STATE OF WISCONSIN, COURT OF APPEALS, DISTRICT II

For Official Use

State of Wisconsin)
Plaintiff ,)
)
(party designation) Plaintiff- Respondent)
)
-vs-)
)
Nicholas M. Gimino)
Defendant ,)
)
(party designation) Defendant-Appellant)

Brief Cover

Case No. 2012-AP-1498 CR

ON APPEAL FROM THE CIRCUIT COURT FOR Racine COUNTY,

THE HONORABLE (name of Judge) Stephen A. Simanek and Eugene A. Gasiorkiewicz, PRESIDIN

BRIEF OF Nicholas M. Gimino, Defendant-Appellant *

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II. Did the court err by denying Mr. Gimino's post-conviction request for a new trial because the District Attorney failed to disclose the content of Dr. Saunders testimony to the defense prior to trial?

III. Did the court err by denying Mr. Gimino's post-conviction motion request for a new trial because his trial counsel was ineffective?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary in this case. Not recommended for publication.

FACTS

1. STATEMENT OF THE CASE

This is an appeal from a final order entered on June 20, 2012, in the circuit court for Racine, the Honorable Eugene A. Gasiorkiewicz presiding. The order denied Mr.

Gimino's post-conviction motion which asked the court to vacate the Judgment of Conviction in case number 09-CF-1492, or in the alternative grant him a new trial. Specifically, Mr. Gimino, in his post-conviction motion, argued that the court erred by allowing Dr. Saunders to testify on issues not previously disclosed to the defense; the prosecutor made impermissible comments during closing; there was insufficient evidence in the record to support the convictions; and Mr. Gimino's trial counsel was ineffective.

2. STATEMENT OF THE FACTS

On the evening of October 11, 2009, Mr. Gimino placed his daughter B.G., (DOB 10/23/06) in a go-kart at his residence in Union Grove, WI. (R1:1-2) (App. 101). Mr. Gimino drove the go-kart on a private road in a condominium development. (R1:2) (App. 102). While Mr. Gimino was driving, his daughter fell out of the go-kart. (R1:1-2)(App. 101-102). Mr. Gimino stated he was going about 10 MPH when the accident occurred. (R1:2) (App. 102). Mr. Gimino immediately took his daughter inside his residence and cleaned her wounds including treating them with an antiseptic. (R.53:93:1-3)(App. 195).

Shortly after the accident, Mr. Gimino called Tamara Varebrooks. (R1:1) (App. 101). Varebrooks is the aunt of Carrie Willms, B.G.'s mother. (R1:1) (App. 101). Mr. Gimino did not call Ms. Willms because there were valid restraining orders between Gimino and Willms in effect on October 11, 2009. (R.53:26:15-20)(App. 128). Mr. Gimino informed Varebrooks that B.G. had been injured. (R1:1) (App. 101). Mr. Gimino told Ms. Varebrook that B.G. was injured when she feel off her bike. (R1:1) (App. 101).

After the accident, B.G. stayed with Mr. Gimino at his residence until the next morning. During the night Mr. Gimino woke B.G. every couple of hours to make sure she was not exhibiting signs of more serious injuries, such as a concussion. (R.53:93:7-12)(App. 195).

Wallace Kissh, Ms. Willms' boyfriend at the time of the accident, picked B.G. up from Mr. Gimino's residence on the morning of October 12, 2009. (R.53:11:21-23)(App. 113). Mr. Gimino told Mr. Kissh, when Kissh picked up B.G. that morning, that B.G. was injured riding the go-cart. (R:13:Exhibit 2, recorded interview of Gimino). Mr. Kissh then drove B.G. 25 minutes back to Ms. Willms' house. (R.53:55:17-19)(App. 157). Ms. Willms and Mr. Kissh then took B.G. to Children's Hospital in Milwaukee, WI.

(R.53:56:19-22)(App. 158). Ms. Willms testified that she spoke with Mr. Gimino over the phone and that he admitted he lied to her aunt about how the accident happened. (R.53:27:5-6)(App. 129). She also claimed he admitted that he was going "too fast" in the go-cart. (R.53:27:9-10)(App. 129).

B.G. was treated by Dr. Mary Saunders at Children's Hospital. (R.53:72:7-12)(App.174). Dr. Saunders determined from x-rays that there was no fracture of B.G.'s ankle. (R.53:78:16-21)(App. 180). Dr. Saunders did not observe any symptoms of concussion or internal injuries. (R.53:78:7-9)(App. 180). Dr. Saunders diagnosed B.G.'s injuries as abrasions or road rash on her left side, "one on her flank, one on her thigh, her shin and also the lower extremity over her ankle as well." (R.53: 61:9-12)(App. 163). Dr. Saunders's testified that for B.G.'s types of injuries the main risk of additional harm was infection. (R.53:82:7-18)(App. 184). No infection was observed at the time of treatment. (R.53:75:11-17)(App. 177). B.G. was discharged from the hospital after her wounds were again cleaned and dressed. (R.53:73:21-25,74:1-15)(App. 175-176). According to Dr. Saunders, the hospital did administer Roxicet, a narcotic pain medication, to B.G. during the course of her

treatment. (R.53:63:14-19)(App. 165). This medication was specifically administered just prior to re-cleaning the road rash. (R.53:84:23-25)(App. 186).

On November 11, 2009, Mr. Gimino was charged with two counts of child abuse in a criminal complaint: one count of Physical Abuse of a Child: Recklessly Causing Bodily Harm in violation of §948.03(3) (b)(count 1); and one count of Neglecting a Child: Bodily Harm in violation of §948.21(1) (b)(count 2). (R:1)(App. 101-102). On February 9, 2012, the State amended the information to add a second count of Physical Abuse of a Child; Recklessly Causing Bodily Harm (count 3). (R:3)(App. 238-239).

On March 11, 2010, the court conducted an "other acts" hearing on the motion of the State. (R:50)(App. 240-269). At the hearing the court denied the State's request to have neighbors of Mr. Gimino testify to Mr. Gimino's previous "reckless" driving. (R.50:26:9-12) (App. 265). Contrary to facts asserted in the criminal complaint the court determined neither of the witnesses could positively identify, "who may have on other occasions operated a vehicle recklessly or carelessly." (R.50:24:7-11) (App. 263).

On March 30, 2011, the court held a Miranda-Goodchild hearing. (R.52)(App. 270-300). The hearing surrounded 2 recorded conversations (one a telephone call(Exhibit 1), the other an in person interview(Exhibit 2)) between Mr. Gimino and Investigator Jesse Lewis of the Racine County Sheriff's Department regarding the accident. (R.52:9:13-17) (App. 293). The trial court determined neither interview was an in custody interview therefore, Miranda did not apply. (R.52:24:14-21) (App. 293). In addition, the trial court determined that the statements were voluntary so they were both admitted into evidence at trial. (R.52:27:18-20) (App. 296). Written transcriptions of the two recordings were never entered into evidence.

A court trial was held on March 31, 2010. (R.53)(App. 103-237). Prior to the evidence portion of the trial, the court expressed concern that counts 1 and 3 were indistinguishable. (R.53:3:22-25,4:1-3)(App. 105-106). However, the defense did not object and the trial continued on all three counts.

At trial, the State presented several witnesses in support of their case: Ms. Willms (who testified about a statement Mr. Gimino made to her over the phone and B.G.'s injuries); Tamara Varebrook (who testified about the

initial phone call she receive from Mr. Gimino on the night of the accident); Wallace Kissh (who was not listed on the State's original witness list, testified about his pick-up of B.G. from Mr. Gimino's residence the morning after the accident); Dr. Mary Saunders (the treating physician at Children's Hospital, who testified about the diagnosis and treatment of B.G.'s injuries at Children's Hospital); and Investigator Jesse Lewis (who testified about the interview with Mr. Gimino and his viewing of the go-kart). (R.53:10-99)(App. 112-201). No witnesses were called by the defense, although the 2 recorded statements he gave to Investigator Lewis were admitted into evidence. (R.53:3:10-11) (App. 105). Mr. Gimino was convicted on two counts of the Physical Abuse of a Child: Recklessly Causing Bodily Harm (count 1 and count 3 of the amended information). (R.23)(App. 301-303) Count 2 (Intentional neglect) was dismissed. (R.24)(App.304). On May 4, 2010, he was placed on 3 years of probation and given a withheld sentence.(R.23:1-3)(App.301-303). Eventually, Mr. Gimino's probation was revoked and he was sentenced to 3.5 years prison (1.5 initial confinement and 2 on extended supervision) on count 1 and 2 years prison (1 IC and 1ES) consecutive to count 1 on count 3 on April 11, 2011. (R.31)(App. 305-306).

Mr. Gimino filed a post-conviction motion alleging: 1) The trial court erred by allowing Dr. Saunders to testify about subjects not previously disclosed to the defense; 2) The prosecutor included false statements in the criminal complaint; 3) Insufficient evidence to support the convictions of Mr. Gimino; and 4) Ineffective assistance of trial counsel. (R.36)(App. 307-323). An evidentiary *Machner* hearing was conducted by Judge Gasiorkiewicz on June 4, 2012. (R.57)(App. 324-401). Attorney Paul Rifelj, trial counsel, and Mr. Gimino testified. (R.57:5-36)(App. 328-369). The court denied the post-conviction in a written decision issued on June 20, 2012. (R.41)(App. 402-409).

ARGUMENT

I. There was insufficient evidence to convict Mr. Gimino on two counts of Physical Abuse of a Child: Recklessly Causing Bodily Harm.

A. STANDARD OF REVIEW

When analyzing the sufficiency of evidence for a conviction, the evidence is viewed in the light most favorable to the State. *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). The Wisconsin Supreme Court has established the standard of review for sufficiency of evidence claims, "The appellate court after

viewing the evidence in a light most favorable to the State must determine that the conviction is so lacking in probative value and force that no trier of fact, acting reasonably could have found guilt beyond a reasonable doubt." *State v. Watkins*, 2002 WI 101, ¶68, 255 Wis.2d 265, 297, 647 N.W.2d 244 (Wis., 2002) Quoting *Poellinger at 507*.

B. ARGUMENT

1.Count 1

No trier of fact could have reasonably convicted Mr. Gimino of counts 1 and 3 of the amended information. As the Wisconsin Supreme Court ruled one should view the evidence, in the light most favorable to the State, to determine if the convictions are supported. A good first step in analyzing sufficiency of evidence claims is to look at the Wisconsin Jury Instructions for the convicted offenses. Next, one must determine when in looking at the elements of the offense if the evidence in a light most favorable to the state supports the conviction. If the evidence, "is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt" the conviction should be reversed. *Poellinger* at 507.

The elements of Physical Abuse of a Child: Recklessly Causing Bodily Harm are stated in Wisconsin JI Criminal 2112. There are three elements to this crime, one of which is that the victim was under the age of 18. Mr. Gimino concedes that this element is not in dispute. The Jury Instructions lists two additional elements:

> "1) The defendant caused bodily harm to victim. "Bodily Harm" means physical pain or injury, illness, or any impairment of physical condition; and
>
> 2) The defendant recklessly caused the bodily harm. This requires that the defendant's conduct created a situation of unreasonable risk of harm to victim and demonstrated a conscious disregard for the safety of victim.
>
> In determining whether the conduct created an unreasonable risk of harm and showed a conscious disregard for the safety of victim, you should consider all the factors relating to the conduct. These include the following: what the defendant was doing; why he was doing it; how dangerous the conduct was; how obvious the danger was; and whether the conduct showed any regard for the safety of victim."

In the instant case, the facts most favorable to the State regarding count 1, of the amended information are: Mr. Gimino placed B.G. in the go-kart, while Mr. Gimino was going "too fast" around a corner B.G. fell out of the go-kart, she was not wearing any protective gear, she suffered bodily harm (road rash and presumably pain) as a result of that fall. Mr. Gimino told Investigator Lewis that he was going about 10 MPH when the accident occurred. (R.1)(App.

102). According to Ms. Willms, Mr. Gimino's estranged girlfriend, Mr. Gimino admitted over the phone he was driving the go-kart "too fast." (R.1)(App. 102). Additionally, Dr. Saunders testified, over objection, that the injuries were a result of a fall at a "high rate of speed". (R.53:67:1-12)(App. 169). Dr. Saunders did not quantify the phrase "high rate of speed"; however, she did elaborate that it would be faster than the speed of a bicycle. (R.53:66:21-25)(App. 168). Thus, in a light most favorable to the State he was going "too fast" when he drove the go-kart.

In a light most favorable to the State Mr. Gimino was driving "too fast"; however, no evidence was presented at trial which suggests that B.G. fell out of the go-kart because of the speed Mr. Gimino was driving. Thus, when viewed in the light most favorable to the State, there is insufficient evidence to support a finding that Mr. Gimino caused B.G., "bodily harm" (element 1). The post-conviction court erroneously stated in its decision that counsel did not challenge that Mr. Gimino's actions caused bodily harm to the child victim. (R.41:6)(App. 407). This issue was raised by post-conviction counsel in the post-conviction motion. (R:36:9)(App. 315).

The record is unclear why or how B.G., fell out of the go-kart. In other words, there is no evidence that Mr. Gimino's actions caused her to fall out of the go-kart. Mr. Gimino concedes he drove the go-kart with B.G. in the right hand seat of the go-kart; however, he rejects that his driving was a significant factor in causing B.G. to fall out of the go-kart. The first element of the crime requires a causal nexus between Mr. Gimino's actions and the bodily harm. For count 1 that nexus has not been made; therefore, the first element of the crime was not proven. Thus, the conviction is not reasonable.

Assuming *arguendo* element 1 has been proven, there is insufficient evidence to support a finding that Mr. Gimino acted recklessly (element 2). To be reckless Mr. Gimino's conduct must have created a "situation of unreasonable risk of harm and conscious disregard of safety of B.G.". Jury Instruction 2112, suggests five questions the trier of fact should consider when determining whether Mr. Gimino's conduct was reckless.

An analysis of the questions set forth in the Jury Instruction to aid in determining "recklessness" supports the determination that Mr. Gimino was not reckless.

What was the Gimino doing and why? Mr. Gimino took his young daughter on a ride, on a private roadway in his go-kart. From past experience, Mr. Gimino believed his daughter enjoyed it and would again have fun. There is no Wisconsin law which prohibits placing your child in a go-kart and driving with them. Additionally, there is no law which requires a helmet or other protective gear be placed on anyone in a go-kart. Finally, the actions of Mr. Gimino were not malicious or punitive in intent. None of Mr. Gimino's actions demonstrate an unreasonable risk of harm or conscious disregard for safety for B.G.

How dangerous was the conduct? Driving a go-kart, like any type of driving, is arguably a dangerous activity. Mr. Gimino concedes B.G., was injured during the go-kart ride; however, many everyday actions such as climbing the monkey bars at a playground, driving in a car, riding a bike, are dangerous activities. The real question is: Is riding in a go-kart with an almost three year old unreasonably dangerous? It was unclear if B.G. was seat belted into the go-kart before the go-kart ride. According to Ms. Willms, Mr. Gimino told her he put the belt on. (R.53:30:19-22)(App. 132). That being said, it is undisputed that B.G. fell from the go-kart. Even in a light most favorable to

the State, the facts indicate that there was no unreasonable risk of harm to B.G. Arguably, it may be negligent to put your child in a go-kart and drive around, but it is not reckless.

How obvious the danger was? The danger was not obvious. The trial record does not indicate any prior accidents with B.G. in the go-kart. Mr. Gimino concedes that the go-kart, as the trial and post-conviction courts point out, had a roll bar and seat belts; however, during none of the previous rides were either B.G., or her older brother injured. Moreover, cars have similar safety features and no reasonable person could claim that placing your kid in a car presents an unreasonable risk of harm to them; despite the fact that car crashes and severe injuries are splashed across news headlines everyday across the country. Once again, even in a light most favorable to the State, no reasonable juror could determine the danger was so obvious Mr. Gimino was reckless by consciously ignoring the dangers.

Whether the conduct showed any regard for the safety of the victim. Mr. Gimino told Officer Lewis he believed he put the seatbelt on B.G. While it is obvious that she fell out of the go-kart, this fact does not prove that Mr. Gimino

failed to put the seat belt on B.G. It is possible that B.G. wiggled out of the seat belt or simply released the belt. It is undisputed that B.G. did not have a helmet or any other protective gear on when she went for the ride; however, there was no evidence presented that if extra protective equipment, such as a helmet, was put on B.G. that her injuries would have been less significant. Ms. Willms' testified that Mr. Gimino admitted he was driving "too fast". So, arguably he was not showing regard for B.G.'s safety by the speed he was driving. In a light most favorable to the State, Mr. Gimino was driving "too fast"; however, he did show **some** regard for the safety of B.G. by placing a seatbelt on her. The jury instruction makes the trier of fact determine if Mr. Gimino showed any regard for B.G.'s safety, which he did. Therefore, element 2 for count one was not supported and no reasonable juror could have found it to be proven beyond a reasonable doubt.

The post-conviction court points out that the trial court based the conviction on count 1 on Mr. Gimino's testimony, the physical make up of the go-cart, the path of travel, lack of helmet or safety belt restraint, and Mr. Gimino's driving. The post-conviction court writes that all of these factors led the trial court to conclude, "that the

defendant's actions in maneuvering the go-cart with an unrestrained child did, in fact, result in bodily harm – road rash." (R.41:60 (App. 407). The trial court concluded that B.G. was on Mr. Gimino's lap just in the go-kart and because of the speed he was travelling at B.G. was "ejected". (R.53:125:21-25-126:1-2)(App. 227-228).

No evidence was presented at trial to support this conclusion. In fact, the only evidence regarding Mr. Gimino's driving were his statement (10MPH), Ms. Willms' claim that Mr. Gimino admitted he was going "too fast", and Dr. Saunders' nebulous statement about the injuries being constituent with an accident at a "high rate of speed". There was no accident reconstruction testimony. Therefore, the trial court's conclusions that Mr. Gimino was driving with B.G. on his lap was pure speculation. Mr. Gimino concedes that a trier of fact can use their common sense when determining guilt but they are not permitted to invent evidence and rely on facts not in evidence. This lack of evidence and the evidence actually presented at trial indicate that Mr. Gimino's actions were not reckless.

In comparison to Mr. Gimino's situation, Wisconsin Courts have ruled on several cases where the burdens of proof for the 2nd element of Wis. Stats. §948.03(3) charges

have been challenged. Subsection 3 of this statute has three different subparts distinguished by the levels of punishment for each violation dependant on the risk of harm and the harm produced; however, all three subparts share the common 2nd element "recklessly caused harm to the child." The appellate challenges specifically raised the question of whether the behavior of the defendant was criminally reckless. In other words, did the defendant's conduct demonstrate an unreasonable risk and conscious disregard of safety of the victim element (the common 2nd element to all three subparts of §938.03(3)).

The Court has said that slapping a three month old in the chest with some degree of force which may have caused the child's death satisfies the element. (Conviction on §948.03(3)(a) recklessly causing great bodily harm) *State v. Owen*, 202 Wis. 2d 620, 635, 551N.W.2d 50, 57 (Wis. App. 1996). When a grown man lays across an 8 ½ year old boy in a hot, un-air-conditioned room for up to 2 hours and kills the boy that satisfies the reckless element. (Conviction on §948.03(3)(a) recklessly causing great bodily harm) *State v. Hemphill*, 2006 WI App 185, 722 N.W.2d 393. Hitting a five year old with a weightlifting belt 5 times with sufficient force to leave bruising 3 days later is

conscious disregard for safety. (Conviction on §948.03(3)(b)) *State v. Williams*, 2006 WI App, 212, 723 N.W.2d 719. Shaking a 3-year old to death also demonstrates a conscious disregard for safety. (Conviction on §948.03(3)(a) recklessly causing great bodily harm) *State v. Rundle*, 166 Wis. 2d 715, 480 N.W.2d 518 (Wis. App. 1992). The common thread through all of these upheld convictions is that the convicted person caused the injury to the victim by actually physically contacting them. In the instant case there is no suggestion that Mr. Gimino physically contacted B.G. which her to fall from the go-kart. 3/31/10, 32:20-21. Therefore, his case is significantly divergent from those listed above where the convictions were upheld.

The lack of causation coupled with the significant disparity in the fact patterns of this case with those in which the convictions were upheld because reckless conduct occurred, indicate that Mr. Gimino was wrongly convicted in this case. There is insufficient evidence to prove elements 1 and 2 of JI 2112, so the conviction on count 1 should be reversed.

2. Count 3

A similar result is reached by performing the same analysis with count 3. The State argued and the trial court ruled that Mr. Gimino was reckless because he did not "respond properly after the accident occurred." (R.53:129:14-16)(App. 131). Basically, the State argued that without immediate medical attention Mr. Gimino could not adequately clean the wounds of B.G. and he was unable to provide her narcotic medications to ease her pain. (R.53:113:1-13)(App. 215). The State continued this line of argument at the *Machner* hearing when they stated, "….the bodily harm was the continued pain that the child felt by the delay in the care that was provided." (R.57: 58:19-21)(App. 391).

Mr. Gimino disputes that the "continuing pain" constitutes a bodily harm separate from that caused in count 1. Mr. Gimino concedes that B.G. was in pain immediately following the accident. However, Mr. Gimino was found guilty of causing this bodily harm in count 1. In other words, the conviction on count 3 is multiplicious because the bodily harm is identical to that in count 1. Mr. Gimino argues that he cannot be convicted of causing the same harm twice.

Even if Mr. Gimino did cause "continuing pain" to B.G., there is no evidence in the record that the medical treatment she received at Children's Hospital alleviated this "continued pain." In its post-conviction decision, the court stated that B.G. did not receive "competent medical attention" which caused "continuing pain" to B.G. as justification for upholding the conviction on count 3. (R.41:6)(App. 407). The court also mentions independent observations of continuation of pain which served as the basis for conviction. (R.41:6)(App. 407). The post-conviction and trial courts failed to point to any evidence that the pain would have been or was alleviated at the hospital. Put another way, there is no evidence that had Mr. Gimino taken B.G. directly to the hospital following the accident the "continuing pain", which served as the basis for the conviction in count 3, would not have occurred.

According to the record, Dr. Saunders testified that infection and the check for other injuries were the reasons why you should take a child into the hospital after an accident like the one in this case. (R.53:82:7-18)(App. 184). There is no mention of medical procedures performed at Children's Hospital to alleviate B.G.'s "continuing

pain." In fact, Dr. Saunders testified that the only pain medication administered to B.G. occurred just prior to the cleaning of B.G.'s injuries. (R.53:84:23-25)(App. 186). The record is devoid of any factual basis for the position that Mr. Gimino's action or in this case inaction caused B.G. bodily harm in the form of "continuing pain".

Mr. Gimino contends that he was convicted not because of he caused "continuing pain" as stated by the courts, but he was actually convicted for not obtaining "competent medical attention" for B.G. He makes this argument because it is the only explanation for his conviction because there is no evidence that his action or inaction did not cause B.G. additional bodily harm. Mr. Gimino's argument is bolstered by the post-conviction court's decision. The court quoted the trial courts summary regarding the decision to convict on count 3, "But while it's quite clear to me, and I think it would be quite clear to anyone who is a parent, that when the observation is made of injuries to this extent, something has to be done. Seeking medical attention." (R.41:4)(App. 405). This statement is insufficient to demonstrate that Mr. Gimino's action caused bodily harm to B.G. The first element of Reckless Child

Abuse (cause bodily harm), was not proven and no reasonable juror could find that element to be proven.

There is no basis for a conviction on count 3 because Mr. Gimino did not cause bodily harm to B.G. because the "continuing pain" is the same pain for which Mr. Gimino was convicted on count 1. More importantly the record is devoid that B.G.'s "continuing pain" stopped after she was taken to the hospital.

Assuming *arguendo* that element one was proven there is no indication Mr. Gimino acted recklessly. Mr. Gimino will concede that he may have been negligent by not taking B.G. to the hospital after the accident. However, he refuses to agree that his actions demonstrated a conscious disregard for her safety or that they created an unreasonable risk of harm to her.

In fact, the evidence from the case indicates he addressed the most dangerous harms to B.G. with the care he provided her. According to the Dr. Saunders, B.G. was given a thorough medical exam at Children's Hospital. (R.53:72:10-12)(App. 174). The results of this exam demonstrated that there were no fractures, evidence of infection or any internal brain or other injury. (R.53:74-78)(App. 176-180). The Doctor further testified that

infection and the potential for other injuries were why it is important to bring B.G. to the hospital after the accident. (R.53:82:7-18)(App. 184). The post-conviction court jumps to the conclusion that the first aid provided by Mr. Gimino was insufficient because, "….Dr. Saunders would not have re-debrided the wound areas…to ward off infection" if the wounds were treated properly; however, this statement ignores the evidence in the case. Dr. Saunders testified there was no sign of infection. While Mr. Gimino's decision may not be what a reasonable parent would have done, that is the standard for negligent behavior not reckless.

As Mr. Gimino told Investigator Lewis, with the benefit of hindsight, he should have taken her to the hospital. (R:13) He didn't because he addressed B.G.'s injuries and made a decision based on his training, albeit limited, and his prerogative as a parent. (R.13) His behavior while arguably negligent did not demonstrate a conscious disregard for B.G.'s safety. To charge him with a felony based on a delay in seeking medical attention is not supported by the facts of this case.

The State has created a slippery slope in this case. How long of a delay in not seeking medical attention is

"reckless"? In this case, 14 hours, the approximate time Mr. Gimino did not take B.G. to the hospital after the accident was a felonious time to wait; however, apparently the hour and a half, the time it took Mr. Kissh to drive B.G. back to Ms. Willms's residence plus the time it took them to drive to Milwaukee, is okay. The State has invited an arbitrary standard to enter into the criminal charging process. More importantly, the conviction on this count is not supported by the evidence in the record.

The ultimate questions to determine guilt on count 3 are: Was B.G. bodily harmed by the actions of Mr. Gimino?; and Was he reckless in doing so? There is no evidence that the delay in seeking medical treatment or more properly that seeking medical treatment would have prevented "continuing pain". Thus, there is no evidence Mr. Gimino caused bodily harm to B.G. Additionally, Mr. Gimino administered first aid to B.G. which according to Dr. Saunders prevented any infection from setting in to the wound. He checked to determine that she was not concussed by observing her closely throughout the night. He observed her walking, so he concluded she had no broken bones in her lower extremities. Dr. Saunders medical exam supported these conclusions. Therefore, there is no factual basis in

the record for the conclusion the treatment provided by the defendant was inadequate. As there is no causation of bodily harm and no conscious disregard for B.G.'s safety, no reasonable trier of fact could convict on count 3. Thus, the conviction should be reversed.

II. The State violated, without good cause, discovery laws by failing to disclose relevant material regarding Dr. Saunders's testimony prior to trial which prejudiced Mr. Gimino.

A. STANDARD OF REVIEW

Alleged violations of discovery statutes specifically those found in Wis. Stats. §971.23(1) are reviewed independently but benefitting from the trial courts analysis. *State v. Harris*, 2008 WI 15, ¶15, 745 N.W.2d 397, 307 Wis. 2d 555 (Wis. 2008). The alleged violation is evaluated in three steps:

1) Did the prosecutor violate the requirements of the statute?
2) Was good cause shown for making a required disclosure; and
3) If evidence that should have been suppressed was erroneously admitted, was the admission harmless.

State v. Rice, 307 Wis. 2d 335, ¶14, 743 N.W.2d 517, 521 (Ct. App. 2007). The State is also required to disclose any discovery the prosecutor should reasonably possess with the exercise of due diligence. *State v. De Lao*, 246 Wis. 2d 304, ¶22, 629 N.W.2d 825, (2002). Wisconsin Stat. §971.23(7m) requires the trial court to exclude evidence that is not produced pursuant to a discovery demand unless "good cause is shown for failure to comply." This burden clearly rests with the State. *State v. Martinez*, 166 Wis. 2d 250, 256-57, 479 N.W.2d 224 (Ct. App. 1991).

B. ARGUMENT

In this case the court allowed Dr. Saunders to testify regarding two subjects: 1) The medication administered to B.G., at Children's hospital; and 2)The mechanics of the go-kart accident. Additionally, Dr. Saunders testified that prior to testifying she, "…reviewed the chart and the diagram drawn by my physician assistant, Ginny Wagner, who saw her with me." (R.53:61:6-7)(App. 163). Mr. Gimino objected at trial to the admission of the testimony regarding medication and mechanics. (R.53: 64:1-25, 67:13-23)(App. 166, 169). He further contends that he was not provided the chart or the diagram drawn by the physician's assistant prior to trial by the District Attorney. The

trial court overruled the objections and allowed the testimony into the record. Mr. Gimino argues that the admission was erroneous and the failure to receive those documents caused prejudicial error to him.

The District Attorney's office is obligated by Wisconsin Statute §971.23(1)(e), and Wisconsin Case law to turn over to the defense within a reasonable time any relevant written or recorded statements of a named witness. *State v. Harris*, 2008 WI 15, 307 Wis. 2d 555, 745 N.W.2d 397. The DA's office did furnish some discovery regarding the testimony of Dr. Mary Saunders, B.G.'s treating physician at Children's Hospital, to the defense. Specifically, the State provided a redacted email between Dr. Saunders and ADA Martinez to the defense. Mr. Gimino obtained some medical records, which he provided to Investigator Lewis during his in person interview. (R.39). These documents were later given back to Mr. Gimino in the State's discovery packet. None of those records or anything else provided to the defense prior to trial mentioned anything regarding medications administered to B.G. while at Children's Hospital. In addition, the discovery materials did not include any information regarding Dr. Saunders's opinions on the mechanics of the go-kart

accident. The medical charts and diagram that Dr. Saunders reviewed prior to testifying were not provided in discovery at all.

Wisconsin Statutes are clear that the subject matter of any expert must be disclosed to the defendant at a "reasonable time" prior to trial. Wis. Stats. §971.23 and its subsections, list several items that must be disclosed to the defense by the District Attorney. Subsection (1)(e) states,

> "…if an expert does not prepare a report or statement, a written summary of the expert's findings or the subject matter of his or her testimony…that the district attorney intends to offer in evidence at trial."

Dr. Saunders was an expert witness. Thus, the district attorney was required to disclose to the defense documentation of the subject matter Dr. Saunders was going to testify to about at trial. Dr. Saunders testified about the treatment of the injuries (including the medication administered to B.G.), the painful nature of those injuries, the mechanics of the accident itself, and the possible injuries that can result from these types of accidents. The fact that B.G., was given a narcotic medication at Children's Hospital and Dr. Saunders' opinion regarding the speed of the go-cart at the time of the accident was part of the subject matter of Dr. Saunders

testimony. Therefore, it was required to be turned over to defense, "within a reasonable time before trial". Wis. Stats. §971.23. Mr. Gimino argues that the State violated Wisconsin Statutes by failing to turn over this crucial information prior to trial.

Mr. Gimino concedes that a violation of Wis. Stat. §971.23, does not automatically entitle him to a new trial. *State v. Ruiz*, 118 Wis. 2d 177, 199-200, 347 N.W.2d 352 (1984); *Kutchera v. State*, 69 Wis. 2d 534, 544-45, 230 N.W.2d 750 (1975). The State is allowed to show that they had good cause for violating the statutes. The State did not file a response to Mr. Gimino's post-conviction motion. In addition, they did not provide any evidence to support their violation of the discovery statute. Thus, Mr. Gimino submits the State has conceded that there is no good cause for the violation.

Finally, Mr. Gimino is required to show that the admission of the evidence prejudiced him. *Ruiz*, 118 Wis. 2d at 199. In the instant case, the admission of the undisclosed evidence resulted in Mr. Gimino's convictions.

The transcripts show the State's theory of the case, "My intention was putting her actually in the cart without a helmet and without making sure she's buckled up is both

neglect and physical abuse of a child (Counts 1 and 2). Not taking her to the physician a physical abuse of a child as well (Count 3).” (Parenthetical added) (R.53:4-4-8)(App. 106). After Dr. Saunders testimony, the State’s theory on count 3 actually evolved to Mr. Gimino was reckless because he did not get B.G. pain medication from a doctor and that is physical abuse because it prolonged B.G.’s pain.

This shift in theory is demonstrated by the District Attorney argument against the defense’s summary judgment motion, “The combination of drugs that the doctor testified she gave her includes Oxycotin, which is synthetic heroin. That kid was in a lot of pain, and probably, you know, he could have gotten that for her the night before if he had just been man enough to take her to the hospital….” (R.53:101:3-8)(App. 203). The State again refers to the medication given to B.G. at the hospital in its closing argument, “The doctor testified that these kinds of injuries are extremely painful, and in fact, the next day this child received combination of Oxycodone(sic) and Motrin prescription medication to help her manage her pain, so he cause her to suffer that pain all night long.” (R.53:107:2-7)(App. 209). The State again referred to the pain medications later in its closing argument, “Well,

unless he gave her some Oxycotin, Motrin isn't going to do it. That's what the doctor testified to. These are very painful injuries, and he caused them, and he continued to cause them when he did not give her medical help." (R.53:113:2-7(App.215). At trial the state clearly emphasized the importance of the medication administered to B.G. in its arguments to the court.

The testimony regarding the medication administered was essential for the State's case on count 3. When addressing count 3 the judge stated, "…Again, the three elements are that he caused bodily harm. Here the bodily harm being **continued pain**. The child remained in pain throughout that evening, based on the testimony." (emphasis added)(R.53:130:11-18)(App. 232). And again later in his decision, "It (failure to seek medical attention) shows a conscious disregard for the well-being and safety of the child, and the other two elements, clearly she's under eighteen and **clearly continued to suffer pain until the significant narcotic medication was provided to her the following day.**" (Parenthetical comment and emphasis added).(R.53:132:3-8)(App. 234). Mr. Gimino argues that the inadmissible evidence regarding the medication administered was used as the basis to convict him on count 3.

At the *Machner* hearing the State downplayed the significance of the administration of medication. The State stated it was not a big factor because the trial judge only mentioned it one time in his decision. (R.57:53:20-23)(App. 386). However, Attorney Rifelj the only person who was at the actual trial stated he thought that the trial court concluded that for the element of harm on Count 3 that the court did, "rely on the denial of pain medication—or not the denial, but the delay in getting pain medication." (R.57:29:9-12)(App. 362). Despite the fact that the court mentioned the medication only one time, an actual participant in the trial thought it was the basis for the conviction on count 3. This demonstrates the importance of the evidence regarding the medication administered to B.G., despite the State's and the post-conviction court's arguments to the contrary. Thus, the erroneous admission of that evidence was prejudicial to Mr. Gimino.

The evidence regarding Dr. Saunders' testimony about the mechanics of the accident, similarly, should not have been admitted as this portion of her testimony was not disclosed to the defense prior to trial. Over defense counsel objection, Dr. Saunders was allowed to testify regarding "the mechanism of the injury". (R.53:66:21-

25,67:1-12)(App. 168, 169). Counsel objected because of the lack of foundation of the doctor's expertise in "forensic work". (R.53:67:13-23)(App. 169). The court overruled the objection stating, "….the mechanism of how the bodily harm occurred, I think is relevant. Overruled" (R.53: 67:25-68:1-2)(App. 169, 170). Mr. Gimino concedes that the trial court was correct that this evidence was relevant; however, the proper foundation for Dr. Saunders's "expertise" had not been established. Moreover, the State did not disclose to the defense, that Dr. Saunders would be testifying about her opinions regarding the "mechanism of the injury". Therefore, the testimony should not have been permitted because the State violated discovery laws by not turning this information to the defense at a reasonable time before trial.

Again the state did not argue they had good cause for violating the discovery statute, so the final question is was Mr. Gimino prejudiced by the admission of Dr. Saunders's opinion regarding the mechanics of the accident.

The plain answer is yes. Both the trial court and the post-conviction court refer to Dr. Saunders's testimony regarding the speed of the accident. Specifically, both courts used the "high rate of speed" testimony to convict

and uphold the conviction of Mr. Gimino on count 1. R.53:106:20-25)(App. 108) and (R.41:6)(App. 407). The only other evidence of speed was provided by Mr. Gimino, who said he was going 10 MPH, and Ms. Willms' who claimed Mr. Gimino admitted he was "going too fast." (R.53:88:15-17, 27:9-10)(App. 190, 129). Dr. Saunders's erroneously admitted testimony is the extra weight that the court used to determine Mr. Gimino was reckless in the operation of the go-kart.

Specifically, the court found, "He was operating apparently fast enough that when he made a turn, the child was ejected from the go-cart." (R.53:125:4-6)(App. 227). The court also relies on some other factors to determine recklessness, but the court mentioned the speed of Mr. Gimino was going just prior to the accident numerous times. R.127:5-6, 11-12, 22-23)(App. 229). Therefore, the decision to admit that evidence prejudiced Mr. Gimino and as such, he is entitled to a new trial. *State v. De Lao*, 2002 WI 49 ¶65, 252 Wis. 2d 289, 643 N.W.2d 480.

III. Mr. Gimino's trial counsel was ineffective.

A. STANDARD OF REVIEW

An ineffective assistance of counsel claim is a mixed question of fact and law. *State v. Johnson*, 153 Wis. 2d

121, 127, 449 N.W.2d 845 (1990). The factual findings of the court will not be overturned unless clearly erroneous. *Johnson* at 128. In order for Mr. Gimino to demonstrate his trial counsel was ineffective, he must prove two things: (1) that trial counsel's performance was deficient; and (2) that "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). This two-prong test is reviewed independently without deference to the trial court. *Johnson* at 128.

B. ARGUMENT

Trial counsel was ineffective for several reasons: 1) Failed to call an accident reconstruction expert to testify about the mechanics of the accident; and 2) Failed to impeach Carrie Willms.

In this case the reckless causation of bodily harm was a key element for count 1. Therefore, the actual mechanics of the accident were essential to the State's case because if the accident occurred for a reason other than Mr. Gimino's reckless behavior he could not be convicted. Thus, it was essential that the circumstances of the accident be fully understood by the trier of fact.

As trial counsel noted at trial, Mr. Gimino and B.G. were the only witnesses to the accident. (R.53:100:9-

11)(App. 202). At the *Machner* hearing trial counsel testified that his strategy was to not put Mr. Gimino on the stand in order to avoid cross examination. (R.57:24:2-4)(App.390). Counsel could have called B.G., but she was not listed on the witness list so it is presumed he would not have her testify because of her young age at the time of the trial. Trial counsel was aware that at least Ms. Willms would be testifying that Mr. Gimino was going "too fast" because according to the criminal complaint that is what she claimed Mr. Gimino told her. This puts trial counsel on notice that Mr. Gimino's driving just prior to the accident would be an issue at trial. Trial counsel did not want to call Mr. Gimino or B.G. so the only other person that could verify Mr. Gimino's claim that he was only going 10 MPH would have been an accident re-constructionist. This expert would have been able to provide an un-biased reconstruction of the accident. Not to call or investigate this type of witness was deficient performance by trial counsel. The omission of this witness was prejudicial to Mr. Gimino.

The failure to provide an expert on the accident re-construction forced the court to rely on the testimony of the State's witnesses to determine if Mr. Gimino was

driving recklessly. Ms. Willms and Dr. Saunders provided the only evidence introduced at trial, albeit vague "too fast" and "going at a higher rate of speed" in support of conviction regarding Mr. Gimino's "reckless" driving of the go-kart. (R.53:27:9-10, 67:4-12)(App. 129, 169). The judge relied on this testimony in his decision to convict on count 1, "He was probably going too fast.", (R.53:124:12)(App. 226). "And then operating the vehicle, the go-kart, fast enough to cause the child, during the process of turning the vehicle, to be ejected from the vehicle." (R.53:127:5-7)(App. 229). Additionally, the court concocted its own version of the accident and placed B.G. on Mr. Gimino's lap which caused her to be ejected from the go-kart. (R.53:125:15-25-126:1)(App. 227-228). Moreover, the court, predictably, rejected Mr. Gimino's explanation that he was only going 10 MPH when the accident occurred because of his lack of credibility. (R.53:126:2-7)(App. 228). A reasonable attorney would have foreseen that Mr. Gimino's credibility was questionable because he admitted to lying to Ms. Varebrook. Therefore, a reasonable attorney would have determined that an alternate source, besides Mr. Gimino, for the mechanics of the accident must be presented at trial to show the actual events of the accident. As this witness was not called , the judge was forced to rely on

the State's witnesses to determine guilt on count 1 due to the lack of the expert witness, Mr. Gimino was prejudiced.

Counsel was also deficient for not impeaching or adequately cross-examining Ms. Willms. The Court of Appeals has previously ruled that failure to adequately impeach and cross examine key witnesses can be deficient performance by counsel. *See State v. Jeannie* 2005 WI App 183,¶¶ 10-12, 286 Wis. 2d 721, 732-33, (explaining that in cases that turn on witness credibility, it is "incumbent on counsel to present evidence to the jury tending to show that the State's two key witnesses should not be believed."); *see also State v. Thiel*, 2003WI 111, ¶ 46, 50, 264 Wis.2d 571, 665 N.W.2d 305 (concluding that it is objectively unreasonable when defense counsel does not pursue evidence to impeach key state witnesses). As stated above Ms. Willms' provided key evidence regarding the speed Mr. Gimino was travelling at when the accident occurred. Additionally, she provided evidence of the extent of B.G.'s injuries. Yet counsel decided not to impeach her testimony with prior inconsistent statements.

Ms. Willms made a significant change in her testimony from the preliminary hearing to the trial. At the

preliminary hearing ADA Martinez and Ms. Willms had the following exchange:

> Q: "Why didn't he (Mr. Gimino) take her (B.G.) to the hospital, did he tell you that?"
>
> A: No, he didn't.
>
> Q: Did you ask him?
>
> A: Yes.
>
> (R. 46:7:3-6)(App. 416)

At the trial a similar exchange takes place between ADA Martinez and Ms. Willms:

> Q: Okay, Did he tell you why he didn't take her to the hospital?
>
> A: Yes.
>
> Q: What did he say?
>
> A: He didn't think the injuries were that bad, and he didn't want to get in trouble.
>
> (R.53:30:3-8)(App. 132).

At the *Machner* hearing trial counsel explained that he didn't impeach Ms. Willms regarding this change in testimony because her answer at trial was basically in line with his trial strategy. (R.57:13:3-17)(App. 346). While trial counsel's assertions that her altered testimony was factually accurate, it misses one of the points of impeachment, which is "to discredit the veracity of a witness." *Black's law Dictionary* 7th Ed. In the instant case, Ms. Willms provided critical evidence for Mr.

Gimino's conviction on both count 1 and count 3, therefore, it was essential for counsel to mitigate her testimony by discrediting her reliability. The failure to impeach was deficient.

This deficiency prejudiced Mr. Gimino. Ms. Willms' testimony, the improperly admitted testimony of Dr. Saunders, and Mr. Gimino's own statement regarding the speed of the go-cart prior to the accident were the only evidence regarding his driving presented at trial. Thus, Ms. Willms was a key witness in the case against Mr. Gimino. Therefore, it was essential to discredit her. By failing to do this the court was able to rely on Ms. Willms testimony to determine Mr. Gimino was travelling too fast and was thus driving recklessly to justify his conviction on count 1. This is prejudicial.

As trial counsel was deficient by not investigating/calling an accident reconstruction expert, and by failing to impeach Ms. Willms. These deficiencies prejudiced Mr. Gimino. Therefore, trial counsel was ineffective.

CONCLUSION

For the above stated reasons Mr. Gimino requests that the Court of Appeals vacate the judgment of conviction in this case on counts 1 and 3, and order the circuit court to acquit Mr. Gimino on both counts. In the alternative, Mr. Gimino requests that the judgment of conviction be vacated and that the case be ordered back to the circuit court for a new trial.

September 17, 2012

_____
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CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c), Wis. Stats., for brief procedure using the following font: Monospaced font: 12 point font; double-spaced; 1.5-inch margin on the left side and 1-inch margins on the other three sides. The length of this brief is 40 pages.

I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief as per §809.19(12).

September 17, 2012

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