STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT 1

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**STATE OF WISCONSIN,**

Plaintiff-Respondent,

v. Appeal No. 2011AP002952 CR

**JOSHUA A. PRESCOTT,**

Defendant-Appellant.

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# DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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Appeal from the Milwaukee County Circuit Court, the Honorable Rebecca F. Dallet, presiding.

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## STATEMENT OF THE ISSUE

Whether trial counsel's failure to move the trial court for relief from prejudicial joinder of the two charges of the case constituted ineffective assistance because the evidence of the defendant's prior felony conviction was inadmissible as to the charge of reckless injury?

Answered by the trial court by post conviction decision: "No"

## STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION

**1. Oral Argument:**

The appellant was not believe oral argument is necessary in this case. The facts jermaine to the issue are not lengthy or complex. The applicable law is statutory and upon well settled cases regarding the inadmissibility of prior conviction evidence in a criminal case when a defendant does not testify.

**2. Publication:**

The appellant however does feel that publication is appropriate. The appellant does not find that the narrow issue of this case has previously been directly decided by appellate courts of this State. Further, it presently is common practice in Wisconsin trial courts to try the charge of felon in possession of a firearm with other charges. The decision of this case will therefore provide important guidance as to the propriety of that procedure and practice.

## STATEMENT OF THE CASE

**a. Nature of the Case**

This case was the criminal prosecution of the defendant-appellant Joshua A. Prescott in the Milwaukee County circuit court upon a Complaint, (R. 2, App. 103), charging him with

violation of §941.30(1) Wis. Stats., First Degree Recklessly Endangering Safety, with the use of a dangerous weapon; 939.63(1)(b), and §941.29(2), Possession of a Firearm by a Felon.

The essential elements of the Complaint were as follows. On July 27, 2010, at 3274 North 21st Street in Milwaukee, Wisconsin, a female juvenile was on the front porch of her residence. An individual wearing a mask fired multiple gun shots in her direction and she was stuck in her left breast, left bicep and right forearm. In a vacant field just north of the residence officers recovered nine millimeter bullet casings.

A co-actor charge in the case, Dominique Gillespie, provided a statement wherein he said he saw Prescott with a nine millimeter handgun and mask at Prescott's girlfriend's house on 22nd Street before the shooting. He heard Prescott say he was going to "air the house" on 21st Street. The two of them then walked to a field, which was the location where investigating officers later recovered the nine millimeter casings. Gillespie continued that he put on a mask, looked toward the 21st Street residence and told Prescott that no one was outside. Prescott responded to him that there were people outside and he, Prescott, began shooting. Prescott fired numerous times and the two then fled.

The Complaint further alleged that from Milwaukee County circuit court records in Case No. 2008JV173 Prescott had been adjudicated delinquent for the felony offense of drive or operate a vehicle without owner's consent on March 6, 2008, with the adjudication of record and not reversed.

At the arraignment of the case on November 5, 2010, an Information was filed charging as count one First Degree Reckless Injury in violation of §941.29(2) and Possession of a Firearm by a Felon (R. 35, 2, App. 109). Prescott plead not guilty to the two counts (2). The case was tried to a jury commencing January 24, 2011 (R. 36). On January 26, 2011 the jury returned

verdicts of guilty as to both counts (R. 41, 6). On March 9 , 2011 Prescott was sentenced as follows. On count one, the sentence was nineteen years of imprisonment with fifteen years of initial confinement and four years of extended supervision. The sentence on count two was five years consecutive to count one, with three years of initial confinement and two years of extended supervision (R. 42, 26).

A judgment of conviction was entered on March 10, 2011, providing for the convictions and sentences as indicated above (R. 16, App. 101).

**b. Procedural Status Leading to Appeal**

At the trial level Prescott was represented by counsel appointed by the State Public Defender and on March 28, 2011, trial counsel filed with the clerk of circuit court a Notice of Intent to Pursue Post Conviction Relief (R. 17). The notice indicated that Prescott's indigency continued and that he requested Public Defender representation for post-conviction relief purposes. Thereafter counsel for post-conviction proceedings was appointed by the Public Defender (R. 18).

On September 9, 2011, appellate counsel filed in the circuit court a post-conviction motion seeking a new trial, with a supporting brief (R. 20, App. 110, R. 21). The State filed a brief in response (R. 27) and the defense thereafter filed a reply brief (R. 28).

The circuit court, the Honorable Rebecca F. Dallet, issued a written decision of December 6, 2011, denying the motion (R. 30, App. 111).

On December 21, 2011, a Notice of Appeal was filed on Prescott's behalf in the circuit court (R. 31).

**c. Disposition in the Trial Court.**

Disposition in the trial court was by way of the judgment of conviction of March 10, 2011, adjudicating Prescott convicted of violation of §940.23(1)(a), 939.63(1)(b) and 941.29(2) with the sentences of the Court as indicated above. Prescott's post-conviction motion was decided by the written decision by Judge Dallet of December 6, 2011, denying the post-conviction motion (R. 30, App. 111).

**d. Statement of Relevant Facts.**

It is essentially upon the pleadings of the case that Prescott argues prejudicial error, that is, that the two counts of the Information were improperly tried together. However, a summary statement of the facts of the case from the jury trial properly is set forth to provide a full context for the issue on appeal.

The State's first witness was a Richard Littlejohn (R. 37, 36). In July of 2010 he lived at 3308 North 21st Street in Milwaukee (37). At about 10:30 in the evening he was sitting on his porch (37). Immediately across the street from his home was a vacant lot (40). While sitting on his porch he observed a man in a black outfit with a black mask fire what he thought was a handgun (41). He did not see the person's face nor did he see the person prior to observing him firing the handgun (41-42). He heard six or seven shots and then laid down on his porch (42). He thought the shots were fired toward the intersection of Concordia and 21st Street (42-43). He then observed "like a shadow moving in the vacant field" toward an alleyway and he went back inside his house (44). He felt that the shadow he saw was that of the individual who had done the shooting (44).

On cross examination he indicated he had related to officers a description of the person as about 18 to 20 years of age with a thin build (45). He only saw one person (46). From what he

could see, he could not tell whether the individual was dark skinned, rather the person just looked dark (46). He felt the individual was wearing a face mask, appearing to be all black (46).

The State's next witness was Dominique Gillespie (50). He knew Prescott as a friend and as having lived in the same neighborhood (52-53). On July 27, 2010, at approximately 10:30 in the evening he saw Prescott at Prescott's girlfriend's house on 22nd Street (53-54), which was close to Concordia and 22nd Street (54). At the girlfriend's house they were just hanging out and several other people were there (55). While there he saw a weapon on the floor (55) and also masks on a chair (56). At a point he put on a mask as did Prescott (56). He recalled that Prescott was wearing all black (57). He did not recall the color of his clothing (57). The two of them left the residence and cut through a field after going through an ally (58-59). He testified that at a point he had been involved in making a video with an investigating officer, with that video depicting where he and Prescott went on July 27, 2010, that is, the path from Prescott's girlfriend's house (59-60). Viewing the video while testifying Gillespie identified the residence, the back door from which they left (61) and the field through which they walked or cut through (62) He further identified a "gangway" between two homes (64). The gangway was on the east side of 22nd Street and they walked through it, up an alley, and behind a home on 22nd Street (64). They then walked through a second open field (66). At that point Prescott asked him if he had seen anyone, and he said no (66). Prescott himself walked up and looked and said to him that there was [persons] and he started to open fire with a gun (66-67). Prescott shot multiple times, more than two (80). While he was unaware if the gun was the one from the girlfriend's house and also was unaware if Prescott left that house with a gun, at the field Prescott did have a gun (67). He testified he felt Prescott was "into it" with some individual at a house on 21st Street (68-69). Gillespie identified the residence as the second home on the southeast corner of the

intersection of Concordia and 21st (72). After the shooting he ran (80) and heard Prescott's footsteps behind him (82). He went back to the girlfriend's house, taking the same route, but Prescott went a different route (82). When he arrived back at the girlfriend's house Prescott was already there with a gun (85).

On cross examination Gillespie indicated that he had earlier told officers that the black mask worn by Prescott had a glowing skeleton face (93). Gillespie was age 18 and was skinny (96). He further recalled telling officers that Prescott fired 17 times, that the weapon had a 20 bullet clip and back at the house he had been shown the clip with three bullets remaining (98).

The State next called as a witness Mark Simonson (109). He was a firearms examiner at the State Crime Laboratory at Milwaukee (110). He had examined ten bullet casings which had been marked as trial exhibits (115) and gave his opinion that the ten casings were all fired from the same handgun (120-121).

Outside of the presence of the jury the parties then presented the Court with a proposed Stipulation, which read as follows:

> The State of Wisconsin and the defendant hereby stipulate to the following facts for trial: That on July 27, 2010 the defendant, Joshua Prescott, had been adjudicated delinquent for an act committed after April 21, 1994 that if committed by an adult in the state would be a felony for the purposes of Wisconsin Statute Section 941.29 (R. 38, 3-4).

It was signed by both counsel and Prescott (4). Prescott acknowledged the Stipulation and that it was correct (3-4). The Court accepted this Stipulation and directed that it be read to the jury as part of State's case (6).

The State's next witness was Deshawn Dyson (7). Timyra Owens was his cousin (8). Barbara Brown was his aunt and they lived at 21st and Concordia (8). The house was near the intersection of 21st and Concordia, and specifically two houses south from Concordia (9). During the evening of July 27, 2010 he was at the aunt's house (9-10). About 10:30 that evening he witnessed a shooting at that location (10). He was outside of the front of the house (10). Timyra was with him, on a concrete staircase leading up to the house (11). He heard gun shots but did not know exactly where they were coming from (12). However, he felt concrete hitting his shins and some bullets were ricocheting off of the concrete, so he knew the gun fire was coming their direction (12). He and the others moved to get inside the house and seconds later he saw Timyra run into the house, shot (12-13).

Timyra Owens next testified (19). She was age 12 (21). She was from Arkansas and in the spring of 2010 had come to Milwaukee to stay for a couple of months at her grandmother's house on 21st Street (22). Her aunt was Barbara Brown who also lived at the 21st Street house (22-23). About 10:30 in the evening on July 27, 2010 she was in front of the house with other family members, sitting on steps (23-24). She was shot three times, her right forearm, left upper arm her left upper chest (26-27).

A Dalonne Jones testified for the State (81). He knew Dominique Gillespie (82). He knew him about a year and a half from the neighborhood (83). He also knew Joshua Prescott (83). He knew him most all of his life from the neighborhood and had grown up with him and they were close friends (84). He identified a case exhibit as his old cell phone that he was carrying in July of 2010 (86). From the cell phone records he testified that at some point during the morning of July 27, 2010 he had received some sort of message from Joshua Prescott (86,87). The message read; "Tell D to come O-v, come bring the mask and shells." (88). He

testified the message was sent from Joshua, with D as Joshua's brother Derrick Prescott (89). He testified that the cell phone message was from Joshua Prescott that he wanted him to relay to his brother Derrick (90).

The further testified that on July 27, 2010, in the evening he was with Joshua Prescott (R. 39, 4). He went to a home on 22nd Street north of Concordia (5). He believed it was Prescott's girlfriend's house (6). Prescott was there, as was his girlfriend and their baby (6). It was a little before 10:00 in the evening (7). When he was leaving he saw Dominique Gillespie (7). He had been smoking and drinking earlier in the day and felt he was more or less intoxicated (8). He recalled seeing a semi-automatic weapon on the banister of the porch at the residence (9). He also saw a mask when Prescott was playing with his child (9-10). The mask was a dark color and had a bright face (11). He left the home because at the time he was on probation and was not supposed to be around a firearm (15). After leaving he went back to his house and about 45 minutes to an hour later he heard six gun shots (18). The next day he was with a Jimmie Horne (19). He received a message on his cell phone that evening (20). On it was an incoming message from Joshua Prescott's cell phone (22). The date was July 28, 2010 at 5:12 pm (22). He was with Jimmie at the time the message came in (22). The message said; "tell Jim to 44 me, 9 him" (22). A second message came in immediately below the first message (22-23). It said the same thing (23). He did not know what the messages meant (24). He testified having told the prosecutor that 9 is street language for a 9 millimeter caliber weapon (25). He gave the cell phone with the messages to Jimmie when he was riding around with him (26). When he was still riding with Jimmie there was an outgoing message from the phone to the effect: "Jimmie said he got 400 for the 9." (27). He testified he understood the message as an offer from Jimmie for $400.00 for the 9 millimeter (28).

On cross examination Jones testified that at Prescott's girlfriend's house on the 27th he saw Gillespie wearing blue jeans and a dark colored long sleeve shirt (30-31). He did not see Prescott bringing shells or masks to the house (31). He did not know whether the hand gun he saw at the house was a 9 millimeter (31). Later that evening he received a phone call from Gillespie and Gillespie did not say they had shot up a house that evening (31-32). Rather, he told him that he was at his house and Prescott was at his house (32). He also testified that the electricity at Prescott's girlfriend's house was not working that evening when he was there (32). He therefore was unable to get a good look at the masks and he only saw one (33). He did not have any knowledge that Jimmie Horn bought a 9 millimeter from Prescott (35).

A Carmena Bryant testified (44). Her grandmother lived at 3323 North 22nd Street, just north of Concordia (46). On July 27, 2010 in the evening she was at her grandmother's home (49). Getting out of a car in front of her grandmother's house she heard shots (49, 50). She felt the shots were coming from the corner area of 21st and Concordia (52). She had seen bright lights, which looked to her like muzzle flash (53). The time was approximately 10:00 p.m. (53). A couple seconds after the shots she saw two males running north with one running in an alley, and one running in a vacant lot (54). The one in the alley had a blue shirt and the one that ran through the vacant lot was all in black (54). She did not see their faces (54). The alley she was referring to was between 21st and 22nd Street (55). On cross examination she testified as having told investigating officers that one person was wearing black and about 6 feet tall and the other wearing a blue shirt was about 5 feet 5 inches, pretty short with a medium, small build (60).

The court then read the stipulation to the jury regarding Prescott having been adjudicated for an offense which would constitute a Wisconsin felony for purposes of §941.29 (62-63).

Milwaukee Police Detective Harold Thomas next testified (63). He was an initially responding investigator and found 9 millimeter shell casings in the vacant lot just north of the home where Owens was injured (69). 10 casings were found (75). He had contacted both Prescott and Gillespie and testified that both were about the same height, 5 feet 5 inches to 5 feet 7 inches (103). Gillepsie had a darker complexion and a smaller build than Prescott (103).

The State then rested (106). Prescott exercised his right to not testify (107-109) and the defense did not call any witnesses.

## ARGUMENT

**1. Joinder for trial of the charges of felon in possession of a firearm and first degree reckless injury was prejudicial error.**

Prescott stood trial in this case upon two counts, felon in possession of a firearm and first degree reckless injury. The State's proof as to felon in possession necessarily required submission to the jury evidence of a prior felony conviction to meet the elements of that offense. That evidence was received in the case by way of a stipulation that in fact Prescott had previously been so convicted[1]. This constituted error as to the reckless injury count because §906.09(1) Wis. Stats allows for a jury to hear prior conviction evidence only if a defendant's credibility is in issue, with credibility coming into issue only if a defendant testifies. *Underwood v. Strasser, 48 Wis. 2d 568, 570-1, 180 N.W. 2d 631, (1970)* recites,

> It is then the law in this state, statutorily established, that on an issue of credibility, a witness who takes the stand may be questioned as to prior convictions of criminal offenses.

[1] The felony status was upon a juvenile court adjudication of an offense, operating without owner's consent, which if committed as an adult would constitute a Wisconsin felony.

*Voith vs. Buser, 83 Wis. 2nd 540, 544, 266 N.W. 2d 304 (1978)* is on point where a witness/defendant does not testify.

> We have, in the first place, stated that impeaching evidence to attack credibility is inappropriate and inadmissible prior to the time that any issue of credibility has arisen in the course of a trial. citing *Underwood v. Strasser, 48 Wis. 2nd 568, 180 N.W. 2d 631 (1970); Alexander v. Meyers, 261 Wis. 2nd 384, 52 N.W. 2d 881 (1952).*

Lastly, the early case of *Esterra v. State, 196 Wis. 104, 109, 219 N.W. 349 (1928),* plainly states that a defendant must testify and thereby put his or her credibility in issue before evidence of prior criminal convictions is permitted.

In this case Prescott did not testify. His credibility therefore was never put into issue. As to the reckless injury charge, the jury thereupon heard inadmissible evidence. *Voith* noted the prejudicial effect which occurs upon this type of error.

> The prior conviction, improperly admitted, could only have the effect of prejudicing the jury by indicating a propensity to commit a crime... *Voith,* at 546 Wis. 2d

More recently, this was stated in *State v. Harris, 307 Wis. 2d 555, 594, 745 N.W. 2d 397, (Ct. App. 2007).*

> The danger of the admission of evidence of the defendant's criminal history is clear. As the defendant argues in his brief, human nature being what it is, most people would more easily find that an individual who has previous criminal cases would be more likely to commit yet another crime.

Further, *State v. Bettinger 100 Wis. 2nd 691, 303 N.W. 2d 585 (1981)* notes that the risk of prejudice arising upon joinder of offenses is not significant when evidence as to one crime is relevant and material to that of a second offense.

> The simple logic behind this rule is that when evidence of one crime is relevant and material to the proof of a second crime, virtually identical evidence will be submitted to the jury whether or not one crime or both crimes are being tried. at 697, Wis. 2d.

Conversely, it may readily be stated that when evidence is admissible as to only one criminal count, i.e. felon and possession of a firearm, but not the other count, reckless injury, the evidence is not properly admitted. As to the reckless injury charge against Prescott, without him having testified his record of a prior felony conviction would not have been admissible.

A second circumstance of error occurred upon the admission of the prior felony conviction. Specifically, the circuit court did not undertake the balancing test called for the §906.09(3). As stated in *State v. Gary M. B., 261 Wis. 2nd 811, 828, 661 N.W. 2d 435 (Ct. App. 2003),*

> Wisconsin Stat. §906.09 does not end with the "general rule," however. Subsection (2) requires that a court also consider whether conviction evidence should excluded because "its probative value is substantially outweighed by the danger of unfair prejudice." … a judge should consider whether from the lapse of time since the conviction, the rehabilitation or pardon of the person convicted, the gravity of the crime, the involvement of dishonesty or false statement in the crime…the probative value of the evidence of the

> crime is substantially outweighed by the danger of undue prejudice. Citing and quoting from *State v. Kuntz, 106 Wis. 2d 722, 752, 467 N.W. 2d 531(1991),* in turn quoting Judicial Counsel Committee's Note, 56 Wis. 2d at R. 181.

In this case no judicial scrutiny of the circumstances of the prior conviction of Prescott was undertaken.

In addition, the jury heard not only that Prescott had a prior conviction, but specifically that it was a felony. *Voith v. Buser*, cited above, specifically holds that the nature of a prior conviction is inadmissible, at 546, Wis. 2d.

Lastly, the jury was given no cautionary instruction, directing that the prior conviction evidence bear only upon the defendant's credibility. *State v. Seefeldt, 265 Wis. 410, 647 N.W. 2d 894 (Ct. App. 2002)*, rev. granted 257 Wis. 2d 115, 653 N.W. 2d 888, affirmed 261 Wis. 2d 383, 661 N.W. 2d 822.

**2. Federal case law on the issue admonishes strongly against joinder of felon in possession with other charges.**

The issue on appeal in this case has been the subject of fairly extensive federal case law. While it is recognized that such cases do not bind Wisconsin courts[2] the legal reasoning of the cases is thorough, and grounded in large part upon law similar to that of this State. Further, Wisconsin courts on review may examine other jurisdictions for persuasive authority upon cases of first impression.[3] *Russ ex. rel. Schwartz v. Russ, 302 Wis.2d 264, 734 N.W. 2d 874 (2007).*

*United States v. Nguyen, 88 F. 3d 812 (9th Cir. 1996)* was a case wherein the defendant Nguyen was charged with several criminal counts, including felon in possession of a firearm.

[2] State v. Gary M. B. at 482.
[3] The appellant does not believe the issue of this case has previously been directly addressed by Wisconsin appellate courts.

Nguyen argued on appeal that the district court erred by failing to bifurcate the felon in possession charge from the other counts. Framing his issue, the Circuit Court stated:

> Nguyen contends that he was unduly prejudiced by the admission of the prior felony conviction in the conspiracy case. Nguyen points out that, had Nguyen been charged only in the conspiracy case, evidence regarding the prior conviction most likely would have been excluded pursuant at Fed. R. Evid. 404 (b). The government was able to obtain by consolidation what it could not obtain if the cases had been tried separately: disclosure of the prior felony to the jury in the conspiracy case at 815.

Rule 404 (b) of the Federal Rules of Evidences is almost exactly the same as Wisconsin's rule found in §906.09. The *Nguyen* court immediately noted regarding this situation that:

> All of the Circuit Courts seem to agree that trying a felon in possession count together with other felony charges creates a very dangerous situation because the jury might improperly consider the evidence of a prior conviction when deliberating about the other felony charges, i.e. convict the defendant because he is a "bad guy" or convict because "he committed a crime before and probably did this one too." at 815 … "there is a high risk of undue prejudice whenever, as in this case, joinder of counts allows evidence of other crimes to be introduced in a trial of charges with the respect to which the evidence would otherwise be inadmissible." at 816,

citing and quoting from *United States v. Lewis, 787 F. 2d 1318 (9th Cir. 1986).*

In *United States v. Daniels, 770 F. 2d 1111 (D.C. Cir. 1985),* Daniels was charged with armed bank robbery, carrying a pistol without a license and possession of a firearm as a felon. He moved to sever, which was only partially allowed by the trial court. On appeal the *Daniels* court noted that:

> There is thus a high risk of undue prejudice whenever, as in this case, joinder of counts allows evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible. at 1116.

The *Daniels* court had noted that pursuant the Federal Rules of Evidence section 404 (b) the introduction of evidence of other crimes, (felony status), would not have been admissible to prove bad character and that a person acted in conformity therewith. at 1115-6. The *Daniels* court additionally noted that the Third Circuit had addressed issue in dicta:

> "if it is determined that the convictions would not be admissible on the other counts-that were these counts to be tried alone the jury would not hear this evidence-then severance should be granted." at 1117, citing and quoting from *United States v. Busic, 587 F. 2d 577, 585 (3rd Cir., 1978).*

The *Daniels* court noted that certain other districts had left the matter within the judicial discretion of the trial court, but was itself not fully satisfied with that procedure.

> We are not nearly so sanguine concerning the efficacy of jury instructions in curing the prejudice caused by the introduction

> of other crimes evidence. To tell a jury to ignore the defendant's prior convictions in determining whether he or she committed the offense being tried is to ask human beings to act with a measure of dispassion and exactitude well beyond moral capacities. at 1118.

The *Daniels* court concluded that joinder was not always an abuse of discretion but did emphasize that: "joinder decisions must be informed by a respect for the special problems created by the introduction of other crimes evidence, and that consequently will behoove prosecutors and trial judges to proceed with caution when situations similar to this one face them in the future." at 1118.

The admonition of the *Nguyen* court is clear as a concluding point.

> This opinion is published to alert trial judges and prosecutors that the practice of consolidating "felon in possession charges" without properly safeguarding the defendant from the prejudicial effect of introducing evidence of the prior felony with other unrelated felony charges is not looked upon with favor by this Circuit, or, for that matter, by other Circuits. *Nguyen,* at 815.

**3. Trial counsel's failure to seek relief from prejudicial joinder constituted ineffective assistance of counsel.**

Section 971.12(3) Wis. Stats. allows for a defendant to seek of the trial court relief from prejudicial joinder of offenses for trial. In this case trial counsel failed to so move the court. The two counts were thereupon tried together, with the jury improperly then having heard the evidence of Prescott as a convicted felon. The familiar test from *Strictland v. Washington, 466 US 668 (1984)* is whether counsel's performance was deficient and prejudicial.

A deficiency is clear. Prescott was entitled to separate trials on the two counts because the felon status evidence was inadmissible as to the reckless injury court. Failure to seek severance, when proper grounds are present, can constitute ineffective assistance of counsel. *State v. Robinson, 177 Wis. 2d 46, 501 N.W. 2d 831 (Ct. App. 1993).*[4]

That the error was prejudicial is equally clear. In the *Voith v. Buser* case, cited above, the erroneous admission of prior conviction evidence was declared as "erroneous and prejudicial." *Voith*, at Wis. 2d 547. That court noted,

> The prior conviction, improperly admitted, could only have the effect of prejudicing the jury by indicating a propensity to commit a crime … *Voith,* at 546.

While *Voith* went on to say that the improper admission of prior conviction testimony is not ipso facto prejudicial, it did note that such evidence in that case could not be said to have not tainted the jury verdict and, minimally created jury confusion. At 547.

Further, the admission of the prior conviction evidence was not made subject to the analysis and balancing test of §901.04, as directed by §906.09(3). Nor was the jury given any type of cautionary instruction, directing that it not consider the felony conviction evidence as to the reckless injury count. Lastly, the prosecutor in the case tied the two offenses together in his closing argument to the jury.

> This is a situation where Mr. Prescott had a score to settle. … I say that because though he was adjudicated delinquent for a felony and

[4] Counsel not having sought severance in that case was determined as reasonable, upon his explanation in post judgment proceedings as to his rational for not having so proceeded.

> he was not allowed possession of a firearm, early in the morning … on July 27, 2010 he sent a text message to Dalonne Jones and it says tells D, Derrick, his brother – tell D to come over, bring the mask and shells. So already at 10:35 in the morning on July 27, 2010 Mr. Prescott has an idea, and obviously the idea is to possess a gun…and obviously the idea is to settle the score (R. 40, 20).

Thereupon, the evidence of Prescott having a prior felony conviction, while entirely appropriate as proof as to the felon in possession charge, was prejudicially used against him as to the reckless injury charge.

## Conclusion

The appellant respectfully request that the judgment on conviction in this case as to both counts be vacated and the matter returned to the trial court with directions for a new trial.

Dated this 30th day of March, 2012.

Respectfully submitted,

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By: _____
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## Rule 809.19(12)(f) and (13)(f) Certification

Glen B. Kulkoski, attorney of record for the appellant in this matter, hereby certifies that the text of the electronically filed brief and appendix in this case is identical to the text of the paper copy of the brief and appendix.

Dated this 30th day of March, 2012.

Carr, Kulkoski & Stuller, S.C.
Attorneys for Defendant-Appellant

By___/s/_____
Glen B. Kulkoski

## Form and Length Certification

I hereby certify that this Brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a Brief and Appendix produced with a proportional serif font. The length of this brief is 5,351 words.

Dated this 30th day of March, 2012.

Carr, Kulkoski & Stuller, S.C.
Attorneys for Defendant-Appellant

By___/s/_____
Glen B. Kulkoski