STATE OF WISCONSIN COURT OF APPEALS, DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

vs.

REPLY BRIEF

NICHOLAS M. GIMINO,

DEFENDANT-APPELLANT APPEAL NO. 12-AP-1498-CR

APPEAL FROM THE CIRCUIT COURT FOR RACINE COUNTY
THE HONORABLE STEPHEN A. SIMANEK, PRESIDING AT TRIAL, AND
EUGENE A. GASIORKIEWICZ, PRESIDING AT THE POST-CONVICTION
STAGE

REPLY BRIEF OF NICHOLAS M. GIMINO,

DEFENDANT-APPELLANT

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I hereby certify that this brief conforms to the rules contained in §809.19 (8) (b) and (c) for a reply brief produced with a monospaced font. The length of this brief is 13 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.

Date: November 13, 2012

Signature: _____
Gregg H. Novack, Wisbar 1045756

ARGUMENT

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

A. There was no unreasonable risk of harm to B.G. by placing her in the go-kart.

The examples the State cites to support a finding of "unreasonable risk" are not convincing. The State notes several examples of the risk Mr. Gimino took placing B.G. in the go-kart: 1) The picture of the go-kart; 2) The picture of the curve; 3) Gimino's driving fashion; and 4) The photos of the injuries. *State's Brief,* p. 10. The State argues the photos of the injury "best show the risk" and disregard for B.G.'s safety. *State's Brief,* p. 10. It is absurd to argue that the resultant injury proves the unreasonable risk of harm.

Recreational activities, go-karting included, have a risk of injury but it is a slippery slope to criminalize recreational activities based on the resultant injury. A recently released study in *Pediatrics* demonstrates the dangers of sledding. According to the study, between 1997-2007, approximately 20,820 children under the age of 19 were injured per year as a result of sledding related accidents.*http://pediatrics.aappublications.org/content/ear*

ly/2010/08/23/peds.2009-1499.abstract. By the State's argument, 20,820 potential felony charges should have been issued for these sledding injuries, if pictures of the injuries showed they were serious. This is an incredible misuse of judicial resources and should be discouraged.

If the resultant injury was the determinative factor in charging then every broken bone suffered from falling off a horse, a sled, a ski, or any other recreational activity would result in criminal charges. This is not rational. Accidents happen and although the road rash in this case is a real injury, the nature of the injury should not be determinative of the unreasonable risk of harm.

B. There was no conscious disregard for B.G.'s safety by placing her in the go-kart.

The State uses an interesting example to bolster their argument that what Mr. Gimino did was criminally reckless because of the conscious disregard for B.G.'s safety he demonstrated by placing her in the go-kart. The example the State uses to illustrate this point references a parent placing a child on a chair next to an open window and then walking away. The child then falls out of the window. *State's brief*, Footnotes 6 and 7. The obvious danger in the State's example is not found in Gimino's behavior.

Go-karts are ridden around this State year round by both children and adults. Anyone that has driven past Wisconsin Dells was inundated by the advertisements for go-karting establishments. Common sense tells one that the reason these go-karting businesses exist is because people enjoy riding go-karts. The widespread use of go-karts obfuscates the risk of harm go-karts pose. In other words, unlike the open window example where the danger is obvious in this case the danger was not obvious. Therefore, there is no conscious disregard for the safety of B.G.

Moreover, obvious danger does not always result in reckless conduct. The State's argument is that the picture of the go-kart shows the obvious danger of the activity and thus demonstrates the risk and conscious disregard for B.G.'s safety Mr. Gimino exhibited. The State reasons the obvious nature of danger supports a finding of guilt on count one. This is not reasonable. For example, a parent could ask a teenage age child to take a sharp knife to cut some potatoes for their Thanksgiving dinner. The obvious danger is clear, the knife is sharp. Parent accidently bumps child while they are cutting the vegetables. Child suffers bodily harm in the form of a laceration (assume there are numerous horrific pictures depicting the bloody finger). By the State's logic, the knife was sharp, the

danger of knives is obvious, the child was under 18, he suffered bodily harm, and the parent was a substantial factor in causing the injury by asking the child to cut the vegetables and then bumping them, the pictures of the injury state a 1,000 words of how dangerous the conduct was; conclusion: child abuser. This is not reasonable. Similarly, the court's findings in this case are not reasonable. Therefore, the conviction on count one should not stand.

C. The State fails to demonstrate how Mr. Gimino caused "additional pain" by delaying B.G.'s medical treatment.

The State fails to demonstrate in their brief how the delay in taking B.G. to the hospital caused pain to B.G. as required for a conviction on count 3. Judge Simanek recognized that this fact would have to be established by the State to prove count 3 when he stated, "There would have to be a demonstration that the delay in time was casual." (53:22). There is no evidence that the delay in treatment caused any additional pain to B.G.

It is undisputed that the road rash injuries were painful; however, the State had the burden to prove that Mr. Gimino's action or inaction caused harm to B.G. There was no evidence that the approximately 12 hour delay in

trained medical treatment caused additional harm to B.G. This is illustrated by the fact that according to Ms. Willms even after receiving medical treatment from the emergency hospital room, "She couldn't move. She couldn't walk." and "…she couldn't make it to the bathroom any more without being carried for over a week…." (53:29). These statements clearly illustrate that B.G. was still in pain even after being taken to the hospital. In other words, there was no evidence presented at trial that B.G.'s pain abated from the hospital visit. More importantly, there is no evidence that not taking B.G. to the hospital caused her additional pain.

At trial the State argues that the physical harm was Mr. Gimino did not adequately clean the road rash. (53:111:19-25). This assertion is not supported by the evidence presented by Dr. Saunders. Dr. Saunders testified that there was no sign of infection when she treated B.G. (53:74-78). This indicates Mr. Gimino did adequately clean B.G.'s road rash.

The State argues in their brief that the, "pain could have been ameliorated by proper medical treatment." *State's Brief,* p. 15. As stated above there was no evidence presented at trial that the pain would have been abated by "swift and proper diagnosis and treatment" as argued by the

State. In fact, as the testimony of Ms. Willms demonstrates, B.G. was in considerable pain even after her visit to the emergency room and other medical providers. Therefore, there was insufficient evidence produced at trial to prove Mr. Gimino caused bodily harm to B.G. by not taking her to seek immediate medical attention.

II. The State violated, without good cause, discovery laws by failing to disclose relevant material regarding B.G.'s medical records prior to trial which prejudiced Mr. Gimino.

A. Dr. Yankavich's Records

1. The State violated the requirements of Wisconsin discovery laws.

It is undisputed the State did not turn over any records related to treatment of B.G. by Dr. Yankavich. The only reason Mr. Gimino received any medical records from the State was because he provided them to Investigator Lewis. (53:95:16-19). Mr. Gimino is unaware of any action the State took to obtain additional records. The State is obligated to exercise due diligence to get these records. *State v. De Lao*, 246 Wis. 2d 304, ¶22, 629 N.W.2d 825 (2002). The State did nothing to get any medical records. Thus, the State violated the discovery laws of the State.

2. The violation of the discovery laws was without good cause.

There is no good cause for the State not turning these records over to the defense. The medical records for B.G.'s treatment are the basis for this criminal action. Causation of harm is one of the elements of Physical Abuse of a Child: Recklessly Causing Bodily Harm. The medical records would demonstrate the injuries or harm B.G. suffered as a resulted of the accident. For example, Dr. Saunders diagnosis was abrasions, no broken bones. Apparently Dr. Yankavich contradicted this diagnosis by finding the ankle to be fractured; however, these records were never provided to Mr. Gimino. Without these records Mr. Gimino was denied the opportunity to cross-examine Ms. Willms about her hearsay statements regarding Dr. Yankavich's diagnosis and treatment. In addition, if this information had been provided to Mr. Gimino prior to trial he may have elected to enter a plea. Thus, the medical diagnosis from **all** of the treating physicians was vitally important for this case.

3. The discovery violation was not harmless.

Failure to turn over all of the medical records prejudiced Mr. Gimino in two ways: 1) The State argues that Dr. Yankavich's diagnosis and treatment help to establish

"additional harm" for count 3. *State's Brief,* p. 15; and 2) Mr. Gimino was not given notice of the extent of B.G.'s injuries prior to trial. These factors prejudiced Mr. Gimino.

> "Prejudice means that 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" State v. Harris, 2008 WI 15, ¶61, 307 Wis. 2d 555, 745 N.W.2d 397, 412 (2008).

The failure to turn over Dr. Yankavich's reports was prejudicial. This failure prevented trial counsel from challenging Ms. Willms's assertion that Dr. Yankavich's diagnosed an ankle fracture and put a cast on B.G. (53:28, 38). This testimony was used to assert B.G. had a fracture by the trial court, "It turns out she did have a fracture" (53:131:12); and the State, in their appellate brief, "Dr. Yankavich discovered an ankle fracture and put Brianna's foot in a splint and later in a modified cast." *State's brief,* p. 15. Both of these assertions come when discussing the harm caused for count 3. The State argues that without medical intervention the discovery of the fracture would not have been made. *State's brief*, p. 15. Clearly this evidence is extremely relevant to Mr. Gimino's trial strategy and the lack of knowledge of it limited trial counsel's ability to defend Mr. Gimino.

This handicapping is evident when one looks at the potential use of the omitted evidence. There are two possibilities regarding the factual findings in Dr. Yankavich's reports: 1) His reports support Ms. Willms's testimony that the ankle was broken and B.G. was placed in a cast; or 2) The reports show Ms. Willms's lied on the stand and B.G. did not have a fracture. If the reports had showed that there was a fracture it is possible that Mr. Gimino may have taken a plea because the fracture and lack of diagnosis of that fracture would indicate "additional harm" by failing to go to the doctor. Prior to trial all the reports Mr. Gimino had told him there was no additional injury beyond the road rash. This extra information could have been the deciding factor for Mr. Gimino to take a plea deal.

If the reports showed there was no fracture, Ms. Willms's credibility would have been impeachable. More importantly there would be no evidence that a fracture occurred as the trial court found and the State argued in their appellate brief.

No matter what the evidence said, without it, Mr. Gimino was unable to prepare an adequate defense or make an informed decision to plea or not especially with respect to Count 3. This is prejudicial.

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

A. Failure to impeach Ms. Willms

In this case Ms. Willms was a key witness. This fact is illustrated by the State's numerous references to her testimony in their brief. According to the State she supplied key evidence regarding: 1) Mr. Gimino's driving of the go-kart. *State's brief*, p. 8; 2) The fracture diagnosis of Dr. Yankavich. *State's brief*, p. 15; 3) That B.G. couldn't walk after going to the hospital. *State's brief*, p. 8; 4) B.G. couldn't undue a seatbelt. *State's brief*, p. 12; and 5) Mr. Gimino's reasons for not going to the hospital. *State's brief*, p. 12. These are key issues of fact in Mr. Gimino's case and are important as indicated by the State's use of them in its brief. Thus, it is key to impeach Ms. Willms to destroy her credibility.

Destroying Ms. Willms's credibility was critical to Mr. Gimino's defense. This is key because she is the **only** witness that testified about Dr. Yankavich's diagnosis and treatment, and Mr. Gimino's hearsay statements to her regarding his driving and why he did not take B.G. to get medical treatment. These are crucial facts that helped to convict Mr. Gimino.

This case boiled down to the credibility of Ms. Willms and Mr. Gimino. Ms. Willms testified Mr. Gimino drove too

fast, Mr. Gimino said he was driving 10 MPH; Ms. Willms testified B.G. had a broken ankle, Mr. Gimino said there was no fracture; Ms. Willms testified B.G. was covered head to toe in abrasions, Mr. Gimino said the abrasions were on the lower left side of B.G. It is clear that Ms. Willms is a key witness; therefore, counsel should have impeached her on cross-examination.

1. Impeach through prior statements

As stated in Mr. Gimino's brief Ms. Willms made a significant change in her testimony regarding Mr. Gimino's statements on why he didn't take B.G. to the hospital. The State asks why this is relevant. *State's Brief,* p. 31. It is relevant because her altered testimony portrayed Mr. Gimino as a selfish bastard worried only about himself. The change in testimony shows that Ms. Willms was willing to embellish her story to smear Mr. Gimino.

2. Impeach through lack of medical records

Ms. Willms testified that Dr. Yankavich diagnosed a broken ankle and put a cast on B.G. Trial counsel had not received any medical records from Dr. Yankavich. Yet he did not press Ms. Willms on the lack of those supporting medical records. Mr. Gimino concedes that the fracture question was impeached by trial counsel with Dr. Saunders's testimony. However, trial counsel had to be aware that Dr.

Saunders's would have been unable to comment on the validity of Dr. Yankavich's diagnosis. Therefore, the only way to cross-examine the Dr. Yankavich diagnosis was through Ms. Willms; however, trial counsel never cross-examined Ms. Willms on this subject. There is no legitimate trial strategy to fail to cross-examine on the lack of medical reports or the prior inconsistent statements.

B. Failure to Investigate

Mr. Gimino argues that the failure to investigate an accident reconstruction expert is deficient performance. In this case Mr. Gimino's driving at the time of the accident was a key factor. Prior to trial it was clear that this fact was disputed. Mr. Gimino told Investigator Lewis he was going 10 MPH; Ms. Willms, as reflected in the criminal complaint, said Mr. Gimino admitted he was going "too fast" around the corner. Additionally, the criminal complaint contained the false information regarding Mr. Gimino's prior reckless operation of the go-kart. It should have been obvious to trial counsel that this issue needed further investigation. Yet this investigation was never conducted. This failure indicates a lack of trial preparation which prejudiced Mr. Gimino.

This lack of preparation is further demonstrated by trial counsel's failure to obtain Dr. Yankavich's reports.

The criminal complaint indicates that B.G. was treated by an orthopedic surgeon at Wheaton Franciscan who diagnosed an ankle fracture and put a cast on B.G. Counsel never received any medical reports regarding this diagnosis or treatment. Mr. Gimino concedes that trial counsel did file a discovery demand with the State; however, trial counsel failed to follow-up with additional demands when the State failed to provide any of the Wheaton Franciscan records to Mr. Gimino. Once again this is lack of preparation that has no legitimate strategic purpose.

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.

November 8, 2012

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