STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 2012AP1498-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NICHOLAS M. GIMINO,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR RACINE COUNTY, HONORABLE STEPHEN A. SIMANEK, PRESIDING AT TRIAL, THE HONORABLE EUGENE A. GASIORKIEWICZ, PRESIDING AT THE POSTCONVICTION STAGE

BRIEF OF PLAINTIFF-RESPONDENT

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BRIEF OF PLAINTIFF-RESPONDENT

ISSUES PRESENTED

1. Was the evidence sufficient for a rational trier of fact, here the trial court, to find Gimino guilty beyond a reasonable doubt of recklessly causing bodily injury to a child by: (Count 1) driving his two-year-old daughter in his go-cart unrestrained and unprotected, resulting in her being thrown from the go-cart and injured as he took a curve; and (Count 3) failing to seek

professional medical care for her injuries, causing her to suffer unnecessary additional pain and risking further serious injury, until others intervened the next day?

This was a trial to the court. The trial judge, as fact-finder, found beyond a reasonable doubt that Gimino recklessly caused bodily harm to a child, in violation of Wis. Stat. § 948.03(3)(b), as alleged in both Counts One and Three of the amended information.

2. Did the state violate Gimino's statutory right to discovery for not disclosing before trial that Dr. Saunders: (a) prescribed pain medication for the child; and (b) would render the opinion at trial that her "road rash" injuries could have been caused by a fall from a go-cart if it was going at a "higher rate of speed?" If so, was any discovery violation prejudicial to the defense?

The court on postconviction review concluded that the state properly disclosed Dr. Saunders' findings before trial and, even assuming a discovery violation, Gimino failed to request a continuance and suffered no prejudice.

3. Did Gimino meet his burden of proving that trial counsel's performance was both deficient and prejudicial for: (a) not hiring an accident reconstruction expert; and (b) not impeaching the child's mother at trial with her preliminary hearing testimony relating what Gimino told her about why he did not seek medical care for her daughter?

The trial court on postconviction review concluded that Gimino failed to meet his burden of proving deficient performance and prejudice in either respect.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The state requests neither oral argument nor publication. This case involves the application of firmly established principles of law to the facts presented.

STATEMENT OF THE CASE

Gimino appeals (42) from a judgment of conviction (31; A-Ap. 305-06) and from an order denying direct postconviction relief (41; A-Ap. 402-09), entered in the Circuit Court for Racine County, Honorable Stephen A. Simanek, presiding at trial, and the Honorable Eugene A. Gasiorkiewicz, presiding at the postconviction stage.

After a trial to the court held March 31, 2010, Racine County Circuit Judge Stephen A. Simanek found Gimino guilty of recklessly causing bodily harm to a child in violation of Wis. Stat. § 948.03(3)(b), as alleged at Counts One and Three of the amended information. Judge Simanek found Gimino not guilty of child neglect causing bodily harm, as alleged at Count Two of the amended information (53:123-32; A-Ap. 225-34).

Gimino filed a postconviction motion February 3, 2012, seeking a new trial based on alleged discovery violations with respect to state's witness Dr. Saunders, and based on the alleged ineffective assistance of trial counsel (36; A-Ap. 307-23). An evidentiary hearing on the motion, at which both trial counsel and Gimino testified, was held June 4, 2012 (57). The trial court issued a written Decision and Order denying the postconviction motion June 20, 2012 (41; A-Ap. 402-09). Gimino now appeals, challenging both the sufficiency of the evidence for Judge Simanek to find him guilty and the order issued by Judge Gasiorkiewicz denying his postconviction motion.

Additional relevant facts will be developed and discussed in the appropriate sections of the Argument to follow.

ARGUMENT

I. THE EVIDENCE WAS SUFFICIENT FOR A RATIONAL FACT-FINDER, HERE THE TRIAL JUDGE, TO FIND GIMINO GUILTY OF RECKLESSLY CAUSING BODILY HARM TO HIS TWO-YEAR-OLD DAUGHTER FOR: (A) (COUNT ONE) RIDNG HER AROUND IN HIS GO-CART UNPROTECTED AND UNRESTRAINED, CAUSING HER TO BE EJECTED AND INJURED AS HE TOOK A CURVE; AND (B) (COUNT THREE) FAILING TO SEEK PROFESSIONAL MEDICAL CARE FOR HER OBVIOUS INJURIES, CAUSING HER ADDITIONAL PAIN AND RISK OF FURTHER INJURY.

Gimino insists the trial judge could not rationally have found him guilty of Count One because there was insufficient proof he recklessly caused his two-year-old daughter's injuries by the operation of his go-cart with her in it; and could not rationally have found him guilty of Count Three because there was insufficient proof he recklessly caused additional pain and risk of further harm to his daughter when he decided not to seek professional medical care for her.

Gimino's challenges to the sufficiency of the evidence are without merit because the evidence of his guilt on both Counts One and Three was overwhelming. At the very least, it was sufficient for a rational trier of fact to find him guilty beyond a reasonable doubt.

A. The standard for review of a challenge to the sufficiency of the evidence to convict.

The standard for review of a challenge to the sufficiency of the evidence to convict was succinctly discussed by the supreme court in *State v. Poellinger*, 153 Wis. 2d 493, 451 N.W.2d 752 (1990):

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and 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. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis. 2d at 507 (citations omitted).

Stated another way: "[t]his court will only substitute its judgment for that of the trier of fact when the fact finder relied upon evidence that was inherently or patently incredible—that kind of evidence which conflicts with the laws of nature or with fully-established or conceded facts." *State v. Tarantino*, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990). Additionally, the trier of fact is the sole arbiter of the credibility of witnesses and alone is charged with the duty of weighing the evidence. *See State v. Poellinger*, 153 Wis. 2d at 506. *Also see State v. Hahn*, 221 Wis. 2d 670, 683, 586 N.W.2d 5 (Ct. App. 1998).

When more than one inference can reasonably be drawn from the evidence, the inference which supports the trier of fact's verdict must be the one followed on review. *See State v. Allbaugh*, 148 Wis. 2d 807, 809, 436 N.W.2d 898 (Ct. App. 1989). It is exclusively within the trier of fact's province to decide which evidence is worthy of

belief, which is not, and to resolve any conflicts in the evidence. *State v. Wyss*, 124 Wis. 2d 681, 693, 370 N.W.2d 745 (1985) (citation omitted).

The standard for review is the same whether the verdict is based on direct or circumstantial evidence. *State v. Poellinger*, 153 Wis. 2d at 503.

Under the *Poellinger* standard for review, this court may overturn the fact finder's verdict "only if the trier of fact could not possibly have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt." *State v. Watkins*, 2002 WI 101, ¶ 68, 255 Wis. 2d 265, 647 N.W.2d 244.

> It is vitally important to maintain this standard of review. An appellate court should not sit as a jury making findings of fact and applying the hypothesis of innocence rule de novo to the evidence presented at trial. *Poellinger*, 153 Wis. 2d at 505-06. "It is not the role of an appellate court to do that." *Id.* at 506.

Id. ¶ 77.

B. The elements of recklessly causing bodily harm to a child.

One who "recklessly causes bodily harm to a child" is guilty of physical abuse of a child, in violation of Wis. Stat. § 948.03(3)(b). The statutory definition of "recklessly" is: "conduct which creates a situation of unreasonable risk of harm to and demonstrates a conscious disregard for the safety of the child." Wis. Stat. § 948.03(1). The elements of this offense are the following:

(1) The defendant caused "bodily harm" to the victim. The definition of "bodily harm" is "physical pain or injury, illness, or any impairment of physical condition";

(2) The defendant "recklessly" caused that bodily harm. As noted immediately above, the conduct is reckless if it "created a situation of unreasonable risk of harm to [the victim] and demonstrated a conscious disregard for the safety of [the victim]." In determining whether the conduct was reckless, the fact-finder should consider all factors relating to the conduct, including: 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 the victim; and

(3) The victim had not attained the age of 18 years at the time of the offense.

Wis. JI-Criminal 2112 (2009).

The state need not prove that the defendant was subjectively aware of the risk to the child's safety his conduct caused. *State v. Williams*, 2006 WI App 212, ¶ 26, 296 Wis. 2d 834, 723 N.W.2d 719; *State v. Hemphill*, 2006 WI App 185, ¶ 11, 296 Wis. 2d 198, 722 N.W.2d 393; Wis. JI-Criminal 2112 cmt. n.2.

C. When it is viewed most favorably to the state and the conviction, the evidence was sufficient for a rational trial judge as trier of fact to find Gimino guilty of recklessly causing his child's injuries as alleged at Count One.

Gimino insists the state failed to present sufficient evidence that he recklessly caused his child's injuries when he placed her unprotected and unrestrained in his go-cart and sped around a curve, causing her to be ejected onto the pavement, resulting in her severe "road rash" injuries. Gimino's brief at 11-12. This claim is utterly devoid of merit.

There is no dispute Gimino's daughter, Brianna, was two-years-old when the offense occurred on the evening of October 11, 2009 (53:14).

There is no dispute Gimino put Brianna in the passenger seat of his go-cart without a helmet or any other protection and drove around with her in it on the evening of October 11, 2009. There is no dispute she was ejected from the go-cart as Gimino took a curve, causing her to skid across the pavement and sustain severe "road rash" injuries. According to her mother, Brianna could not walk the next day and had suffered "road rash" injuries "from head to toe" (53:11). According to Dr. Saunders, who examined Brianna after her mother and her mother's boyfriend brought her to the emergency room the next day, Brianna suffered "multiple abrasions throughout her body" (53:61) that were "very painful" (53:62).

Brianna told Dr. Saunders that she fell out of a go-cart (53:61 ("[S]he initially said she'd fallen off a bike, and then it came out she had fallen off a go-cart.")). Gimino admitted to the child's mother that Brianna "flew out of the side of" his go-cart when he took a corner "too fast" (53:27, 29-30). Gimino admitted to Racine County Sheriff Investigator Lewis that he was riding in his go-cart with Brianna after dinner, he went around a curve and she fell out, landing in the road (53:88).[1] Gimino's trial counsel testified at the postconviction hearing he did not at trial dispute that his client's conduct was a substantial factor in bringing about Brianna's injuries (57:27-28, 34). Gimino admitted in his own testimony at the postconviction hearing that he told Investigator Lewis Brianna's injuries "were caused from the go-cart accident" (57:45).[2] His reckless conduct was, therefore, causal of

[1] Gimino initially lied to the child's mother, Carrie Willms, to Tamara Varebrook, and to Wally Kissh when he told them the child fell off her bike (53:25-26, 45, 57).

[2] Gimino also admitted at the postconviction hearing that what he told Investigator Lewis was the truth (57:42-43).

the child's injuries as a matter of law. Wis. JI-Criminal 901 (2004) (the state need only prove the defendant's conduct was a "substantial factor" in bringing about the injury). *See State v. Owen,* 202 Wis. 2d 620, 631, 551 N.W.2d 50 (Ct. App. 1996).

The only remaining issue is whether the state proved Gimino's conduct was reckless. Gimino concedes it could be considered negligent, but insists it was not reckless. Gimino's brief at 14 ("Arguably, it may be negligent to put your child in a go-cart and drive around, but it is not reckless"). Gimino does not bother to explain why it is anything short of reckless conduct to put a two-year-old in a go-cart that has no sides or roof, to not put a helmet on her, to not properly restrain her, and then drive fast enough around a curve to eject her onto the pavement with sufficient force to cause the severe "road rash" injuries that covered much of her body. More to the point, Gimino does not bother to explain why a rational fact-finder could not determine beyond a reasonable doubt that such conduct, when viewed most favorably to the state and the conviction, "created a situation of unreasonable risk of harm" to Brianna and "demonstrated [his] conscious disregard for the safety of" Brianna. Wis. JI-Criminal 2112.

Gimino made a number of poor decisions that resulted in Brianna's extensive injuries. He put the two-year-old Brianna in the passenger seat of his go-cart unprotected by a helmet and unrestrained,[3] then drove at a sufficient rate of speed around a curve that the child was violently thrown from the vehicle across the pavement,

[3] Gimino insisted to Carrie Willms that he put a seat belt on the child but she may have unbuckled it without his knowledge (53:27, 30-31). Gimino's brief at 15. A rational finder of fact could infer from the fact that Brianna was so easily ejected from the vehicle that Gimino did not put a seat belt on her or otherwise make sure she was properly restrained before taking off. Willms also testified that her daughter was incapable of unbuckling a seat belt (53:40-41).

resulting in her extensive "road rash" injuries. The picture of the go-cart shows the risk Gimino took when he put the toddler in the unprotected and unenclosed passenger seat (18:Trial Exhibit #13). The picture of the curve that Gimino took with sufficient speed to eject the unprotected and unrestrained child onto the pavement shows the serious risk he took and his disregard for the child's safety by driving in the fashion he did (19:Trial Exhibit #14). The photos of the child's injuries – the extensive and severe "road rash" all over her body – best show the risk Gimino took and his disregard for her safety (13:Trial Exhibits #3-#8). Those photos represent the proverbial "1,000 words" that, in addition to the trial testimony, provide firm support for Judge Simanek's guilty verdict with respect to Count One.

An analysis of the relevant factors drives this point home:

What Gimino was doing. He was driving his unrestrained (or insufficiently restrained) two-year-old child in an open, unprotected go-cart without putting a helmet on her around a curve at a sufficient rate of speed to eject her onto the pavement.

Why Gimino was doing it. Only Gimino knows, and he did not testify at trial. Perhaps Gimino wanted to go riding in his go-cart but, realizing he could not leave the child alone while he did so, decided to take her along for the ride despite the obvious risks.

How dangerous the conduct was. Again, the photos of the go-cart, the curve and Brianna's injuries best demonstrate how dangerous his conduct was.

How obvious the danger was. The danger of racing around with an unprotected and unrestrained two-year-old in a go-cart should be obvious to anyone, and

would be obvious to any reasonable person, even assuming it was not obvious to Gimino.[4]

Whether Gimino's conduct showed any regard for the child's safety. No. Gimino did not put a helmet on the child. Gimino either did not restrain, or he insufficiently restrained, the child before taking off. Gimino then drove at a sufficient rate of speed around a curve to violently eject the child from the go-cart and cause her to skid across the pavement and sustain the severe "road rash" injuries over much of her body. Gimino essentially concedes this point when he states at page 15 of his brief: "So, arguably he was not showing regard for [Brianna's] safety by the speed he was driving. In a light most favorable to the State, Mr. Gimino was driving 'too fast.'"

The evidence was, thereof, sufficient for the trial judge to rationally find Gimino guilty of recklessly causing bodily harm to a child as charged at Count One (53:124-28; A-Ap. 226-30).

[4] Gimino insists the risk was not obvious because go-carts are like cars: "Moreover, cars have similar safety features and no reasonable person could claim that placing your kid [sic] in a car presents an unreasonable risk of harm to them [sic]." Gimino's brief at 14. There is no comparison, unless this court is willing to agree that the small, low-to-the-ground and unprotected vehicle into which Gimino placed his daughter (18;Trial Exhibit #13), has the same safety protections as the typical family sedan or SUV. Obviously, a child riding in a standard car with its thick exterior, doors, roof, safety glass, air bags, soft upholstery, etc., is far less likely to suffer serious injury if she is tossed as the car makes a sharp turn than in a go-cart that had none of these standard safety features. Moreover, the child's mother testified that she always buckled Brianna into her car seat for further protection when in the family car (53:40).

D. When it is viewed most favorably to the state and the conviction, the evidence was sufficient for a rational trial judge as trier of fact to find Gimino guilty beyond a reasonable doubt of recklessly causing unnecessary pain and further risk of serious injury to Brianna by deciding against seeking professional medical care for her because he believed it would get him in trouble.

Gimino argues he was not guilty of recklessly causing bodily harm to his daughter as alleged at Count Three because the "pain" caused by his refusal to seek medical treatment was the same pain as that caused by his reckless conduct introduced to support the verdict on Count One. Gimino's brief at 19.[5] One causes "bodily harm" to a child not only by inflicting physical "injury" but also by inflicting "pain." Wis. Stat. § 939.22(4); Wis. JI-Criminal 2112 cmt. n.1.

After he caused Brianna's injuries, Gimino did not seek medical care for her and, apparently, had no intention of ever doing so because as he told the child's mother, he "didn't think that her injuries were that bad, and he didn't want to get in trouble" (53:30).

Gimino told Tamara Varebrook when he called her shortly after the incident on the evening of October 11 that Brianna fell off her bike and "scraped" herself, the injury was "not that bad," and he put Neosporin and a "band-aid"

[5] Gimino also argues that Counts One and Three are "multiplicitous." Gimino's brief at 19. He did not below (57:66) and does not here develop that argument. This court should not develop it for him. *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

on it (53:44-45). He rejected Varebrook's offer to drive the short distance from her house to his to check on the child and, based on what Gimino told her downplaying the seriousness of the injuries, she did not see any need to go over there (53:47).

According to Investigator Lewis, Gimino said he did not seek medical treatment because he did not have a driver's license or access to a car. Gimino also told Lewis his girlfriend urged him to call a doctor after he told her what happened. Gimino assured his girlfriend it was a simple road rash, the hospital could not do anything more for the child and he did not want to wait for a long time in the hospital (53:97-98). Finally, Gimino admitted he lied about Brianna's having fallen off her bike because he did not want everyone to "freak out" (53:98).

Gimino told Investigator Lewis that after he took off Brianna's pants and saw the "road rash," he cleaned the wounds with a damp wash cloth and applied an antiseptic (53:91-93). Gimino also said he checked on the child periodically throughout the night for evidence of a closed head injury or shock (53:93, 96-97).

Wally Kissh, Carrie Willms's boyfriend, came over to pick up Brianna at Gimino's house the next morning, October 12. Kissh heard Brianna crying when he arrived (53:51). When Gimino carried the child in her PJs into the room and placed her on the couch, Brianna was "whimpering" and appeared to be in pain (53:53). Kissh asked why she was crying. Gimino answered that he had given her a bath and she fell off her bike (53:57). Kissh told Gimino not to get Brianna dressed because it would hurt her. According to Kissh, Brianna was not walking or playing at all (53:54). Kissh said Brianna "winced" when she put her foot on the ground as Gimino put a blanket around her shoulders (53:55).

When Kissh returned to Willms's house with Brianna, they jointly decided to take her straight to the emergency room at Children's Hospital upon seeing her

injuries (53:56). According to Willms, Brianna could not walk and she was "covered from head to toe in road rash burns" (53:11, 37-38).

Dr. Saunders observed in the emergency room the "multiple abrasions throughout [Brianna's] body" that were "very painful" (53:61-62). She said the injuries were consistent with the report of having fallen off a go-cart causing the child to skid on the ground, taking off the first layer of skin (53:61). On a scale of one to ten, these abrasions were a nine or ten, making it hard for the child to move about or sleep (53:63-64). Dr. Saunders prescribed a narcotic medication to help her sleep (53:63).

According to Dr. Saunders, abrasions of this nature can become infected if not immediately treated. They need to be scrubbed vigorously or irrigated with a lot of normal saline, an antibiotic ointment should be applied, and the wounds should be properly bandaged (53:65). There is also concern about a potential closed head injury and broken bones (53:66, 68), as well as shock (53:80). These concerns are exacerbated by the inability of a toddler to communicate sufficiently to localize the pain she is experiencing (53:69-70). It was important to get Brianna in for medical treatment right away to properly clean her injuries, provide her pain medication and check for closed head injuries (53:71, 82). It is important to get medical treatment right away because it would be difficult for a parent to properly clean these injuries and treat them without causing the child a great deal of pain (53:83). Dr. Saunders indeed gave Brianna a pain killer before thoroughly cleaning her wounds (53:84).

Dr. Saunders instructed Brianna's mother, Carrie Willms, to see a Racine Pediatric Surgeon, Dr. Yankavich, for a follow-up exam to make sure her injuries were properly healing and not infected. Dr. Saunders noted that although x-rays did not reveal an ankle fracture, x-rays do not always reveal small fractures and fractures sometimes cannot be diagnosed until after seven to ten days have passed (53:79-80).

According to Carrie Willms, Dr. Saunders instructed her to continue cleaning Brianna's wounds and to give her Ibuprofen to ease her pain. She was to bring Brianna back at the first sign of infection (53:27, 34-35). Willms said she had to put Brianna in diapers after returning from the hospital because she could not walk (53:29). As directed, Willms took Brianna to Dr. Yankavich for a follow-up exam. Dr. Yankavich discovered an ankle fracture and put Brianna's foot in a splint and later in a modified cast (53:28, 38).

A rational fact-finder could reasonably find beyond a reasonable doubt from these facts, and the reasonable inferences therefrom, that Gimino caused Brianna unnecessary additional pain by not seeking immediate medical treatment for what the photos plainly show were obviously extensive, severe and painful abrasions (13:Trial Exhibits #3-#8). If Gimino tried to clean the wounds as he claimed, he likely caused the child significant pain in doing so; pain that could have been ameliorated by proper medical treatment, including the pain killer administered by Dr. Saunders before she cleaned the wounds a second time the next day. Proper cleaning, bandaging and prescribed pain medication right away would likely have reduced the child's pain throughout the night, enabling her to sleep better. It would have likely ameliorated the pain she continued to suffer that was so obvious to Willms and Kissh the next day.

Gimino's inaction also "created a situation of unreasonable risk of harm" to Brianna by unnecessarily exposing her to the risk of infection, closed head injury and shock. Gimino was fully aware of that risk as he admittedly checked on Brianna throughout the night for evidence of closed head injury and shock. Moreover, had Brianna not been brought in, her mother would not have been directed by Dr. Saunders to see Dr. Yankavich who, days later, discovered and treated Brianna's fractured ankle. A reasonable trier of fact could find that Brianna would have suffered additional pain and structural harm as

a result of her untreated ankle fracture; an unreasonable risk created by Gimino's inaction. Gimino was not a doctor and had no medical training. His inaction in the face of these risks after seeing his daughter's extensive abrasions and watching her suffer throughout the night demonstrated his conscious disregard for Brianna's safety solely to protect himself.

As with Count One, an analysis of the relevant factors firmly supports the trial court's guilty verdict on Count Three for inflicting unnecessary additional pain on Brianna and exposing her to the risk of additional serious injury:

What Gimino was doing. He did nothing for his daughter beyond attempting to clean these extensive wounds with a damp cloth, applying an antiseptic and putting a "band-aid" on them. He refused to seek medical treatment for her and apparently had no intention of ever doing so unless something catastrophic happened.

Why he was doing it. Gimino refused medical treatment for his daughter, and downplayed her injuries when specifically asked by others, entirely out of self-interest. He did not want to get in trouble (53:30). His own selfish concerns mattered more than the medical needs of his daughter.

How dangerous his conduct was. Gimino recognized the danger of inaction. He checked the child repeatedly throughout the night for evidence of a closed head injury or shock.

How obvious the danger was. If the child sustained a closed head injury, the danger of inaction for any amount of time should have been obvious to Gimino. Moreover, the severity of her abrasions, and the need for immediate medical attention to ease Brianna's pain and prevent infection, should have been obvious to Gimino the moment he took down her pants and got his first look at

her extensive "road rash" injuries (13:Trial Exhibits #3-#8; 53:91).

Whether Gimino's conduct showed any regard for Brianna's safety. No. A rational trier of fact could determine that Gimino was more concerned about himself than his daughter's physical well-being, suffering and risk of further injury. To be clear, it appears Gimino had no intention of ever seeking professional medical treatment for Brianna because it would get him in trouble. While Gimino showed some regard for Brianna by trying to clean her wounds, applying an antiseptic, and checking on her throughout the night for evidence of a closed head injury and shock, it was not enough. The fact that Gimino immediately recognized the child's wounds needed to be cleaned, medicated and bandaged; the fact that Gimino recognized she might have suffered a closed head injury or could go into shock; and the fact that the child appeared to be in great pain as evidenced by what Willms and Kissh observed immediately upon seeing her the next day, all cried out for immediate professional medical attention to ease the child's pain, reduce the risk of infection and examine her for a closed head injury. Gimino showed little regard for Brianna's safety on balance with his perceived need to avoid trouble for himself. He chose not to seek medical treatment in the apparent hope that "everything would just go away" overnight before Kissh and Willms saw the child the next day.

The trial judge properly could and did find from these facts, and the reasonable inferences drawn therefrom, that Gimino was guilty beyond a reasonable doubt of causing Brianna unnecessary additional pain and unreasonably risked causing additional serious physical harm to her by not seeking professional medical attention for her obviously severe injuries (53:129-32).

Gimino concedes the trier of fact can use "common sense when determining guilt." Gimino's brief at 16. The trier of fact may also draw all reasonable inferences from the evidence presented. Yet, Gimino's arguments ignore

common sense and all the inferences that could reasonably be drawn from the evidence presented.[6] This court must uphold the trial judge's guilty verdicts on Counts One and Three because the evidence presented, the reasonable inferences drawn therefrom and simple common sense firmly support them. Gimino's conduct is every bit as reckless as the conduct discussed in the cases he unpersuasively tries to distinguish at pages 17-18 of his brief.[7]

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[6] Gimino maintains he did not act recklessly because "[t]here is no Wisconsin law which prohibits placing your child in a go-cart and driving with them," Gimino's brief at 13; and it was "his prerogative as a parent" not to seek medical help for his injured child. *Id.* at 23. The callousness of these remarks aside, they do nothing to disprove the recklessness of Gimino's decisions to: (1) put his unprotected and unrestrained two-year-old in a go-cart and take a curve at a sufficient rate of speed to eject her onto the pavement; and (2) not seek professional medical help despite the obvious severity of these injuries, her obvious pain and the obvious risk of additional harm from infection and closed head injury without swift and proper diagnosis and treatment.

There is also "no Wisconsin law" preventing a parent from placing a toddler on a chair next to an open three-story window and walking away. When that child climbs on to the sill and falls, the parent is criminally liable under § 948.03 for his reckless exercise of the "parental prerogative" to put that child in harm's way. Gimino chose to put Brianna in harm's way and then chose to do next to nothing when she was injured by his conduct. That was his "parental prerogative" but it was also, under the circumstances, criminally reckless conduct because it created a situation of unreasonable risk of harm and demonstrated his conscious disregard for her safety.

[7] Gimino maintains those cases are distinguishable because they require a showing that he "caused the injury to the victim by actually physically contacting them [sic]." Gimino's brief at 18. Those cases place no such "physical contact" limitation on proof of criminal recklessness. The crime is complete once the state proves Gimino caused injury to the child by creating a situation of unreasonable risk to her and demonstrated a conscious disregard for his daughter's safety, whether or not he made physical contact with her to cause her injuries. The parent who places a child on a chair next to an open three-story window and walks away is guilty of recklessly causing injury when that child crawls out the window (footnote continued)

II. THE STATE DID NOT VIOLATE THE DISCOVERY STATUTES WITH RESPECT TO DR. SAUNDERS' REPORTS AND, EVEN IF IT DID, GIMINO FAILED TO REQUEST A CONTINUANCE AND FAILED TO PROVE ANY PREJUDICE TO HIS DEFENSE.

A. The relevant facts.

Dr. Saunders instructed Carrie Willms to give Brianna Ibuprofen for her pain and to prevent infection (53:27, 34-35). She also prescribed the narcotic drug Roxacet to help the child sleep (53:63-64). Dr. Saunders also gave Brianna pain medication just before thoroughly cleaning out her wounds (53:84). Counsel for Gimino objected to testimony about pain medication on the ground that the defense was given no notice during pretrial discovery that pain medication was administered or prescribed by Dr. Saunders (53:64). The trial court overruled the objection (53:65). As the court observed at the postconviction hearing, the notes prepared by Dr. Saunders and turned over to the defense by the state do not indicate whether pain medication was administered to Brianna (57:51).

Brianna initially told Dr. Saunders that she was injured when she fell off her bike, but it later came out that she fell out of her father's go-cart (53:61). Dr. Saunders testified that the "road rash" abrasions were consistent with a fall out of a go-cart onto the ground and skidding (53:61), "if she was going at a higher rate of speed" (53:67). Defense counsel objected to Dr. Saunders' "higher rate of speed" opinion as lacking foundation and beyond the scope of her expertise (*id.*). The trial court overruled the objection, holding that her

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even though the parent had no physical contact with the child when she crawled out.

opinion as to the mechanism of injury was relevant (53:67-68).

Trial defense counsel, Paul Rifelj, testified at the postconviction hearing that none of the reports prepared by Dr. Saunders and turned over to the defense by the state during pretrial discovery mentioned any medications having been administered to the child. Counsel said he was "surprised" when Dr. Saunders testified at trial that Brianna was given a narcotic pain medication and he objected (57:7-8). Attorney Rifelj strategically decided against seeking a continuance or impeaching Dr. Saunders with the fact that none of her reports mentioned pain medication because he did not believe he could convince the trial judge that Dr. Saunders was lying about this. Counsel also believed it did not hurt the defense theory that Gimino did not act recklessly in not seeking medical treatment because, just as Dr. Saunders did the next day, he immediately cleaned Brianna's wounds and applied an antiseptic; Gimino did for Brianna on October 11 what the medical professionals did for her the next day (57:9-10, 21-22, 28).

Gimino did not question Attorney Rifelj at all at the postconviction hearing about his strategy with respect to Dr. Saunders' "higher rate of speed" comment.

B. There was no discovery violation.

1. The applicable law and standard for review.

Gimino contends that the state violated the discovery statute, Wis. Stat. § 971.23(1)(e), by not disclosing any reports by Dr. Saunders before trial indicating that she prescribed pain medication; or that she was prepared to offer the opinion that the go-cart was going at a "higher rate of speed" when Brianna was ejected and sustained her "road rash" injuries. Section

971.23(1) provides, in pertinent part, that "[u]pon demand" the state must disclose:

> (e) Any relevant written or recorded statements of a witness . . . any reports or statements of experts made in connection with the case or, 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, and the results of any physical or mental examination, scientific test, experiment or comparison that the district attorney intends to offer in evidence at trial.

Wis. Stat. § 971.23(1)(e).

This court's analysis of the alleged discovery violation involves three steps, each of which poses a question of law to be reviewed independently on appeal: (1) whether the state failed to disclose information required to be disclosed to the defense under Wis. Stat. § 971.23(1); (2) whether the state showed "good cause" for its failure to disclose as required by the statute; and (3) assuming a violation of § 971.23(1), and an insufficient showing of "good cause," whether admission of the evidence in question was nonetheless harmless. *State v. Harris*, 2008 WI 15, ¶ 15, 307 Wis. 2d 555, 745 N.W.2d 397; *State v. Rice*, 2008 WI App 10, ¶ 14, 307 Wis. 2d 335, 743 N.W.2d 517.

2. There was no discovery violation merely because Dr. Saunders' reports did not discuss whether pain medication was administered.

The state timely disclosed all of Dr. Saunders' notes and reports before trial as required by Wis. Stat. § 971.23(1). Those reports contained the doctor's findings as to the nature and extent of Brianna's injuries. They simply did not specify whether pain medication was

administered (57:7-8). Counsel for Gimino was free to impeach Dr. Saunders on cross-examination with the fact that her reports failed to mention pain medication. Counsel strategically decided not to go that route because he doubted he could convince the trial judge that Dr. Saunders was lying when she testified she administered pain medication. In short, the state turned over to the defense before trial all of Dr. Saunders' reports which contained all of her medical findings.

The postconviction court properly determined that the state turned over all of Dr. Saunders' findings before trial (41:2-3; A-Ap. 403-04). The fact that Dr. Saunders did not mention pain medication is not a discovery violation or grounds for exclusion of her reports; it is grounds for impeachment on cross-examination. The fact remains that the state turned over to the defense "a written summary of [Dr. Saunders'] findings or the subject matter of . . . her testimony." Wis. Stat. § 971.23(1)(e); *see State v. Schroeder*, 2000 WI App 128, ¶ 9, 237 Wis. 2d 575, 613 N.W,2d 911 ("The statute does not require that an expert make out a report reciting in detail the bases for his or her opinion. Rather, it requires that the defense be provided with the report if one has been prepared or, if the expert does not prepare a report, a written summary of findings"). All the reports containing Dr. Saunders' medical "findings" (along with those of the other doctors who examined Brianna) as to the nature and extent of Brianna's injuries were timely disclosed to the defense before trial (39:Exhibit #1). *Compare State v. Harris*, 307 Wis. 2d 555, ¶¶ 31-40 (without "good cause," the state was unaware until the day of trial that it possessed the fingerprint reports that should have been discovered by the prosecutor with due diligence and should have been disclosed to the defense pretrial); *State v. Martinez*, 166 Wis. 2d 250, 257-59, 479 N.W.2d 224 (Ct. App. 1991) (the evidence was lost and the state had no explanation why or how it was lost).

No documentary evidence was withheld or lost here. There was no discovery violation with respect to

Dr. Saunders' notes and reports, all of which were disclosed to the defense before trial, and all of which contained her medical findings.

3. There was no discovery violation merely because the doctor's reports did not discuss the mechanism of injury.

For the same reasons, there was no discovery violation with respect to Dr. Saunders' "higher rate of speed" remark when asked whether the child might have been injured, as she was told, in a fall from a go-cart. The trial judge overruled the defense objection that Dr. Saunders' testimony on this point lacked foundation and was beyond the realm of the doctor's expertise. The court ruled her testimony as to the possible mechanism of injury was relevant (53:67-68).[8]

As it was with regard to her pain medication testimony, there was no missing or undisclosed report prepared by Dr. Saunders that contained her opinion as to possible mechanisms of injury in general or the speed of the go-cart in particular. The absence of such a report was, again, not a discovery violation; it was fertile ground for impeachment if counsel chose to go there. Counsel could have attacked Dr. Saunders on cross-examination by pointing to her failure to include this opinion in any of her reports and to her lack of expertise as an accident reconstruction expert to assess mechanisms of injury and speed. Again, there was no discovery violation because all of the doctor's reports containing all of her medical findings with respect to the nature and extent of Brianna's injuries were turned over to the defense before trial.

[8] Gimino does not challenge that ruling here. He argues only that the state should have disclosed to the defense before trial that it would ask Dr. Saunders for her opinion as to speed.

C. Assuming a discovery violation, the state showed "good cause," Gimino did not request a continuance, and he suffered no prejudice.

The trial court's decision whether to impose a sanction for a discovery violation is a matter addressed to its sound discretion. *State v. Martinez*, 166 Wis. 2d at 259.

1. The state showed good cause.

A discovery violation may be excused if the state shows "good cause" for its failure to comply with the statute. *State v. Rice,* 307 Wis. 2d 335, ¶¶ 15-16. There is "good cause" if the state shows it acted in good faith and provides "a specific reason for the lack of disclosure." *Id.* ¶ 16. *See State v. DeLao,* 2002 WI 49, ¶¶ 52-53, 55-56, 252 Wis. 2d 289, 643 N.W.2d 480.

The state acted in good faith when it disclosed all of Dr. Saunders' reports and notes (as well as those of the other doctors who examined the child). There was "good cause" here by virtue of the fact that Dr. Saunders did not discuss pain medications or mechanism of injury in any of her reports. The state properly disclosed all of the doctor's findings with respect to the nature and extent of Brianna's injuries. The state's failure to also disclose what Dr. Saunders might or might not say about pain medication and the speed of the go-cart at trial was inadvertent and non-prejudicial. *See State v. Rice,* 307 Wis. 2d 335, ¶ 18 ("it is understandable that the potential significance of [Dr. Saunders'] testimony was overlooked during the initial investigation, and only uncovered while the prosecutor was preparing the case for trial").

2. Gimino did not request a recess or continuance.

As discussed above, the trial court properly determined there was no discovery violation. Consequently, there was nothing to sanction. But even assuming there was, the remedy for a discovery violation is not normally a mistrial, but only "a recess or a continuance." Wis. Stat. § 971.23(7m)(a). "'The granting of a continuance or recess is to be favored over striking the witness.'" *Kutchera v. State*, 69 Wis. 2d 534, 543, 230 N.W.2d 750 (1975) (quoting *Irby v. State*, 60 Wis. 2d 311, 322, 210 N.W.2d 755, 761 (1973)). It necessarily follows that reversal on appeal for a proven discovery violation is not favored.

Moreover, the defendant is not to be granted even a recess or continuance unless and until he shows surprise and prejudice caused by the discovery violation. *Kutchera*, 69 Wis. 2d at 543, 545.

Gimino's trial counsel decided against moving to strike Dr. Saunders' testimony, or requesting a recess or continuance of the trial, for strategic reasons; not because he was surprised. Counsel sensibly doubted that he could convince the trial judge as fact-finder that Dr. Saunders was lying about the administration of pain medication. Although the matter was not addressed by postconviction counsel at the postconviction hearing, trial counsel also presumably decided not to seek a continuance in response to Dr. Saunders' "higher rate of speed" remark because it was only consistent with Gimino's admission to Carrie Willms that he was going "too fast" around a curve when Brianna was ejected and skidded across the pavement; along with his admission to Investigator Lewis that the child was ejected from his go-cart when he went around a curve.

3. Any unexcused discovery violation was harmless.

Even when a discovery violation is proven, prejudice must exist before a new trial is warranted. *State v. Harris,* 307 Wis. 2d 555, ¶¶ 41-43; *State v. DeLao,* 252 Wis. 2d 289, ¶¶ 59-60; *State v. Ruiz,* 118 Wis. 2d 177, 197, 202, 347 N.W.2d 352 (1984); *Kutchera v. State,* 69 Wis. 2d at 543, 545.

Gimino does not explain how his defense was adversely affected by these alleged discovery violations. This did not adversely impact trial counsel's ability to cross-examine Dr. Saunders about what she did and did not write in her reports and notes. It did not adversely affect trial counsel's ability to cross-examine Dr. Saunders about whether and which pain medications were administered; or about her qualifications and ability to opine as to the go-cart's speed at the time of the accident.

There was no prejudice with respect to pain medication because, as trial counsel testified at the postconviction hearing, this did not undercut the defense theory that Gimino cleaned the wounds and applied pain medication the night before, just as Dr. Saunders did the next day, so he did not act recklessly in deciding not to seek professional medical treatment right away. Also, the pain medication evidence was relevant only as to Count Three. It had no impact whatsoever on Count One.

There was no prejudice with respect to Dr. Saunders' "higher rate of speed" remark because there is no dispute the go-cart was going at a rate of speed sufficient to eject the child and cause her severe abrasions; and Gimino admitted to the child's mother that he was going "too fast" around the curve. *See* Gimino's brief at 34 (acknowledging his own admissions to Willms and to

Investigator Lewis).[9] Finally, Gimino does not challenge Dr. Saunders' separate opinion that these extensive injuries could not have been caused by the toddler's fall from a bike (53:66-67). This opinion arguably damaged the defense more than the doctor's "higher rate of speed" remark because it discredited Gimino's initial claim to everyone who asked that Brianna was injured when she fell off her bike. The postconviction court properly rejected Gimino's discovery challenges (41:2-4; A-Ap. 403-05).

III. GIMINO FAILED TO PROVE TRIAL COUNSEL'S PERFORMANCE WAS DEFICIENT AND PREJUDICIAL FOR: (A) NOT CALLING AN ACCIDENT RECONSTRUCTION EXPERT; AND (B) NOT IMPEACHING CARRIE WILLMS WITH HER PRELIMINARY HEARING TESTIMONY.

Gimino insists his trial attorney was ineffective for not calling an accident reconstruction expert to refute evidence that the child was injured when she was ejected from the go-cart; and for not impeaching Carrie Willms's trial testimony with her differing preliminary hearing testimony about what Gimino told her. Gimino has failed to prove both deficient performance and prejudice.

[9] Gimino told Investigator Lewis he was going ten miles an hour into the curve when Brianna was ejected (53:88). The trial judge, as fact-finder, could disregard Gimino's low estimation of his speed, just as the judge could disregard his downplaying of the severity of the child's injuries and need for treatment when others inquired. The extent and severity of the child's abrasions strongly support the inference he was going faster than ten miles an hour.

A. The applicable law and standard for review of a challenge to the effectiveness of trial counsel.

Gimino bore the burden of proving that trial counsel's performance was both deficient and prejudicial to his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

On review, this court is presented with a mixed question of law and fact. The trial court's findings of historical fact and credibility determinations will not be disturbed unless clearly erroneous. *State v. Domke*, 2011 WI 95, ¶ 58, 337 Wis. 2d 268, 805 N.W.2d 364; Wis. Stat. § 805.17(2). The ultimate determinations based on those facts as found as to whether counsel's performance was deficient and prejudicial are questions of law subject to independent review. *State v. Balliette*, 2011 WI 79, ¶ 19, 336 Wis. 2d 358, 805 N.W.2d 334.

1. Deficient performance.

"Strategic choices are 'virtually unchallengeable.'" *McAfee v. Thurmer*, 589 F.3d 353, 356 (7th Cir. 2009) (quoting *Strickland v. Washington*, 466 U.S. at 690).

To establish deficient performance, Gimino had to prove trial counsel's errors were so serious he was not functioning as the "counsel" guaranteed by the Sixth Amendment to the United States Constitution. *State v. Johnson*, 153 Wis. 2d at 127. Judicial review of counsel's performance is highly deferential. The case is to be reviewed from counsel's perspective at the time of trial, not in hindsight, and Gimino had to overcome a strong presumption that counsel acted reasonably within professional norms. *State v. Domke*, 337 Wis. 2d 268, ¶ 36; *State v. Johnson*, 153 Wis. 2d at 127.

Gimino was not entitled to error-free representation. Counsel need not even be very good to be deemed constitutionally adequate. *State v. Wright*, 2003 WI App 252, ¶ 28, 268 Wis. 2d 694, 673 N.W.2d 386; *State v. Mosley*, 201 Wis. 2d 36, 49, 547 N.W.2d 806 (Ct. App. 1996); *McAfee v. Thurmer*, 589 F.3d at 355-56. Gimino does not prove deficient performance unless counsel's deficiencies sunk to the level of professional malpractice. *State v. Maloney*, 2005 WI 74, ¶ 23 n.11, 281 Wis. 2d 595, 698 N.W.2d 583.

2. Prejudice.

If Gimino proves deficient performance, he must next prove prejudice. He bore the burden of proving that counsel's errors were so serious they deprived him of a fair trial, a trial whose result is reliable. *See State v. Johnson*, 153 Wis. 2d at 127. Gimino had to prove a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. A reasonable probability is one sufficient to undermine confidence in the outcome. *State v. Trawitzki*, 2001 WI 77, ¶ 40, 244 Wis. 2d 523, 628 N.W.2d 801. He had to prove counsel's conduct so undermined the adversarial process that the trial cannot be relied upon as having produced a just result. *Id.* ¶ 39. Gimino could not speculate. He had to affirmatively prove prejudice. *State v. Balliette*, 336 Wis. 2d 358, ¶¶ 24, 63, 70; *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433.

B. Trial counsel's failure to hire an accident reconstruction expert.

Gimino maintains he is entitled to a new trial because trial counsel did not hire an accident reconstruction expert to dispute the state's theory that Gimino's operation of his go-cart caused Brianna's injuries. He maintains that trial counsel was ineffective

for not finding "an alternate source, besides Mr. Gimino, for the mechanics of the accident." Gimino's brief at 37.

This issue is a non-starter because Gimino did not in his postconviction motion or at the evidentiary hearing identify any "alternative source, besides Mr. Gimino, for the mechanics of the accident." Gimino did not in his motion or at the evidentiary hearing name, or offer any proof from, an accident reconstruction expert who would have disputed the state's proof that his operation of the go-cart caused Brianna to be ejected and injured. *Compare State v. Balliette*, 336 Wis. 2d 358, ¶¶ 14, 73-78 (where the defendant's postconviction motion included an affidavit from an accident reconstruction expert who refuted the state's theory at trial as to the cause of the fatal accident; but it was not sufficient to merit an evidentiary hearing or a new trial).

Gimino does not explain how an accident reconstruction expert would have proven that he did not cause the child's injuries. Would the expert have established some intervening cause for the injuries? Would the expert have opined that Brianna threw herself out of the go-cart? Or, that a passing individual, dog or sudden gust of wind pulled Brianna out of the go-cart and dragged her across the pavement? Gimino does not specify. Gimino offered no such testimony at the postconviction hearing because, presumably, he found none. Absent any proof that trial counsel would have found an accident reconstruction expert to challenge the state's theory as to the causal mechanism of the child's injuries, Gimino failed to prove trial counsel engaged in deficient performance. Trial counsel is not deficient for failing to find an expert who by all accounts could not provide the testimony Gimino hoped for.

For the same reason, Gimino failed to prove prejudice. Moreover, there is no reasonable probability of a different outcome because there was never any dispute

that Gimino's operation of the go-cart caused Brianna's injuries, as Gimino himself admitted to the child's mother and to Investigator Lewis. As trial counsel sensibly acknowledged in his postconviction hearing testimony, there was no valid argument that the child was harmed by anything other than the go-cart accident in light of Gimino's multiple admissions to that effect introduced against him at trial (57:27-28, 34).

C. Trial counsel's failure to impeach Carrie Willms with her preliminary hearing testimony.

Carrie Willms testified at trial that Gimino told her he did not take Brianna to the hospital because "[h]e didn't think that her injuries were that bad, and he didn't want to get in trouble" (53:30). When examined at the preliminary hearing, Willms testified she asked Gimino why he did not take Brianna to the hospital but he did not tell her why (46:7; A-Ap. 416). Gimino faults trial counsel for not impeaching Willms with her preliminary hearing testimony.

To what end? The undisputed fact remains that, for whatever reason, Gimino did not take Brianna to the hospital and, apparently, had no intention of ever doing so. That was the important point. The delay in seeking medical treatment, the state sought to prove, caused the child additional unnecessary pain and unreasonably risked further harm from possible infection and closed head injury. Gimino told Investigator Lewis he regretted putting Brianna in the go-cart and regretted not taking her to the hospital (53:94-95).

There is no dispute Gimino falsely told Tamara Varebrook that Brianna fell off her bike and did not need Varebrook's help or medical care. Moreover, Gimino's statement to Investigator Lewis was similar to what Carrie

Willms said he told her. Gimino told Lewis he did not seek medical treatment because he did not think the injuries were that serious, he did not have a driver's license or access to a vehicle (despite Tamara Varebrook's offer to drive over when Gimino told her Brianna fell off her bike), he did not think the hospital could do anything more for Brianna, and he did not want to wait at a hospital for her to be treated (53:97-98). Even if counsel successfully impeached Willms, these statements would all have remained admissible.

Trial counsel strategically decided against impeaching Willms because Gimino's statement to her was consistent with the defense theory that he may have been negligent, or used poor judgment, but did not act recklessly. This was sound strategy that, as *Strickland* holds, cannot be second-guessed.

Finally, this alleged deficiency in counsel's performance had no impact whatsoever on the conviction as to Count One. In light of the undisputed fact that Gimino did not seek medical treatment for Brianna, and in light of his similar statements to others explaining why he did not do so, there is also no reasonable probability of a different outcome as to Count Three had counsel impeached Willms at trial with her preliminary hearing testimony.

CONCLUSION

Therefore, the State of Wisconsin respectfully requests that the judgment of conviction and the order denying postconviction relief be AFFIRMED.

Dated at Madison, Wisconsin, this 24th day of October, 2012.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,399 words.

Dated this 24th day of October, 2012.

_____
DANIEL J. O'BRIEN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

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 24th day of October, 2012.

_____
DANIEL J. O'BRIEN
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