore, Kronenwetter did not perform deficiently by not objecting to it. *See Toliver*, 187 Wis.2d at 346. The instruction did not prejudice the defense. On the contrary, it allowed Kronenwetter to argue that Dale's reliance on prayer proved that he fulfilled his duty to care for Kara "in sickness and in health" (112:39-47). Kronenwetter was not ineffective and the instruction did not prevent the real controversy from being tried. *See Mayo*, 301 Wis.2d 642, ¶60.

Jury question: During deliberations, the jury asked: "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?" (113:3-4). The jury was essentially asking the court how it should apply the reckless-homicide instruction to the facts of the case.

The court and counsel had the following discussion:

> [ADA LAMONT] JACOBSON: I think you just have to tell them that they have to consider the instructions as given.
>
> THE COURT: That's what my thought was.

> ….
>
> MR. JACOBSON: ... Just tell them they have to reread the instructions and consider them as given.
>
> MR. KRONENWETTER: … [W]e would consider that to be an appropriate instruction, your Honor. Otherwise, I don't think the State and defense will come to an agreement on any answer to that one.
>
> MR. JACOBSON: No. I could fashion and answer, but you wouldn't like it. I'm sure you could fashion one I might not appreciate….
>
> MR.KRONENWETTER: I'm certain of that. You know that.
>
> MR. JACOBSON: We will stay neutral.

(113:4-5). The court redirected the jury to the original instructions (113:6).

During deliberations, a circuit court "*may* reinstruct the jury as to all or any part of the instructions previously given, or *may* give supplementary instruction as it deems appropriate." Wis. Stat. § 805.13(5). "[T]he necessity for, the extent of, and the form of re-instruction" is within the trial court's discretion. *State v. Hubbard*, 2008 WI 92, ¶57, 313 Wis.2d 1, 752 N.W.2d 839. If the given instructions as a whole correctly state the law, the court's discretionary decision to redirect the jury to those instructions does not warrant a new trial. *See id.*

The court did not exercise its discretion erroneously. The instructions originally given stated the law correctly—they told the jury that Dale's subjective awareness that his conduct was causing a severe risk to Kara was necessary to a finding of guilt (112:52). The court discussed the jury's question with counsel. Both agreed that (1) a rereading of the given instructions was appropriate, and (2) they would be unable to agree on an appropriate instruction. The sufficiency of the original instructions, the court's consultation with counsel, and counsel's agreement that the jury be redirected to the

original instructions support a finding that the court exercised its discretion appropriately.

Dale suggests no legally correct instruction the court could have used to answer the jury's question that would have satisfied him. Dale does not address the difficulty of fashioning a response that would be acceptable to both parties. Because Dale has failed to brief these issues adequately, this court need not address them. *See State v. Pettit,* 171 Wis.2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

Instead of language, Dale provides a concept: "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." Dale's Brief at 34. This is not a statement of law, it is an argument for how a fact-finder could apply the legal subjective-awareness standard to the facts of this case. "[O]nly a recital of the legal theory, as opposed to the evidentiary facts offered in support of that theory, may properly be offered to the jury." *State v. Hess*, 99 Wis.2d 22, 34, 298 N.W.2d 111 (Ct. App. 1980). "A recital of the latter by the trial court must be avoided as it constitutes an impermissible comment on the evidence by the court." *State v. Pruitt*, 95 Wis.2d 69, 81, 289 N.W.2d 343 (Ct. App. 1980). No proper instruction could be based on Dale's concept.

Dale fails to show that Kronenwetter was ineffective. He identifies no legally correct jury instruction that Kronenwetter failed to proffer. Therefore, he has failed to prove that Kronenwetter performed deficiently. *See McMahon*, 186 Wis.2d at 85. Furthermore, Kronenwetter's decision to rely on the earlier instructions, given the difficulty of crafting a supplementary instruction that the prosecutor would agree to, is a tactical decision entitled to this court's deference. *See Westmoreland*, 307 Wis.2d 429, ¶20. Dale has failed to prove prejudice. Without the text of a legally correct instruction, this court can only speculate about whether the result of the trial

would have been different; speculation does not satisfy *Strickland*. *See Erickson*, 227 Wis.2d at 774. The original instruction on the subjective-awareness requirement was sufficient to assure that Dale's trial was fair (112:52). There was no prejudice. *See Strickland*, 466 U.S. at 687.

Kronenwetter provided effective assistance of counsel and the real controversy was fully tried. *See Mayo*, 301 Wis.2d 642, ¶60.

Theory-of-defense instruction: A criminal defendant is entitled to a theory-of-defense instruction that relates to a legal theory of defense rather than an interpretation of the evidence; is supported by the evidence; and is not adequately covered by other instructions. *State v. Coleman*, 206 Wis.2d 199, 212-13, 556 N.W.2d 701 (1996). An instruction that essentially instructs the jury that the State has failed to prove an element of the crime does not meet this criterion. Thus, in *Pruitt*, 95 Wis.2d 69, Pruitt's proposed instruction explaining the difference between first- and second-degree murder was unnecessary because Pruitt's "'theory' … was simply that he lacked the requisite intent to commit first-degree murder. Therefore, his 'theory' was adequately explained to the jury through the general instructions given on intent." *Id.* at 81 (citations omitted).

Dale asserts that counsel was ineffective and the real controversy not fully tried because "the jury was never directly instructed that a sincere belief in treatment by spiritual means may negate the subjective awareness element." Dale's Brief at 34.

Dale's argument must be rejected. Dale assumes that he was entitled to an unspecified sincere-belief instruction. But he provides no case authority supporting his assumption. That is unacceptable. *See Pettit,* 171 Wis.2d at 646. In order to meaningfully address the merits of Dale's argument, the State would first have to research whether a sincere-belief defense has been recognized in

any context and determine whether it could apply here.[4] It is not the duty of the State to do Dale's research for him. Dale's argument is also fatally underdeveloped. *See id.* Without the text of an instruction that Kronenwetter should have proposed, the State has nothing to respond to. It is not the State's duty to develop Dale's argument for him.

Dale's default on the substantive issue is also a default on the procedural issue. He does not explain how the unarticulated instruction would have satisfied *Coleman*'s requirements. Without specific language, how can this court determine whether the unproffered instruction related to a legal theory of defense rather than an interpretation of the evidence, was supported by the evidence, and was not adequately covered by other instructions? *See Coleman*, 206 Wis.2d at 212-13.

We know that Dale wishes the jury had been specifically told that "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." Dale's Brief at 34. But, as discussed above, that is an interpretation of the evidence, it is not a legal theory of defense. Meanwhile, the jury was instructed that it could find Dale guilty only if it found that he was subjectively aware that his conduct created a severe risk to Kara (112:52). That correct legal instruction—combined with the trial evidence and Kronenwetter's argument that Dale's beliefs precluded his development of the necessary mental state—adequately instructed the jury on this core principle of reckless-homicide liability. *See Pruitt*, 95 Wis.2d at 81. Therefore, Dale was not entitled to a theory-of-defense instruction along these lines. *See Coleman*, 206 Wis.2d at 212-13.

[4]The foreign cases discussed earlier do not address this defense. *See supra* at 19-24.

Dale's briefing deficiencies are especially troubling in the ineffective-assistance context. The failure to make a meritless argument is not deficient performance. *See Toliver*, 187 Wis.2d at 360. Nor is a failure to advance a proposition that lacks the support of binding precedent. *See Maloney*, 2005 WI 74, ¶23. Unless there was a sincere-belief defense instruction both meritorious and clearly available under Wisconsin law or United States Supreme Court precedent, Kronenwetter did not perform deficiently by not proposing one. *See State v. Ambuehl*, 145 Wis.2d 343, 352, 425 N.W.2d 649 (Ct. App. 1988). Because the burden of proving Kronenwetter's deficiency is on Dale, it was his obligation to prove the existence of such an instruction and to describe it with specificity. *See Moats*, 156 Wis. 2d at 100-01.

Kronenwetter provided effective assistance of counsel and the real controversy was fully tried. *See Mayo*, 301 Wis.2d 642, ¶60.

IV. THE JURY WAS NOT OBJECTIVELY BIASED.

A. Background.

Leilani was convicted on May 22, 2009 (Leilani's Record 71). Dale's trial began on July 23, 2009 (102).

At a June 9, 2009 scheduling conference, the court and counsel discussed the substantial media attention Leilani's trial generated in Marathon County (101:6-10). Concerned about Dale's right to a fair trial, the court suggested two possible solutions: change of venue or trial postponement (101:10-11). Dale rejected both suggestions, asserting his right to a speedy trial in Marathon County (101:12-13).

Jury selection began on July 23. The court held an in-chambers conference regarding the fair-trial problem. On the record, ADA Jacobson summarized the parties' agreement:

> [F]rom the jury questionnaires, we know that some of the potential jurors had knowledge of the prior conviction while others didn't; that the possibility would exist that someone might end up on the panel with no knowledge of that prior conviction and someone who knew of the prior conviction and that perhaps during jury deliberations that would become known to the one that didn't and affect them and their ability to serve as an impartial juror.
>
> So I think it was decided by the parties that during individual voir dire each [prospective] juror will be apprised of the fact that there was the prior conviction, instructed that that conviction will be made known at trial but only for the purposes of assessing it and determining Leilani Neumann's credibility and that no other purpose would be appropriate and then making inquiries as to whether or not they would be influenced either way by that knowledge improperly, meaning either one of two things.
>
> And I could assert for both the defense and the State, one, 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.
>
> The flip side of that coin would be the family suffered enough already and by putting him through this trial, after having gone through his wife's trial with the result that occurred in that case, would be unfair and perhaps make it impossible for a person to serve under either of those scenarios as an impartial juror and follow the Court's instructions.

(102:4-5). Kronenwetter responded: "That sounds like our discussion, your Honor" (102:5).

The court informed each impaneled juror about Leilani's conviction, told each that the information could be used only to assess Leilani's credibility, and obtained from each an assurance that he or she would decide Dale's case solely upon the evidence presented (102:83-84, 110-11, 165-66, 180-81, 189-90, 197-99, 220-22, 238-39, 245-50; 103:40-41, 51-52, 75, 163-64, 174-75).

In the postconviction hearing, Kronenwetter testified that he had intended "to object to the jury being told of Leilani's prior conviction" and thought he had (118:7).

Dale sought postconviction relief on the ground that the disclosure of Leilani's conviction created an objectively biased jury (82:2-4). The court found that "automatic disqualification for prior knowledge of the conviction would not be [proper] without an individual inquiry of whether [the juror was] a reasonable person willing to set aside such prior knowledge in assessing the guilt of a different person under evidence related to that person alone" (85:10). It further found that the disclosure of Leilani's conviction to the venire and the subsequent questioning of each juror's ability to be impartial were appropriate (85:11-12). Finally, the court concluded that Kronenwetter was not ineffective for failing to object (85:12).

B. Law.

Prospective jurors are presumptively impartial. *State v. Meehan*, 2001 WI App 119, ¶35 n.7, 244 Wis.2d 121, 630 N.W.2d 722. Prior knowledge about a case does not necessarily create bias. *See Mu'Min v. Virginia*, 500 U.S. 415, 418-21 (1991); *Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961); *State v. Oswald*, 2000 WI App 3, ¶19, 232 Wis.2d 103, 606 N.W.2d 238.

"Objective bias"

> can be detected "from the facts and circumstances surrounding the … juror's answers" notwithstanding … statements to the effect that the juror can and will be impartial. This category of bias inquires whether a "reasonable person in the juror's position could set aside the opinion or prior knowledge."

State v. Kiernan, 227 Wis.2d 736, 745, 596 N.W.2d 760 (1999) (citations omitted).

The "trial court's determination of objective bias will be reversed only if, as a matter of law, a reasonable [court] could not have reached the same conclusion. This is a higher standard of review than the clearly erroneous standard but still very deferential …." *Oswald*, 232 Wis.2d 103, ¶5.

The defendant must object on the record to an allegedly prejudicial communication to the jury venire; failure to do so waives the issue for appeal. *See State v. Lewis*, 2010 WI App 52, ¶26, 324 Wis.2d 536, 781 N.W.2d 730. Similarly, failure to object to the impaneling of a biased juror waives the issue for appeal. *See State v. Williams*, 2000 WI App 123, ¶¶19-21, 237 Wis.2d 591, 614 N.W.2d 11. "The party raising the issue on appeal has the burden of establishing, by reference to the record, that the issue was raised before the circuit court." *State v. Caban*, 210 Wis.2d 597, 604, 563 N.W.2d 501 (1997).

C. Analysis.

Dale has not satisfied his burden of proving that he objected to either the disclosure of Leilani's conviction to the jury venire, or the impaneling of any juror on the ground of objective bias. The issues are waived.

To obtain relief, Dale must prove that Kronenwetter provided ineffective assistance of counsel.

Kronenwetter's performance was not deficient. Notwithstanding his comments at the postconviction hearing, the trial record clearly reveals that the parties jointly agreed to the disclosure of Leilani's conviction (102:4-5). They did so for the reasons stated by ADA Jacobson on the record and specifically confirmed by Kronenwetter (*id.*). Agreeing to the disclosure was a reasonable strategic decision by Kronenwetter that should not be "second-guess[ed]." *Westmoreland*, 307 Wis.2d 429, ¶20.

Kronenwetter's performance was not deficient for another reason. There is no controlling authority from a

Wisconsin appellate court or the United States Supreme Court either precluding the disclosure of Leilani's conviction or compelling an objective-bias objection on the basis of facts shown here. Kronenwetter did not perform deficiently because he had no clear duty to perform in the manner urged on appeal. *See McMahon*, 186 Wis.2d at 85.

Dale cites several cases. The first, *Leonard v. United States*, 378 U.S. 544 (1964), is factually distinguishable. Leonard was convicted of forgery in two separate trials. The first jury announced its guilty verdict in the presence of the venire for Leonard's second jury. The Court held that jurors who witness a verdict in such circumstances should be "automatically disqualified" if a contemporaneous objection is made *Id.* at 545. Here, *two different defendants* are involved and there was no objection.

The other cases cited are non-controlling and distinguishable.[5] In *United States v. Gillis*, 942 F.2d 707 (10th Cir. 1991), members of Gillis's jury had served on the venire for his previous trial on similar charges. The court found reversible error because (1) Gillis unequivocally objected to the jurors' presence and (2) the court failed to question the jurors to determine bias. This case involves *two different defendants*, there was no objection, and the court questioned the jurors adequately.

United States v. Hansen, 544 F.2d 778 (5th Cir. 1977), found reversible error where the jury was told that Hansen's co-defendant pleaded guilty. The court ruled that the prejudicial impact of a "self-confessed [co-defendant] is obvious." *Id.* at 780. *United States v. Maliszewski*, 161 F.3d 992 (6th Cir. 1998), found plain but not reversible error in similar circumstances. The court concluded that a curative instruction could have eliminated any prejudice. *Id.* at 1004. Leilani's jury

[5]The judgment in *Quintero v. Bell*, 256 F.3d 409 (6th Cir. 2001), was vacated by the Supreme Court. *See* 535 U.S. 1109 (2002).

verdict is clearly distinguishable from co-defendants' guilty pleas. Further, unlike *Hansen* and *Maliszewski*, the critical question here was whether Dale (as opposed to Leilani) had the subjective awareness necessary for a reckless-homicide conviction. In *Leroy v. Canal Zone*, 81 F.2d 914 (5th Cir. 1936), the convictions of Leroy's co-defendants were held inadmissible in evidence for the obvious reason that "[t]he previous conviction of others charged with the same criminal offense is not proof of appellant's guilt of that offense." *Id.* The disclosure of Leilani's conviction during voir dire did not purport to act as trial evidence of Dale's guilt.

The law does not require that the jury be ignorant of the case. *See*, *e.g.*, *Oswald*, 232 Wis.2d 103, ¶19. The law requires that the jury be able to judge the case fairly, by putting aside any previous knowledge or preconceived notions it might have. *See Kiernan*, 227 Wis.2d at 745. Here, the impaneled jurors said they could do that. *See supra* at 38-40. To overcome the presumption that these jurors were unbiased, Dale must show that a "'reasonable person in the juror's position could [not] set aside the opinion or prior knowledge.'" *Kiernan*, 227 Wis.2d at 745. Dale's brief lacks any plausible argument satisfying this standard. *See* Dale's Brief at 40-42.

A reasonable person could certainly remain unbiased in these circumstances. Most importantly, the court in its jury instructions and counsel in their arguments made it very clear that the issue in this case was whether Dale was *subjectively* "aware" that *his* "conduct" "create[d] an unreasonable and substantial risk of death or great bodily harm" to Kara (112:6-9, 16, 22-36, 39-47, 52). Leilani's prior conviction, based on *Leilani's subjective awareness*, did not address *Dale's state of mind*. Significantly, during Leilani's testimony, whenever she was asked about Dale's views on anything, she essentially answered: "you'll have to ask Dale" (109:56-57, 92, 110, 128-30, 145).

Granted, there was substantial evidentiary overlap between the two cases. But the jury didn't know that. Indeed, the jurors were told "that the evidence presented in this trial may be different than the evidence presented in [Leilani's] trial" (*e.g.*, 102:110). Besides, much of the overlap consisted of uncontested evidence—that Kara had many symptoms of DKA at the end of her life, that DKA killed her, and that the Neumanns and their friends prayed for her. Wholly absent from Leilani's trial was the 112 pages of Dale's own testimony, in which he explained his religious beliefs and Kara's last days to the jury (111:64-176). Kronenwetter relied on Dale's testimony when trying to convince the jury that Dale lacked the individual, subjective awareness necessary for a reckless-homicide conviction (112:39, 42-43, 46-47).

Notable as well is the fact that the jury took more than fifteen hours over a two-day period to reach its verdict (Criminal Court Record 18-19). An "objectively biased" jury would not engage in such lengthy deliberations.

Dale has failed to prove that his jury was objectively biased. Therefore, he has also failed to prove that the circuit court's conclusion that the jury was not objectively biased was unreasonable. If the court's decision was reasonable, it is not reversible. *See Oswald*, 232 Wis.2d 103, ¶5. He has also failed to prove that Kronenwetter was ineffective for handling the pretrial-publicity problem as he did. As shown above, Kronenwetter did not perform deficiently. Dale has also failed to prove that Kronenwetter's actions were prejudicial because Dale has failed to prove that he had an objectively biased jury based on the facts of this case and the law of objective bias. Dale did not receive ineffective assistance of counsel.

CONCLUSION

Respondent respectfully requests that this court affirm the judgment and order from which this appeal is taken.

Dated this 17th day of October, 2011.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 12,447 words.

_____
Maura FJ Whlean
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

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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 17th day of October, 2011.

_____
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