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 REPLY BRIEF

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

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal No. 11 AP 1044

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DALE R. NEUMANN,

Defendant-Appellant.

DEFENDANT-APPELLANT'S REPLY BRIEF

ARGUMENT

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

Wis. Stat. § 948.03(6) extends the faith-healing privilege to all conduct criminalized by that statute. That is not disputed. Rather, the state argues the scope of Wis. Stats. § 948.03 and 940.06 are not co-extensive.

The state alleges three distinctions between the statutes which allegedly give "notice" that conduct falls outside the faith healing privilege of Wis. Stat. § 948.03.

First, the state distinguishes the recklessness standard in Wis. Stat. § 940.06 because it requires the defendant to create a substantial risk of death or great bodily harm, rather than an "unreasonable risk of harm."

The main problem with this argument is that, without a resulting death, a defendant who creates a "substantial risk of great bodily harm or death" remains privileged under Wis. Stat. § 948.03. When a person's conduct remains firmly within the scope of the faith-healing privilege, he does not have "notice" he crossed a line into reckless homicide.

The other problem is that the faith-healing privilege in Wis. Stat. § 948.03(6) extends to *causing* "great bodily harm," which includes "bodily injury which creates *a substantial risk of death*,...." (Emphasis added). Wis. Stat. § 939.22(14). The distinction between *causing* a "substantial risk of death" under Wis. Stat. § 948.03; versus knowingly *creating* a "substantial risk of great bodily harm or death" under Wis. Stat. § 940.06; is not only hard to fathom at a conceptual level, but is, for all practical purposes, a distinction without a difference. In other words, it would be a very rare circumstance when someone actually causes bodily injury which creates a substantial risk of death without knowing it. More importantly, the state's hyper-technical elements analysis fails to provide anything resembling notice from the standpoint of the average person trying to conform his conduct to the law.

Second, the state distinguishes the statutes based upon "mental state," arguing that an *awareness* one has created a "substantial risk of great bodily harm or death" is a much higher standard of recklessness than a "conscious disregard" for a child's safety. (State's Brief, p.24).

Again, the short answer is that even if the standards are different, a "conscious disregard" for a child's safety would clearly encompass proof that a defendant was "aware" he created a "substantial risk of great bodily harm or death." Absent a death, such an awareness would not take a defendant outside the privilege contained in Wis. Stat. § 948.03.

Third, the state argues that the privilege under Wis. Stat. § 948.03 does not extend to death. The problem with this argument is that the happenstance of death is typically an unintended result which, by its very nature, cannot give advanced notice as to liable conduct. Constitutionally adequate notice requires that a person of average intelligence have sufficient information to conform his *conduct* to what the law requires. As the trial court noted, "[i]t is not the death of the child that makes conduct criminal...." Rather, a person must have "fair notice that *their conduct* might 'cross the line'...." (Emphasis added) (29:18).

According to the state, the "line" that gives a person notice is the self-awareness one has caused a substantial risk of great bodily harm or death. This "line" that allegedly gives a person "fair warning," however, consists of the same conduct expressly privileged under Wis. Stat. § 948.03. Absent death, Dale would have been immune from prosecution.

In fact, a jury could have reasonably concluded Dale's conduct was privileged until Kara stopped breathing. With no knowledge of what was causing her condition, there was no boundary, no line, no discernible moment when Dale 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 (up to and including a substantial risk of death) and liability under Wis. Stat. § 940.06 (death).

The state makes the same mistake when it analyzes the relevant case law. It cites *State v. Hays*, 964 P.2d 1042 (Or.Ct.App. 1998) and *Walker v. State*, 763 P. 2d 852 (Cal.1988), as well as others, for the proposition that the spiritual treatment privilege applies only so long as the child's condition is not life threatening. (State's brief, pp.19-22). What the state conveniently ignores throughout its brief, however, is the substantial gap in these cases between the scope of privileged conduct on the one hand, and the elements of the homicide charge on the other. In *Walker*, for example, the faith-healing privilege only covered the routine provision of dependent support. The privilege did not come anywhere protecting conduct causing a substantial risk of death. *Walker*, at 143-144. In *Hays*, the privilege extended to the maltreatment of dependents, the worst of which was causing "physical injury." Defendant's notice argument was rejected because the privilege in the criminal maltreatment statute clearly did not, according to the court, apply to "life threatening" illness. *Id.*,at 1046. In contrast, the scope of Wis. Stat. § 948.03 extends far beyond the privileged conduct at issue in either *Walker* or *Hays*, or any of the other cases cited by the parties (pro or con).

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

The state does not dispute it bears the burden of proving "a known duty to act" in an omission based prosecution. Nor does it dispute that Dale's treatment by prayer qualified him for the spiritual treatment privilege contained in Wis. Stat. § 948.03. Rather, the state makes two main arguments:[1] (1). The privilege under Wis. Stat. §

---

1 The state conceded at the postconviction hearing that the duty to provide conventional medical care, as articulated in pages 10-15 of

948.03 does not "release" the faith healing parent "from the duty common to all Wisconsin parents to provide their children with the medical treatment necessary to preserve their lives." (State's Brief, p.27); and (2) there is no "arguable conflict" between the instruction the trial court gave and the statutory language of Wis. Stat. § 948.03. (State's Brief, p.26-27).

As a threshold observation, the "duty common to all Wisconsin parents," now advocated by the state, differs radically from the instruction actually given. The jury heard nothing about a duty to provide medical treatment when "necessary to preserve" the child's life. Rather, the jury was instructed the parent has a duty to "protect their children, to care for them in sickness and in health." If the state's position is that Dale did not have a duty to provide conventional medical care until it was necessary to preserve the child's life, it has confessed error.

Whatever a parent's "common duty" may be, however, Wis. Stat. § 948.03 clearly supersedes it. Dale had no enforceable duty to provide conventional medical care up to and including the point Kara suffered from "bodily injury which creates *a substantial risk of death*." The state makes no effort to explain how Dale could have a "known duty" to provide conventional medical care under some amorphous standard pulled from a 40-year-old civil case while, at the same time, Wis. Stat. § 948.03 very specifically, and expressly, grants him a statutory privilege to rely exclusively on faith-healing.

Dale's postconviction motion, was preserved by trial counsel for appeal. (84:19; 118:3; 24:12). Consequently, the trial court did not address the issue in its postconviction decision. Any argument the state makes concerning trial strategy or whether trial counsel was "ineffective" or not is irrelevant.

Dale, moreover, was clearly prejudiced by the trial court's instruction. The instruction provided no standards for a jury to determine *when* Dale's duty to provide conventional medical care arose. The instruction is so broad, a jury could have easily interpreted it as requiring Dale to provide medical attention long before he was legally required to do so under Wis. Stat. § 948.03 (or, for that matter, under the state's proposed definition). By failing to provide any standards at all, much less standards consistent with the privilege contained in Wis. Stat. § 948.03, the instruction effectively relieved the state of proving Dale had a "known" duty to act.

On the other hand, had the jury been informed Dale did not have a duty to provide conventional medical care up to and including a substantial risk of death, it could have concluded no duty arose at all. The jury could have reasonably concluded Kara's overt medical condition never went beyond "a substantial risk of death" until she stopped breathing, and 911 was called. The instruction given, on the other hand, allowed the jury to set its own standards as to when the duty arose.

Alternatively, if the state is correct that the instruction as given "embrace[s]" Dale's theory "that prayer provided the appropriate means for protecting Kara's health," then the prosecution fails entirely. (State's Brief, p.27). There is no dispute Dale believed in the efficacy of treatment by prayer,[2] and further, provided that treatment to Kara. If, as the state suggests, Dale could meet his duty to "protect [his] children, to care for them in sickness and in health" through treatment by prayer, then the evidence was clearly insufficient to convict.

---

2 The efficacy of treatment by prayer must be assumed for constitutional reasons. See *United States v. Ballard*, 322 U.S. 78, 82, 86 (1944).

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

The state addresses this issue solely on the basis of *Strickland*, contending that "[w]here a 'real controversy' claim is based upon errors by counsel, 'the *Strickland* test is the proper test to apply.'" The state cites *State v. Mayo*, 2007 WI 78, ¶60, 301 Wis.2d 642, 734 N.W.2d 115. (State's Brief, p.30). The state mischaracterizes *Mayo's* holding. *Mayo* held it was "necessary" for the court "to review the record to determine if a new trial is warranted in the interest of justice or due to plain error" *in addition to* deciding defendant's ineffective assistance of counsel claim. *Mayo*, at ¶¶28, 30. *Mayo* also considered the totality of the alleged errors for "their cumulative effect...." *Id.*, at ¶66. See also *State v. Hicks*, 202 Wis.2d 150, 152-153, 549 N.W.2d 435 (1996) (Court of Appeals reversed on ineffective assistance of counsel grounds; Supreme Court reversed on discretionary reversal grounds (real controversy not fully tried) using same evidentiary basis).

The fundamental disagreement on appeal is whether the instructions informed the jury that Dale could rely on the sincerity of his belief in faith-healing as a defense to the "subjective awareness" element of reckless homicide. Defendant has argued that the instructions, combined with the trial court's failure to answer the jury's question, prevented the real controversy from being tried. (see Dale's Brief-in-Chief, pp.33-35).

The state, on the other hand, employs the same have-it-both-ways approach it used at the trial level. It repeatedly argues "[t]here is no 'treatment through spiritual means defense.'" (See e.g. State's Brief, p.32). The jury's instruction, moreover, was properly limited to whether Dale "was subjectively aware that his conduct created a severe

risk to Kara," without any reference to the role his religious beliefs may play. (State's Brief, p.37). The state then concludes, nonetheless, that this instruction "clearly informed" the jury 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." (State's Brief, p.32).

The jury did not, however, consider itself "clearly informed." The jury expressed its uncertainty by asking the trial court: "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). What the jury wanted to know was whether Dale's defense could actually be considered. Was it legitimate? Was it legally possible for Dale's belief in faith-healing to have negated, as a matter of law, his subjective awareness? The trial court's response was to have the jury re-read the instructions they had already found unhelpful.

When a jury "makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *State v. Hubbard*, 2007 WI App 240, 306 Wis.2d 356, ¶14, 742 N.W.2d 893. As the *Hubbard* court notes: "Jury instructions must have two key characteristics in order to protect the integrity of our jury system: (1) legal accuracy, and (2) comprehensibility." *Id.*, at ¶19. Jurors "cannot follow instructions that they do not comprehend." *Id.* Unclear instructions, moreover, "lead to uncertainty about how to apply the law to the facts, which may invite the jury to decide the case without regard to the facts or the law." *Id.* While jury instructions may be legally accurate, the real controversy is not fully tried when the jury admits in its questions to the court it did not understand a key legal concept of the charge before it. *Id*

Whether Dale's belief in faith-healing negated the subjective element of reckless homicide was the key—and only—issue in dispute. The jury's confusion on this question prevented the real controversy from being fully tried.

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

The state first argues this issue was waived because Dale "has not proven" he objected to the disclosure of Leilani's conviction to the jury. Further, the state argues Dale's trial counsel actually agreed to disclose Leilani's conviction to the jury panel.

Apparently, the sworn testimony of trial counsel is not "proof." Kronenwetter testified that to the best of his recollection, he objected to having any jurors placed on the panel with knowledge of the prior conviction. (118:7,9). He acknowledged the objection was probably made in chambers, off the record. *Id.* He further articulated his firm belief that knowledge of the prior conviction was prejudicial. (118:8). He always assumed, when discussing Dale's options with him, that "jurors who had knowledge of the prior conviction would have been excused for cause." (118:19). Kronenwetter also made clear that his "agreement" with prosecutors to inform the entire jury panel of Leilani's conviction was a tactical choice made only after the trial judge decided to allow jurors with prior knowledge on the panel. (85:11-12; 118:8).

Kronenwetter's post-conviction testimony was not contradicted. The trial court, moreover, neither disputed Kronenwetter's testimony, nor made any findings to the contrary. In fact, the trial court corroborated Kronenwetter's version by acknowledging it probably "remarked off the

record that prior knowledge alone does not disqualify a juror." (85:9).

If the Court finds Kronenwetter did not preserve this issue as he believes he did, or at least intended to, he was ineffective for failing to do so.

The state next attempts to distinguish the cases Dale cites in support of his objective bias contention. While each stands on its own facts and none, of course, are identical to the facts here, the overriding theme of each case still applies: jury knowledge of a prior judicial finding of guilt—whether of a co-defendant under similar charges and facts, or the defendant under similar charges and facts—creates objective bias.

The state then argues Dale's brief "lacks any plausible argument satisfying" the objective-bias standard. While the state concedes a "substantial evidentiary overlap" between the two cases, it nonetheless contends "the jury didn't know that." In addition, Leilani's prior conviction turned on *her* subjective awareness, which did not address *Dale's* state of mind.

None of these arguments are persuasive. The state's evidence was nearly identical in both cases, and so was the defense. In his brief-in-chief, Dale discusses how the jury either knew, or would have easily surmised, the factual overlap of the cases, including the evidence addressing subjective awareness. (See pp.40-41, Brief-in-Chief). Suffice it to say, it would be hard to imagine two trials more similar in terms of the charges, the state's evidence, and the defense.

The state next argues the jury could not have been objectively biased because it took 15 hours to reach its verdict. It may be true that an objectively biased jury would

spend less time deliberating than one that is not. It may also be true, however, that an unbiased jury would have acquitted. At a minimum, the degree of objective bias necessary to prejudice the outcome in a close case such as this is far less than a case where the result is a foregone conclusion.

Finally, the state argues the standard of review is one of deference to the trial court. As long as the trial court's decision was "reasonable, it is not reversible."

Unlike subjective bias, objective bias is a question of law. Although the reviewing court does not typically defer to the trial court's decision on a question of law, "where the factual and legal determination are intertwined as they are in determining objective bias, we give weight to the circuit court's legal conclusion." *State v. Funk*, 2011 WI 62, ¶30, 335 Wis.2d 369, 799 N.W.2d 421.

In this case, however, Dale is alleging a "per se" objective bias. See *Funk*, at ¶63 (court could find juror was "per se" biased against defendant without specific proof of partiality); *State v. Faucher*, 227 Wis.2d 700, ¶50, 596 N.W.2d 770 (whether extraneous information creates a "reasonable possibility" of prejudice "upon a hypothetical average juror" is a question of law.) In this case, deference to the trial court is not warranted because "per se" bias is a purely objective determination based on a hypothetical juror. In addition, the trial court itself caused exposure to this "extraneous" information, and therefore was not ideally situated to judge whether prejudice occurred. See e.g *State v. Tody*, 2009 WI 31, ¶29-31, 316 Wis.2d 689, 764 N.W.2d 737 (No deference paid to trial court when its relationship to potential juror was source of potential bias.)

CONCLUSION

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

Respectfully submitted this 2nd day of November, 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 2998 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 2nd day of November, 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 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 November 2, 2011. I further certify that the brief or appendix was correctly addressed and postage was prepaid.

Dated this 2nd day of November, 2011

MILLER & MILLER
Attorneys for the Defendant-Appellant

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