STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2012AP2547-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL L. CRAMER,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, HONORABLE KEVIN E. MARTENS, PRESIDING AT TRIAL; HONORABLE JEFFREY A. WAGNER, PRESIDING AT POSTCONVICTION STAGE

BRIEF OF PLAINTIFF-RESPONDENT

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C O U R T O F A P P E A L S

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ISSUES PRESENTED

1. Did the trial court properly exercise its discretion when it denied Cramer's postconviction motion alleging ineffective assistance of counsel without an evidentiary hearing?

The court determined that the motion's allegations of deficient performance were insufficient and the record

conclusively showed Cramer would be unable to prove both deficient performance and prejudice.

2. Did the trial court properly exercise its discretion when it denied without an evidentiary hearing Cramer's postconviction motion alleging that the prosecutor knowingly used false testimony?

The court determined that Cramer only proved the expert he hired postconviction would render an opinion that differed in some but not all respects from the opinions rendered by the state's doctors at trial. This mere difference of opinion was not proof of the prosecutor's knowing use of false expert testimony at trial.

3. Did the trial court properly exercise its discretion when it denied Cramer's motion seeking a new trial in the interest of justice? Should this court exercise its independent discretionary reversal authority under Wis. Stat. § 752.35?

The trial court determined that the real controversy was fully tried.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The state does not request oral argument or publication. The issues presented are fact-bound and involve this court's deferential review of the trial court's exercise of discretion.

STATEMENT OF THE CASE

Cramer appeals (50) from the judgment of conviction (37; A-Ap. 101-03), and from the Decision and Order denying his motion for new trial (49; A-Ap. 104-07), entered in the Circuit Court for Milwaukee County, the Honorable Kevin E. Martens presiding at trial, and the

Honorable Jeffrey A. Wagner presiding at the postconviction stage.

After a trial held April 26-30, 2010, a Milwaukee County jury found Cramer guilty of the first-degree reckless homicide of his infant son, Matthew, and of bail jumping (29; 68:5). Cramer was sentenced June 15, 2010, to ten years and nine months of initial confinement in prison, followed by eight years and nine months of extended supervision (37; 69; A-Ap. 101-03).

Cramer filed a motion for new trial (43). Cramer raised the same issues as here: (1) he was denied due process when the prosecutor knowingly introduced false testimony; (2) his trial attorney was ineffective; and (3) he is entitled to a new trial because the real controversy was not fully tried. The state opposed the motion (47). The trial court denied the motion without an evidentiary hearing in a written Decision and Order November 2, 2012 (49; A-Ap. 104-07).

The court held that Cramer failed to prove the prosecutor knowingly presented false testimony just because Cramer found an expert after trial (Dr. Plunkett) whose opinions would contradict some but not all of the opinions rendered by the state's medical experts at trial (49:2; A-Ap. 105). Cramer failed to prove his attorney performed deficiently because counsel put on a medical expert at trial (Dr. Young) who contradicted the opinions of the state's trial experts as to the cause of the infant's death; and the postconviction expert (Plunkett) said he agreed with Dr. Young's cause of death determination (49:2-3; A-Ap. 105-06). Cramer was therefore not entitled to discretionary reversal because the real controversy regarding the cause of the infant's death was fully tried (49:3-4; A-Ap. 106-07).[1]

[1] Cramer does not challenge his bail jumping conviction.

STATEMENT OF RELEVANT FACTS

The circumstances of Matthew's death

Fire and police responded to a "911" call received at 11:56 a.m., February 17, 2009, reporting a non-breathing infant at the home of Cramer's wife, Candice's, grandmother where they were both living on Burleigh Street in the City of Milwaukee (63:90, 105). When they arrived at 12:04 p.m., the first responders found a pulseless, non-breathing two-and-a-half-month-old infant, Matthew Cramer (63:26-29, 37; 66:24). Paramedic Stephanie Hampton attended to the child and noticed that the stool inside his diaper was cold to the touch, indicating that the child had been "down" (that is, pulseless and not breathing) for some time (63:42). Hampton took off the child's clothes and, as she was about to insert an IV, noticed bruising on the child's lower left leg and upper body (63:43-45). Hampton believed these bruises were not caused by resuscitation efforts because they appeared to be older (63:45, 48-49).

Cramer, the child's father, was present (63:29) and, according to Hampton, just "walking around." He asked no questions and did not watch what was going on with his son (63:38). A police officer at the scene said Cramer was unemotional and did not appear to be upset (63:74).

Cramer told police at the scene he was left alone with the child that morning. The child was acting normally when Cramer put him on his stomach on the couch and took a shower. When he returned 15-20 minutes later, his son was not breathing. Cramer said he then performed CPR before calling "911" (63:72-73).

The child's mother, Candice Cramer, testified that Matthew was born November 29, 2008, two-and-one-half months previous (63:89-90). Matthew was a healthy, normal baby with no medical problems during that brief period of time. Candice said Matthew was acting normally in the days leading up to February 17, and there

was nothing out of the ordinary when she changed and fed Matthew around 7:30 a.m. the morning of February 17 (63:94-95, 103-04). Cramer was left alone with Matthew and his four-year-old sister, Camarina (nicknamed "CC") after Candice's grandmother left for work at 7:15 a.m., and after Candice left at 8:30 a.m. to run errands all morning (63:86, 103, 105-06).

When she returned from her errands sometime around noon, Candice saw emergency personnel at the house (63:111). Cramer had not phoned or texted Candice that morning to tell her something tragic happened to their child (63:158). Candice asked Cramer what happened. Cramer told her he did not know but gave the following account: Cramer said he fed Matthew, laid him down on the couch and took a shower (63:114). Before a court hearing several days later, Cramer sent a text message to Candice telling her he and their daughter, "CC," were jumping on the bed and Matthew was "whining." Cramer said Matthew would not burp after feeding him. He then laid the child on the sofa, took a shower, and noticed Matthew was not breathing when he came out (63:121-22). Cramer told Candice on three occasions that he was "sorry," and later admitted to Candice that he was playing with Matthew "too hard." After they were done playing, Cramer said he gave Matthew a bottle, placed him on the couch and took a shower (63:124-25, 144). Candice testified Cramer would normally not help with Matthew when he cried and the child's crying "irritated" him (63:97-98, 150-51).

Candice did not see any bruising on Matthew when she changed him before leaving that morning (63:148-49). Although she believed Cramer did not harm Matthew and is a peaceful man (63:153-54), Candice admitted on cross-examination that Cramer hit her in 2005-06; their young son, Michael, suffered a broken femur when Cramer gave him a bath in 2003; and their daughter, "C.C.," suffered cracked ribs when she stayed with Cramer and her grandmother (63:154-55).

When interviewed by Milwaukee Police Detective Salazar later the same day, Cramer said he was left alone with the children that morning. Matthew became "fussy" around 11:00 a.m. Cramer gave him a bottle but he still fussed and could not be burped. He then placed Matthew face down on the couch and took a 10-15 minute shower (63:174-75). Cramer saw nothing unusual before the shower but found Matthew unconscious and completely limp when he came out. Cramer said he started CPR and chest compressions before calling for help (63:176-78). Cramer said he did not know what happened, but then remarked he does not "know himself anymore" and does not "know[] right from wrong" (63:184). Cramer also told Detective Salazar he did not know how to tell Candice what happened or how to put it into words (63:184-86).

After Detective Salazar denied Cramer's request to speak with his wife alone, telling Salazar "I want to tell her first" but did not know how (63:186), Salazar said Cramer's attitude changed. Cramer remarked it did not matter what he said because he would be seen as a child abuser (63:185). Cramer then said, in response to a question by Salazar, that Candice's family did not have the right to know what happened to Matthew (63:186).

Detective Salazar interviewed Candice Cramer. Candice said Cramer told her at some point before the February 27th preliminary hearing that he threw Matthew into the air and admitted he was "playing too hard" with the child, but he did not explain to her how Matthew got hurt (63:190, 192-93).

Cramer had a telephone conversation with Candice an hour before the February 27th preliminary hearing asking her not to come to court (63:189). He also sent her a text message that morning shortly before the preliminary hearing telling Candice, "I'll do everything to make sure this never happens again. I promise, mama" (63:213-14). Later that morning, Cramer sent another message asking

Candice to tell Matthew that he loves him and "I'm sorry" (63:214-15).

The testimony of the state's medical witnesses

Dr. Thomas Valvano, a pediatrician who attended to Matthew in the emergency room and the intensive care unit at Children's Hospital, testified that he is a child abuse pediatrician at Children's Hospital and an assistant professor of pediatrics at the Medical College of Wisconsin (64:17-20). According to Valvano, there was no history of accidental injury, falling, being dropped, fractures or bruises to Matthew. Valvano learned from Candice that Matthew was healthy, active and feeding normally when she left that morning (64:26-30). Medical reports showed that Matthew had an uncomplicated birth and no significant medical issues in the two-and-one-half months since (64:31).

When admitted to Children's Hospital, Matthew was non-responsive, had no heart rate, was intubated and breathing on a ventilator. His pupils were fixed and dilated, indicating to Valvano that Matthew's brain was not working (64:31-33). Valvano learned that the EMTs revived Matthew and got his heart beating again with a stimulant (64:35).

Dr. Valvano personally examined Matthew and saw bruising above and below Matthew's left knee and a linear bruise on his left arm. Valvano found this to be significant because two-month-old infants are not ambulatory and, so, do not normally sustain bruises unless something is "done to them" (64:36-38, 99-100). Valvano had also learned from Candice that Matthew had no bruises when she left that morning and there was no history of accidental trauma to him (64:37).

Valvano described the severe injuries to Matthew's brain revealed by the CT scan taken at 1:21 p.m. on February 17th (66:24). There are two membranes enclosing the brain: the closest to the brain is the

arachnoid and the next is the dura. Valvano observed extensive bleeding beneath both the arachnoid and the dura on both sides of the front of the brain, as well as a small subarachnoid hemorrhage on the back of the head (64:39-40, 42-43).

An MRI taken on February 20th, three days after the event (66:24-25), revealed significant brain swelling. It also revealed small pin-point hemorrhages to the brain tissue, indicating trauma to the brain itself (64:47-48). The MRI also revealed an injury to the spine close to the opening at the base of the skull that Valvano described as "a bruise to the spine" (64:56). He observed an injury to the brain stem "that controls the very basic functions of life" (64:48, 51-52). There was also extensive hemorrhaging ("[t]oo numerous to count") to the retinas in both eyes (64:54-55).

These massive injuries were, in Dr. Valvano's opinion, indicative of abusive head trauma: injuries that were inflicted by trauma with "significant force" (64:57). He arrived at this opinion only after engaging in a "differential diagnosis" to eliminate other non-traumatic, non-abusive causes. There was no evidence of infection, fever, vomiting, or suffocation. There was no explanation for the observed bruises, the retinal hemorrhages or this constellation of injuries (64:58-60). These injuries were not caused by efforts to resuscitate a SIDS victim (64:61-62, 71-74). These injuries were not sustained by being tossed in the air or in a short fall off a sofa or while rough-housing (64:61-62, 89, 96, 102-03). Such a fall could have resulted in a "focal" injury, but not the extensive diffuse injuries observed here, according to Dr. Valvano (64:75-76).

Dr. Valvano specifically rejected the notion that this could have been a Sudden Infant Death Syndrome ("SIDS") case; or that these injuries could have resulted from the EMTs successfully resuscitating a SIDS baby (64:60-62).

Dr. Valvano described the rotational and acceleration/deceleration forces that produce these severe diffuse injuries when a baby, with its large head, undeveloped neck muscles and not-yet-fully-formed brain matter, is violently swung or shaken with impact (64:62, 65-70, 102). These injuries, Valvano concluded, were "inflicted upon Matthew" (64:65).

On cross-examination, Valvano explained it is not uncommon to have abusive internal head trauma without external trauma. These injuries could have been caused by violently shaking or swinging the baby and hitting its head against even a soft surface with such "force and violence" that it causes the internal injuries (64:89). Valvano further explained that this is not a "Shaken Baby Syndrome" ("SBS") case; while shaking may be part of the mechanism, it is a subset of abusive head trauma and but one mechanism that could contribute to these injuries (64:90-91). He described this as instead a "classic case" of abusive head trauma: diffuse brain injuries, bilateral subdural and subarachnoid bleeding, injuries to the brain tissue itself, and retinal hemorrhaging (64:96-97). These are not the type of injuries suffered by drowning or caused by hypoxia (loss of oxygen) in SIDS cases. This is the result of trauma (64:97-98).

The Assistant Milwaukee County Medical Examiner (at that time) and a forensic pathologist, Dr. Wieslawa Tlomak, performed the autopsy on Matthew after life support was finally withdrawn by the family September 2, 2009 (65:5). The cause of death, she opined, was complications from blunt force injuries to the head (65:6). The injuries Dr. Tlomak saw during the autopsy were the same as those revealed to Dr. Valvano by the MRI almost seven months earlier, but with the exception that the brain had dramatically shrunk due to the loss of blood and oxygen (65:11-19, 21-22). She described the "diffuse axonal brain injury" consistent with severe head trauma but with no history of accidental injury (65:16-17); along with the retinal hemorrhages and injury to the spinal cord (65:19).

As did Dr. Valvano, Dr. Tlomak ruled out SIDS as a possible cause due to the nature of these injuries. With SIDS babies, the autopsy findings are "negative" for these injuries (65:24). With no history of accidental injury, Dr. Tlomak rendered the opinion that this was a "homicide" due to inflicted head trauma involving a "very large" amount of force (65:25). A short fall of 2-4 feet would not account for these injuries (65:26).

On cross-examination, Dr. Tlomak explained this is not an SBS case because it involved shaking combined with blunt force trauma involving some sort of impact (65:29-30). Tlomak said she often does not find external injuries during an autopsy but discovers hemorrhages after cutting underneath the skin (65:38-39). She explained how the differences in an infant's anatomy can produce such catastrophic internal injuries when subjected to violent trauma (65:38-39).

The testimony of the defense medical expert

In the defense case, Cramer called Dr. Thomas Young, a forensic pathologist who reviewed the medical and police reports. In Young's opinion, the cause of death was complications from resuscitation of a SIDS victim (65:53-54). This occurs when a baby's heart and breathing stops due to SIDS but are then restarted by medical personnel. In the meantime, the brain has suffered extensive damage due to the temporary loss of blood and oxygen. When the blood flow starts anew upon resuscitation, it causes weakened blood vessels to leak into the membranes surrounding the brain (65:53-61). Matthew's injuries, Young insisted, were not caused by abuse (65: 81-82, 120).

On cross-examination, Dr. Young admitted he regularly testifies for the defense and received $300 an hour (up to $7,500) for testifying in this case (65:84). He has performed "a dozen" autopsies in abusive head trauma cases in 18 years and has found subdural subarachnoid and retinal hemorrhages in child abuse autopsies (65:85-

86). He agreed with the findings by Drs. Valvano and Tlomak that Matthew sustained subdural, subarachnoid and retinal hemorrhaging (65:70, 111-12). Young admitted that a "resuscitated SIDS" case "is a really rare event" and he has never come across one in his 20 years of experience (65:87-89). Young never saw Matthew and was not present at his autopsy (65:89-90).

Dr. Young was unaware that Cramer claimed he tossed Matthew into the air or that he admitted to playing "too hard" with Matthew (65:96). Young did not recall seeing any description of bruises on Matthew (65:103, 108-09) and did not recall mentioning any bruising in his report (65:110-11). Young conceded it is unusual to see bruising on a two-month-old because an infant that age is not mobile; it is a sign of trauma (65:109-10). Although he believed brain swelling would have occurred shortly after resuscitation of a SIDS baby, Young could not recall whether the CT scan on February 17 revealed brain swelling (it did not) (65:115-16).

The state's rebuttal witness

The state recalled Dr. Tlomak in rebuttal. She explained there was evidence of trauma to Matthew in addition to what would be caused by the lack of oxygen and loss of blood flow (66:15-16). There were injuries to his brain's gray matter and to the white matter beneath it. There was hemorrhaging in the connectors of the brain's two hemispheres and dilated ventricles. Tlomak found a number of "infarcts" (dead tissue) in the white matter and in the brain stem. She also noted the separate spinal cord injury revealed by the MRI (66:15-20). The spinal injury was most likely caused by trauma. The only other possibility would be a bleeding disorder that Matthew did not have (66:34). Moreover, she said, the spinal cord injury was separate and not formed by gravitational bleeding from other regions of the brain because the injury was to the front of the spinal cord and above the dura, whereas the bleeding caused by the brain injuries was beneath the dura (66:21-22).

All of these injuries would not have been caused by loss of blood flow and oxygen alone. In Dr. Tlomak's opinion, they are indicative of trauma (66:15-17).

Unlike Dr. Young, Dr. Tlomak has seen that "rare" case of resuscitated SIDS death, having performed an autopsy on an infant under six months old (66:17-18). According to Tlomak, the findings in that case were "completely different" from the findings here. Tlomak said that child's brain was slightly swollen and there was no subdural, subarachnoid or retinal hemorrhaging as there was with Matthew (66:18-19). Dr. Tlomak testified the CT scan did not support Dr. Young's findings because there would have been immediate brain swelling after the SIDS resuscitation. There was no brain swelling shown on the CT scan taken roughly one-and-a-half hours after the first responders arrived (66:23-25).

On cross-examination, Dr. Tlomak confirmed that a fall in a bathtub would be "very unlikely" to kill somebody and she has never seen that (66:26) (there is no claim here that Matthew fell or was dropped in the bathtub). Dr. Tlomak acknowledged that the term "Shaken Baby Syndrome" is controversial and she does not use it (66:28). Tlomak also acknowledged that she and Dr. Young have differing opinions (66:30-31).

Cramer did not testify at trial (65:126-30).

ARGUMENT

I. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION TO DENY CRAMER'S POSTCONVICTION MOTION ALLEGING INEFFECTIVE ASSISTANCE OF COUNSEL WITHOUT AN EVIDENTIARY HEARING BECAUSE IT FAILS TO SUFFICIENTLY ALLEGE DEFICIENT PERFORMANCE AND PREJUDICE; AND THE RECORD CONCLUSIVELY SHOWS CRAMER WOULD BE UNABLE TO PROVE BOTH DEFICIENT PERFORMANCE AND PREJUDICE AT AN EVIDENTIARY HEARING.

Cramer contends his trial attorney, Richard Hart, was ineffective in two respects: (1) for failing to present evidence there could have been a "lucid interval" between the infliction of injury to Matthew and the onset of symptoms, and thus "one can not [sic] determine when Matthew was injured"; (2) for failing to "correct the inaccuracies" in the testimony of Drs. Valvano and Tlomak. Cramer's brief at 37.

A. The applicable law and standard for review.

1. The required factual specificity in the motion's allegations to merit an evidentiary hearing.

The sufficiency of Cramer's postconviction motion to require an evidentiary hearing on his ineffective assistance of counsel claim is a question of law to be

reviewed by this court *de novo. State v. Balliette*, 2011 WI 79, ¶ 18, 336 Wis. 2d 358, 805 N.W.2d 334.

To be sufficient to warrant further evidentiary inquiry, the postconviction motion must allege material facts that are significant or essential to the issues at hand. *State v. Allen*, 2004 WI 106, ¶ 22, 274 Wis. 2d 568, 682 N.W.2d 433. The motion must specifically allege within its four corners material facts answering the questions who, what, when, where, why and how the defendant would successfully prove at an evidentiary hearing that he is entitled to a new trial: "the five 'w's' and one 'h'" test. *Id.* ¶ 23. *See State v. Balliette*, 336 Wis. 2d 358, ¶ 59; *State v. Love*, 2005 WI 116, ¶ 27, 284 Wis. 2d 111, 700 N.W.2d 62.

If the motion is facially insufficient, presents only conclusory allegations, or even if facially sufficient the record conclusively shows the defendant is not entitled to relief, the trial court has the discretion to deny the motion without an evidentiary hearing, subject to deferential appellate review. *State v. Balliette*, 336 Wis. 2d 358, ¶ 50; *State v. Allen*, 274 Wis. 2d 568, ¶¶ 9, 12; *State v. Bentley*, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996); *Nelson v. State*, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). *See State v. Roberson*, 2006 WI 80, ¶ 43, 292 Wis. 2d 280, 717 N.W.2d 111.

To obtain an evidentiary hearing on an ineffective assistance of counsel claim, the defendant must allege with factual specificity both deficient performance and prejudice. *State v. Balliette*, 336 Wis. 2d 358, ¶¶ 20, 40; *State v. Bentley*, 201 Wis. 2d at 313-18. He may not rely on conclusory allegations of deficient performance and prejudice, hoping to supplement them at an evidentiary hearing. *State v. Bentley*, 201 Wis. 2d at 317-18; *Levesque v. State*, 63 Wis. 2d 412, 421-22, 217 N.W.2d 317 (1974). The motion must allege with specificity how and why counsel's performance was both deficient and prejudicial to the defense. *State v. Balliette*, 336 Wis. 2d 358, ¶¶ 40, 59, 67-70; *State v. Bentley*, 201 Wis. 2d at

313-18; *State v. Saunders*, 196 Wis. 2d 45, 49-52, 538 N.W.2d 546 (Ct. App. 1995). Even when the allegations of deficient performance are specific, the trial court may in its discretion deny the motion without an evidentiary hearing if the allegations of prejudice are only conclusory in nature. *State v. Bentley*, 201 Wis. 2d at 313-18. *See State v. Balliette,* 336 Wis. 2d 358, ¶¶ 40, 56, 70.

2. Deficient performance.

To establish deficient performance, it is not enough for Cramer to prove his attorney was "imperfect or less than ideal." *State v. Balliette*, 336 Wis. 2d 358, ¶ 22. The issue is "whether the attorney's performance was reasonably effective considering all the circumstances." *Id.* Counsel is strongly presumed to have rendered reasonably competent assistance. *Id.* ¶¶ 25, 27. Cramer must, therefore, make specific allegations in his motion to overcome that presumption if he is to have an evidentiary hearing. *Id.* ¶ 78.

Cramer 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 121, 127, 449 N.W.2d 845 (1990). 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 Cramer must overcome a strong presumption that counsel acted reasonably within professional norms. *State v. Domke*, 2011 WI 95, ¶ 36, 337 Wis. 2d 268, 805 N.W.2d 364; *State v. Johnson*, 153 Wis. 2d at 127.

"Strategic choices are 'virtually unchallengeable.'" *McAfee v. Thurmer*, 589 F.3d 353, 356 (7th Cir. 2009) (quoting *Strickland v. Washington*, 466 U.S. 668, 690 (1984)). Cramer 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. Cramer does not prove deficient performance unless he can show that 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.

3. Prejudice.

Cramer also had to specifically allege prejudice because it would be his burden to affirmatively prove at an evidentiary hearing actual prejudice resulting from any proven deficient performance. Cramer would bear the burden of proving 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. Cramer would have 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. Cramer may not speculate. He must *affirmatively prove* prejudice. *State v. Balliette*, 336 Wis. 2d 358, ¶¶ 24, 63, 70; *State v. Allen*, 274 Wis. 2d 568, ¶ 26.

B. Defense counsel strategically chose the reasonable strategy of proving this was a natural SIDS death over the strategy of trying to prove someone else inflicted the head trauma because there may have been a "lucid interval" of unspecified short duration.

1. Deficient performance.

Cramer does not like the strategic approach taken by Attorney Hart at trial because it failed. He now wants a do-over to pursue an entirely different strategy that he hopes will work. His motion fails, however, to overcome the strong presumption that counsel acted reasonably in relying on the testimony of his own expert and on cross-examination to challenge the opinions of the state's experts that Matthew suffered abusive head trauma, and to support the defense theory that he was instead a SIDS victim who died of natural causes.

Trial counsel opted for the reasonable theory that *no one* caused Matthew's injuries over the theory now proposed in hindsight that *someone other than Cramer* caused Matthew's injuries because there could have been a "lucid interval" between the infliction of injury and the onset of symptoms. Both are plausible theories. The problem for Cramer is that his motion does not explain why it was unreasonable for counsel to favor the first theory over the latter; or why it was unreasonable for counsel to decide against presenting both theories to the jury.

Certainly, counsel could reasonably decide against presenting both theories to the jury because they are contradictory. The first assumes no human fault. The second assumes human fault but cannot place the precise time of the child's maltreatment. *See* Cramer's brief at 38 (faulting Hart for not employing the alternative strategy

"that even if the jury accepted [the] state's theory that Matthew had been subjected to a head trauma," there could have been a lucid interval). Counsel could reasonably decide not to argue to the jury: "No one abused Matthew. He was a SIDS baby. But if you believe someone abused Matthew, it wasn't Cramer." A reasonable juror might ask: "Well, which is it? Did someone injure this child or didn't they?" A reasonable juror might see this inconsistent approach as a clever defense "smoke and mirrors" strategy designed to avoid conviction.

a. Dr. Young's expert testimony.

Counsel's wise strategy was to establish through his own expert, Dr. Young, that the cause of death was "natural," the result of complications from resuscitating a SIDS victim, and not abuse (65:53-54, 120). Counsel also established through Dr. Young that "shaken baby syndrome," the diagnosis that this constellation of injuries can be caused by shaking alone, has been "proven false" (65:75-76), and biomechanical studies do not support it (65:76-78). Moreover, Dr. Young testified, an infant can die from a short fall (65:71); there are a number of other possible explanations for these injuries besides abuse (65:73-75); and hitting an infant's head against a sofa cushion would not cause death (65:80). Dr. Young testified he saw no evidence of trauma to Matthew other than from resuscitation efforts (65:78-79), and noted that the doctor who examined Matthew in the emergency room saw no evidence of bruising (65:116). Young also rendered the opinion that even if Cramer dropped Matthew on the bed while playing, it should not have caused this brain damage (65:117). Young criticized the "backward reasoning" he believes was employed by the state's experts enabling them to arrive at their opinions that these injuries must have been caused by abuse (65:119-120).

b. Cross-examination of the state's experts.

Attorney Hart also aggressively attacked on cross-examination of the state's doctors their diagnosis of abusive head trauma (64:76-98; 65:27-37; 66:26-33). Counsel delved into the shaken baby syndrome "controversy" with both doctors (64:90-92; 65:29). Counsel also established through these witnesses that there was no skull fracture and little evidence of external injury as one might expect if the child was violently impacted against an object (64:86-87; 65:32-37).

Attorney Hart's approach was thorough and sound. "Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies." *Harrington v. Richter,* __ U.S. __, 131 S. Ct. 770, 789 (2011). *See Lutze v. Sherry,* No. 07-11227, 2008 WL 2397640, *15 (E.D. Mich. 2008) ("The fact that another expert might have opined the victim was not shaken, with the benefit of hindsight, does not establish ineffective assistance of counsel").

2. Prejudice.

Cramer would be unable to prove prejudice at an evidentiary hearing. The record conclusively shows there is no reasonable probability of a different result had Dr. Plunkett testified for the defense at trial instead of, or in addition to, Dr. Young.

Cramer concedes that Attorney Hart did not hire "the wrong expert" when he chose Dr. Young over Dr. Plunkett (assuming Plunkett was both available and affordable at trial). Cramer's brief at 40. Plunkett would agree with Dr. Young's diagnosis of a natural cause death

by resuscitation of a SIDS baby (A-Ap. 108).[2] Plunkett also would agree with Young's opinion that these injuries could be caused by a short fall (A-Ap. 113-14). On these points, Plunkett's testimony would only be cumulative to Young's.

Plunkett's proffered testimony regarding a possible lucid interval (A-Ap. 109-10) would not have helped. As explained above, it would support the theory that someone other than Cramer caused these injuries at some unspecified time; a theory inconsistent with the theory presented at trial that no human caused these injuries because Matthew died naturally of SIDS.[3]

Had Attorney Hart pursued the lucid interval strategy in addition to the natural cause of death strategy, there is no reasonable probability of a different outcome. That evidence would have shown that only several minutes or at most a few hours conceivably could have passed between the infliction of injury by a human agent and the onset of symptoms. Most often, however, symptoms are immediate.

In most cases where the perpetrator confessed, there was no lucid interval between the confessed shaking and the onset of symptoms:

> Most perpetrators in this study reported that symptoms appeared immediately after the injury was inflicted. The 5 cases in which the symptoms seem to have been delayed all involved children who were not observed closely in the immediate period after their injuries. These results suggest that children do not behave normally immediately after inflicted in-

[2] It is interesting to note that, just as the state's experts were reluctant to use the term "shaken baby syndrome" due in large part to its impreciseness, Dr. Plunkett no longer uses the term "SIDS" due to its impreciseness (A-Ap. 108).

[3] Plunkett would also be cross-examined by the state about his disagreement with Dr. Young regarding the nature of the injury to the spinal cord (A-Ap. 109).

> tracranial injury, and confirm recent studies showing immediate onset of symptoms in children who sustain primary head injury. A history in which the child initially was behaving completely normally and only later developed symptoms is, therefore, unlikely.

Suzanne P. Starling, M.D., et al., *Analysis of Perpetrator Admissions to Inflicted Traumatic Brain Injury in Children*, 158 Archives of Pediatric and Adolescent Medicine 454, 456-57 (May 2004) (footnotes omitted). "In sum, lucid intervals are extremely uncommon following devastating head injury." John E.B. Myers, Myers on Evidence of Interpersonal Violence, Child Maltreatment, Intimate Partner Violence, Rape, Stalking and Elder Abuse, § 4.14[E], p. 340 (5th ed. 2011).

Dr. Plunkett's bald assertion in his letter to Cramer's postconviction counsel that "it is not possible to determine when the injury occurred" (A-Ap. 109) is, to put it diplomatically, misleading. It is contrary to virtually every credible authority on the matter. It is even contrary to Plunkett's own 2001 study revealing that lucid intervals are rare and last only a matter of minutes or a few hours in most cases. John Plunkett, M.D., *Fatal Pediatric Head Injuries Caused by Short-Distance Falls*, 22 Am. J. Forensic Med. Pathology 1 (2001). Nowhere in his report does Plunkett define when a child is "lucid," what is an "interval," and what constitutes a "lucid interval." Be that as it may, Plunkett's report plainly reveals that to the extent they occur at all, lucid intervals are normally brief.

Plunkett's 2001 study of 75,000 children injured after falling from playground equipment included 114 fatalities, of which 18 fatalities were from head injuries after short falls. The 18 fatalities ranged in age from one year to thirteen years. *Id.* at 2-3. There were no infants like Matthew in his study. Plunkett found that 12 of the 18 fatalities involved a lucid interval. But of the children aged three years or younger who died, the lucid intervals were no more than *fifteen minutes*. Of the seven children who died in falls from swings, five had no lucid interval at

all and the other two had lucid intervals of ten minutes. *Id.* at 3. A four-year-old who fell off a ladder reportedly had a lucid interval of 3 hours. The only lucid intervals beyond three hours were an eight-year-old who fell off a retaining wall (twelve plus hours) and a seven-year-old who fell off a horizontal ladder (48 hours). *Id.*[4]

This expert testimony would not help Cramer. There is no dispute that Cramer was alone with Matthew for close to three hours before the "911" call at 11:56 a.m. He was alone with Matthew (and the other small child) all morning from 8:30 a.m. on. Plunkett's own study, though of limited value because it did not include infants, would nonetheless support the state's theory that Cramer and no one else injured Matthew in those hours he was alone with Matthew. Moreover, there was no evidence at trial, and there is no evidence offered in Cramer's motion, to indicate that anyone injured Matthew accidentally or intentionally before 8:30 a.m., during the night before, or in the preceding 48 hours. There was no evidence Matthew fell, or was dropped, in the minutes, hours or days preceding the "911" call.

Again, because Matthew was only two-and-a-half months old, he could not injure himself as a four- or eight-year-old might by falling off a swing or ladder. Someone had to do something to Matthew – intentionally, recklessly or accidentally -- to cause these injuries. Cramer offers nothing to show that anyone other than himself injured Matthew in the minutes and hours before he found

[4] Plunkett's report undercuts Cramer's naked assertion, at p. 41 of his brief, that there could have been a "lucid interval of up to 72 hours." Again, the longest interval in Plunkett's study was 48 hours (for a seven-year-old); the next longest was 12 plus hours (for an eight-year-old); the next three hours (for a four-year-old). Plunkett, at 3. Moreover, all of the children in Plunkett's study fell off playground equipment. There was no history that Matthew ever fell, was dropped or thrown from anywhere (64:26-30). Cramer never claimed that Matthew fell in his presence or rolled off the couch where Cramer left him while he showered.

Matthew lifeless on the couch after leaving him there healthy and fully alive just 15-20 minutes earlier.

Finally, Cramer was the one who admitted to tossing and playing "too hard" with Matthew during the morning. Cramer was alone with him and four-year-old "CC" when Matthew fussed, cried, needed to be fed and would not burp. Cramer was the one who claimed to have put a healthy and normal Matthew on a sofa only to find him in the same position lifeless 15-20 minutes later. Cramer was the only one who apologized to Candice for whatever it was he did to Matthew and the only one who promised never to let it happen again.

There is no reasonable probability of a different outcome because, with respect to the cause of death, Plunkett's testimony would have added little to what was presented by Dr. Young. Plunkett's testimony would have done little to overcome the persuasive force of the state's experts, the only doctors who examined Matthew firsthand. The jury rejected Young's opinion based on the powerful circumstantial and medical evidence presented by the state. All other aspects of Plunkett's proffered testimony were beside the point as they had no relevance to the SIDS defense. The lucid interval testimony would have contradicted the chosen defense theory that no one inflicted injury on Matthew; he died of SIDS. There is no reason to believe the jury would have acquitted had Plunkett testified in addition to, or instead of, Dr. Young.

C. Defense counsel competently challenged the opinions of the state's experts.

Cramer laments that Attorney Hart did not do enough to expose the "scientific flaws" in the testimony of the state's experts. Cramer's brief at 39. This challenge is utterly baseless.

1. Deficient performance.

As discussed above, counsel challenged the "shaken baby syndrome" (shaking without impact) concept on cross-examination and got both of the state's experts to admit this is a controversial diagnosis when impact is not involved; they favor the more encompassing diagnosis of "abusive head trauma."

Cramer complains that Hart failed to challenge the impression left by the testimony of the state's doctors that "only doctors who act as defense witnesses" dispute the existence of SBS. *Id.* That is, however, essentially true. *See* Myers, Myers on Evidence of Interpersonal Violence, § 4.14[C], pp. 325-26 ("[t]he weight of evidence suggests that shaking alone is sometimes sufficient to cause devastating injury and death"). *See also id.* at p. 324; n.320 at pp. 330-32; and [E] at 338-40 (noting medical experts severely critical of Plunkett's articles over the years regarding short falls and lucid intervals). Almost all medical experts agree infants do not suffer this constellation of injuries from short falls. Almost all agree symptoms would appear almost immediately upon infliction of this constellation of injuries. Experts are especially strong in their criticism of Plunkett's shaky conclusion that a short fall can cause this constellation of injuries. *Id.* [B], p. 324); Sandeep Narang, M.D., J.D., *A Daubert Analysis of Abusive Head Trauma/Shaken Baby Syndrome*, 11 Hous. J. of Health L. and Pol'y 505, 574-76 (Summer 2011).[5] *See* Brandon M. Togioka, M.D., et al.,

[5] As mentioned above, recent authors and cases have cited "a shift in mainstream medical opinion" against the validity of AHT as a medical diagnosis. Other proffers have included: "[a]nd as technology and scientific methodology advanced, researchers questioning the basis for SBS reached a critical mass." There is but one simple question for these assertions: Where is the evidence/data for these assertions (other than the opinions of known defense experts)?

(footnote continued)

Retinal Hemorrhages and Shaken Baby Syndrome: An Evidence-Based Review, 37 Journal of Emergency Medicine 98-106 (2009) (retinal hemorrhages "are common in abused children and exceedingly rare in cases of accidental head injury." *Id*. at 103). The survey all but rules out accidental causes of eye hemorrhaging such as: short falls, seizures, coughs and vomiting, efforts to resuscitate or birth trauma. The more severe the retinal

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> Rather than respond in like, with unsupported generalizations, this author will simply cite, with supporting, verifiable references, the various international and domestic medical organizations that have publicly acknowledged the validity of AHT as a medical diagnosis:
>
> 1) The World Health Organization
> 2) The Royal College of Pediatrics and Child Health
> 3) The Royal College of Radiologists
> 4) The Royal College of Ophthalmologists
> 5) The Canadian Paediatric Society
> 6) The American Academy of Pediatrics
> 7) The American Academy of Ophthalmology
> 8) The American Association for Pediatric Ophthalmology and Strabismus
> 9) The American College of Radiology
> 10) The American Academy of Family Physicians
> 11) The American College of Surgeons
> 12) The American Association of Neurologic Surgeons
> 13) The Pediatric Orthopedic Society of North America
> 14) The American College of Emergency Physicians
> 15) The American Academy of Neurology
>
> While it is certainly true that the public promulgations of the various international and domestic medical societies are not representative of each and every member of that society, it is safe to conclude they are representative of the majority of its members. The notable subspecialties that have some discord amongst their members are pathologists (represented by the National Association of Medical Examiners) and biomechanical engineers.

11 Hous. J. of Health L. and Pol'y, at 574-76 (footnotes omitted).

hemorrhaging, the more severe the neurological damage and the more likely there is subdural bleeding. *Id*. at 102-04.

In a study of seventeen cases from 2002-07 in Michigan where perpetrators confessed to abusing the child, retinal hemorrhages were found in 94 percent of the cases, and severe hemorrhaging in both eyes was found in 65 percent. Edward A. Margolin, M.D., et al., *Prevalence of Retinal Hemorrhages in Perpetrator-Confessed Cases of Abusive Head Trauma*, 128 Archives of Ophthalmology 795 (June 2010). James R. Gill, M.D., et al., *Fatal Head Injury in Children Younger Than 2 Years in New York City and an Overview of the Shaken Baby Syndrome*, 133 Archives of Pathology & Laboratory Med. 619-27 (April 2009) (empirical study of infant deaths supports theory of shaking without impact: "an infant who presents with a traumatic brain injury, where there is no history of any preceding accidental injury, is highly suspicious for nonaccidental injury." *Id*. at 626. When an infant child presents with the triad of injuries without impact evidence, and the caregiver admits to shaking, "[w]hiplash shaking without impact is the cause of death of this subset of infant homicides." *Id.*). *Also see* Catherine Adamsbaum, M.D., et al., *Abusive Head Trauma: Judicial Admissions Highlight Violent and Repetitive Shaking*, 126 Pediatrics 546-55, No. 3 (Sept. 2010).

Attorney Hart challenged on cross-examination and through Dr. Young the opinion testimony of the state's experts that violently impacting Matthew's head on a sofa cushion could have caused these injuries (64:88-89). Cramer complains, nonetheless, that Hart did not also establish the state's testimony "defied the laws of physics." Cramer's brief at 39. Nowhere in his motion or brief does Cramer explain what those "laws of physics" are or how they were violated. Attorney Hart directly challenged abusive head trauma as the cause of death. Every indication is that, due to the unique and fragile nature of an infant -- the disproportionate size of his head, the undeveloped neck muscles and the not yet fully

formed brain, infliction of these injuries by violent shaking with or without impact does not defy the laws of physics even assuming it would if the injuries were to an adult or an older child falling on a playground.

Cramer does not like that Dr. Valvano testified biomechanical modeling in this area is "very crude" and he faults counsel for not challenging that answer. He complains that Valvano's answer "undercut" Hart's line of questioning. Cramer's brief at 39-40. This ignores the fact that, in his next breath, Valvano acknowledged that everyone is still learning as modeling becomes "more sophisticated" (64:93-94). Cramer then points to sophisticated biomechanical modeling used to set standards for "sports helmets, motor vehicles, playground equipment, playground surfaces," and the like. Cramer's brief at 40 (relying on Plunkett's letter to counsel, A-Ap. 117).

As far as anyone knows, Matthew was not playing football or baseball with a helmet, swinging on playground equipment or was involved in a motor vehicle crash at any point in his brief two-and-a-half months on earth. Biomechanical modeling with regard to infant head trauma from suspected violent abuse will always be problematic no matter how sophisticated for the obvious reason that one cannot experiment by swinging or shaking a live infant. Cramer nowhere explains in his motion or brief what helpful biomechanical models with respect to infant head trauma are out there that Attorney Hart should have introduced at trial. To the extent Dr. Valvano's answer "undercut" Hart's line of questioning, Cramer's complaint is not with his attorney; it is with Valvano who gave an answer he does not like.

2. Prejudice.

There is no reasonable probability of a different outcome if Plunkett or someone like him testified on these points. The supposed "scientific flaws" in the testimony of the state's experts concerned matters tangential to the

central issue of cause of death: whether a small cadre of hired defense experts disputes the existence of shaken baby syndrome; whether causing these injuries by hitting the infant's head on a sofa "defies the laws of physics"; or whether biomechanical modeling is "crude" or "sophisticated."

The state's experts opined that Matthew died from inflicted abusive head trauma, not just by shaking, so the SBS "controversy" was not central to the state's case. The issue whether Matthew could have suffered these severe internal injuries without evidence of external injury was fully explored at trial through Dr. Young and on cross-examination of the state's experts. There was, however, evidence of external trauma in the form of the bruises to Matthew's leg and upper body observed by the first responders. The fact remains, as the trial court found, there was no evidence that Matthew "sustained any prior head traumas in his short life or that he was anything other than a normal, healthy baby prior to February 17, 2009" (49:3; A-Ap. 106).

Had Attorney Hart directly challenged Drs. Valvano and Tlomak by asking whether their opinions violate "the laws of physics," or are contrary to contemporary biomechanical modeling with regard to infant head trauma, their answers would have been a resounding "no." Had Hart asked whether their diagnosis of abusive head trauma -- based as it was on this constellation of severe brain and eye injuries, the suspicious bruising, and the history of good health and no accidental trauma in Matthew's short life -- would be the diagnosis of the vast majority of pediatricians, neurologists and pathologists, their answer would have been a resounding "yes."

> A court must be vigilant against the skewed perspective that may result from hindsight, and it may not second-guess counsel's performance solely because the defense proved unsuccessful. *Strickland,* 466 U.S. at 689; *see also State v. Harper,* 57 Wis. 2d 543, 556-57, 205 N.W.2d 1 (1973) ("In

> considering alleged incompetency of counsel, one should not by hindsight reconstruct the ideal defense.").

State v. Balliette, 336 Wis. 2d 358, ¶ 25.

The trial court properly denied Cramer's motion without an evidentiary hearing because all his motion has shown is that the defense strategy selected by trial counsel failed; not that it was unreasonable.

II. THE TRIAL COURT PROPERLY HELD THE STATE DID NOT KNOWINGLY USE FALSE EXPERT TESTIMONY.

Cramer blithely challenges the prosecutor's personal integrity and ethics, accusing him of *knowingly* presenting *false* testimony at trial. This argument is utterly devoid of merit for two reasons: (1) it was forfeited when Cramer did not object; and (2) it involved nothing more than a "garden variety" disagreement among medical experts.

A. Cramer forfeited this claim by not objecting.

Cramer forfeited this argument by not objecting when the prosecutor supposedly introduced false expert testimony.

Failure to object at trial generally precludes appellate review of a claim, even claims of constitutional dimension. *See, e.g., State v. Huebner*, 2000 WI 59, ¶¶ 10-11, 235 Wis. 2d 486, 611 N.W.2d 727; *State v. Davis*, 199 Wis. 2d 513, 517-19, 545 N.W.2d 244 (Ct. App. 1996); *State v. Edelburg*, 129 Wis. 2d 394, 400-01, 384 N.W.2d 724 (Ct. App. 1986).

The forfeiture rule helps the circuit court avoid or correct any error with minimal disruption of the judicial process, thus eliminating the need for appeal. *See Huebner*, 235 Wis. 2d 486, ¶ 12. The forfeiture rule also gives both parties and the circuit court notice of the issue and a fair opportunity to address the objection; encourages attorneys to diligently prepare for and conduct trials; and prevents attorneys from "sandbagging" opposing counsel by failing to object to an error for strategic reasons and later claiming that the error supports reversal. *See id.* ¶¶ 11-12.

Cramer's claim is now only reviewable as an ineffective assistance challenge with the burden of proving deficient performance and prejudice squarely on him. *See Kimmelman v. Morrison*, 477 U.S. 365, 374-75 (1986); *State v. Beauchamp*, 2011 WI 27, ¶¶ 14-15, 333 Wis. 2d 1, 796 N.W.2d 780; *State v. Carprue*, 2004 WI 111, ¶ 47, 274 Wis. 2d 656, 683 N.W.2d 31; *State v. Jones*, 2010 WI App 133, ¶ 25, 329 Wis. 2d 498, 791 N.W.2d 390; *State v. Haywood*, 2009 WI App 178, ¶ 15, 322 Wis. 2d 691, 777 N.W.2d 921 (the defendant forfeited his right to appellate review of a prosecutorial misconduct claim by not objecting at trial; the claim could only be reviewed as an ineffective assistance claim).[6] As discussed above, Cramer's motion failed to sufficiently allege both deficient performance by Attorney Hart and resulting prejudice.

[6] That is why the state opened this brief by addressing the *Strickland* challenge because, the state believes, the outcome of this appeal rises or falls on that challenge.

B. The state did not knowingly present false testimony; its experts presented truthful and accurate testimony in line with modern medicine.

Due process prevents the prosecutor from relying on testimony the prosecutor knows to be false or later learns to be false. *Giglio v. United States*, 405 U.S. 150, 153-54 (1972). To prevail, Cramer must prove both that the prosecutor knowingly relied on false testimony and he suffered actual prejudice. *United States v. Lovasco*, 431 U.S. 783, 789-90 (1977). Cramer must prove the false testimony was "material" in a constitutional sense; there is a reasonable likelihood the testimony could have affected the judgment of the jury. *Giglio*, 405 U.S. at 153-54; *Napue v. Illinois*, 360 U.S. 264, 271 (1959). This applies to false testimony bearing on the credibility of a witness. *Giglio*, 405 U.S. at 153-54; *Napue*, 360 U.S. at 269-70. *Also see Strickler v. Greene*, 527 U.S. 263, 280-81 (1999); *Braun v. Powell*, 227 F.3d 908, 920-21 (7th Cir. 2000).

The prosecutor did not knowingly present false testimony. The prosecutor presented what he believed to be truthful expert medical testimony regarding the cause of an infant's death in a case where there were no eyewitnesses and a constellation of injuries that contradicted the medical history provided; injuries that strongly supported the experts' diagnosis of abusive head trauma.

Cramer's dispute is not with the prosecutor but with the opinions of the state's experts as to cause of death. His expert, Dr. Young, presented a contrary opinion. No one gave "false" testimony; medical experts just disagreed as they often do (65:122; 66:30-31).[7] As

[7] One point Cramer emphasizes at length is that shaking alone cannot cause these brain injuries unless accompanied by neck injury. Cramer's brief at 27-29. There was, however, proof of spinal (footnote continued)

the trial court correctly found, the trial experts were all qualified to render their opinions as to cause of death. The fact that Plunkett disagreed with the state's experts (and to some extent even with Dr. Young), "does not establish that their testimony was false or misleading" (49:2; A-Ap. 105).

This case is no different than any "garden variety" civil or criminal case where one side presents expert opinion testimony and the other side presents expert opinion testimony to counter it. Labeling that the "knowing presentation of false testimony" is a serious charge that, if accepted by this court, would wreak havoc on countless civil and criminal trials in this state, and expose countless attorneys to bogus ethics complaints.

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cord injury to Matthew here. Cramer also claims that short falls of a few feet can cause these injuries. Cramer's brief at 29-31. They almost never do. It is closer to a one-in-a-million occurrence.

> Plunkett set out to prove the likelihood of short-fall death and concluded that death in falls of <3 m is "possible," on the basis of the occurrence of 18 head injury deaths resulting from falls in playground injuries in the NEISS [National Electronic Injury Surveillance System] database over 12 years (1988-1999). Nine of the 18 children who died were >5 years of age. Among the 9 young children, 4 cases were not witnessed at all, even by other children. Of the remaining 5 cases, 1 fall height was estimated at >2.0 m. Of the remaining 4 cases, 1 had no autopsy, and the cause of death in that case was uncertain.

David L. Chadwick, et al., *Annual Risk of Death Resulting From Short Falls Among Young Children: Less Than 1 in 1 Million*, 121 Pediatrics 1213, 1215 (2008) (footnote omitted). No one claimed that Matthew fell at any time. Cramer did not claim that Matthew fell off the couch when he took his shower. He found Matthew in the same spot when he returned from his shower. Cramer never claimed that he dropped Matthew after tossing him in the air. "It is the devastating or fatal head injury that a guilty conscience so often attributes [to] a short fall." Myers, Myers on Evidence of Interpersonal Violence, § 4.14[B], p. 325.

III. CRAMER IS NOT ENTITLED TO DISCRETIONARY REVERSAL BECAUSE THE REAL CONTROVERSY, THE CAUSE OF MATTHEW'S DEATH, WAS FULLY AND FAIRLY TRIED.

Wisconsin trial and appellate courts share the authority to grant discretionary reversal of a conviction in the interest of justice. *See* Wis. Stat. § 751.06 (supreme court); § 752.35 (court of appeals); §§ 974.02 and 809.30 (trial court; on direct review only). *State v. Henley*, 2010 WI 97, ¶¶ 58-66, 328 Wis. 2d 544, 787 N.W.2d 350.

This court may grant discretionary reversal under two circumstances: (1) the real controversy was not fully tried, or (2) there was a miscarriage of justice. *State v. Burns*, 2011 WI 22, ¶ 24, 332 Wis. 2d 730, 798 N.W.2d 166; *Vollmer v. Luety*, 156 Wis. 2d 1, 17-21, 456 N.W.2d 797 (1990); Wis. Stat. §§ 809.30, 751.06, 752.35. *See also State v. Harp*, 161 Wis. 2d 773, 779-82, 469 N.W.2d 210 (Ct. App. 1991), earlier opinion at *State v. Harp*, 150 Wis. 2d 861, 443 N.W.2d 38 (Ct. App. 1989).

A defendant who seeks discretionary reversal on the ground that the real controversy has not been fully tried does not have to prove a new trial would likely produce a different outcome. *State v. Williams*, 2006 WI App 212, ¶ 36, 296 Wis. 2d 834, 723 N.W.2d 719. The court looks to the "'totality of circumstances and determine[s] whether a new trial is required to accomplish the ends of justice.'" *State v. McGuire*, 2010 AP 91, ¶ 59, 328 Wis. 2d 289, 786 N.W.2d 227 (quoting *State v. Wyss*, 124 Wis. 2d 681, 735-36, 370 N.W.2d 745 (1985)). *See State v. Hicks*, 202 Wis. 2d 150, 161, 549 N.W.2d 435 (1996).

The discretionary reversal power is formidable, however, and should only be exercised "'in exceptional cases.'" *State v. Burns*, 332 Wis. 2d 730, ¶ 25 (quoting

State v. McGuire, 328 Wis. 2d 289, ¶ 59; *Vollmer v. Luety*, 156 Wis. 2d at 11.

> However, such discretionary reversal power is exercised only in "exceptional cases." *Id.*, ¶ 25; *State v. Hicks*, 202 Wis. 2d 150, 161, 549 N.W.2d 435 (1996). The power to grant a new trial in the interest of justice is to be exercised "infrequently and judiciously." *State v. Ray*, 166 Wis. 2d 855, 874, 481 N.W.2d 288 (Ct. App. 1992). "This court approaches a request for a new trial with great caution. We are reluctant to grant a new trial in the interest of justice. . . ." *Armstrong*, 283 Wis. 2d 639, ¶ 114 (citation omitted).

State v. Avery, 2013 WI 13, ¶ 38, 345 Wis. 2d 407, 826 N.W.2d 60 (footnote omitted).

> Such exceptional cases are generally limited to cases in which the jury was erroneously denied the opportunity to hear important testimony bearing on an important issue of the case, when the jury had before it evidence not properly admitted that "so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried," *id.* at 160, or when an erroneous instruction prevented the real controversy in a case from being fully tried. *State v. Bannister*, 2007 WI 86, ¶ 41, 302 Wis. 2d 158, 734 N.W.2d 892. This is not such a case.

State v. Doss, 2008 WI 93, ¶ 86, 312 Wis. 2d 570, 754 N.W.2d 150. *See State v. Burns*, 332 Wis. 2d 730, ¶¶ 25, 45.

> The "erroneous" denial of relevant evidence refers to a legal evidentiary error by the trial court. *See, e.g.*, *State v. Cuyler*, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983) ("We conclude that the case was not fully tried inasmuch as the circuit court erred in its interpretation of sec. 906.08(1) and excluded admissible and material evidence on the critical issue of credibility."); *State v. Joyner*, 2002 WI App 250, ¶ 25, 258 Wis. 2d 249, 653 N.W.2d 290.

State v. Burns, 332 Wis. 2d 730, ¶ 45 (emphasis added).

A court may not grant discretionary reversal unless and until it has balanced the compelling state interests in the finality of convictions and proper procedural mechanisms against the factors favoring reversal. *State v. Henley*, 328 Wis. 2d 544, ¶ 75.

The power of discretionary reversal is not to be used simply to enable a defendant to present another defense theory at a new trial after the defense theory presented by competent counsel at the first trial failed. *State v. Maloney*, 2006 WI 15, ¶ 37, 288 Wis. 2d 551, 709 N.W.2d 436; *State v. Hubanks*, 173 Wis. 2d 1, 29, 496 N.W.2d 96 (Ct. App. 1992). *See State v. Williams*, 2001 WI App 155, ¶¶ 16-17, 246 Wis. 2d 722, 631 N.W.2d 623. "'When there are alternative causes of action and one makes a choice, there is little room for arguing the real controversy has not been tried.'" *State v. Maloney*, 288 Wis. 2d 551, ¶ 37 (quoting *Buel v. La Crosse Transit Co.*, 77 Wis. 2d 480, 496, 253 N.W.2d 232 (1977)).

Cramer wants a new trial because he found a new expert after trial who challenges the testimony of the state's trial experts. If a new trial were awarded any time a litigant found a new expert with a different viewpoint than the trial experts, few convictions and few civil judgments would ever be "final." That is not the law. *See State v. Williams*, 246 Wis. 2d 722, ¶¶ 16-17; *State v. Fosnow*, 2001 WI App 2, ¶ 9, 240 Wis. 2d 699, 624 N.W.2d 883. Cramer presented expert testimony that contradicts, but does not disprove, the diagnostic testimony of the state's medical experts. *See State v. Williams*, 246 Wis. 2d 722, ¶ 17 ("a contradictory [psychiatric] report merely confirms that mental health professionals will sometimes disagree on matters of diagnosis"). *Also see State v. Fosnow*, 240 Wis. 2d 699, ¶¶ 25-26 (the opinion testimony of a new expert witness based on the same facts available to the trial experts is not as a matter of law new evidence; it is merely the newly-discovered significance of evidence available at the time of trial). There was no "legal evidentiary error by the trial

court" that kept out important relevant evidence. *State v. Burns*, 332 Wis. 2d 730, ¶ 45.

A new trial based on nothing more than Plunkett's proffered testimony would be especially inappropriate here where Cramer presented his own trial expert who contradicted the state's experts.

The real controversy at trial was whether Matthew's death was caused by abusive head trauma or by resuscitation of a SIDS victim. That controversy was fully developed before the jury and directly addressed by all three experts on direct and cross-examination. Dr. Plunkett agreed with Dr. Young's opinion as to cause of death (A-Ap. 108). It would be highly improper to award Cramer a new trial simply to present the cumulative testimony on this point from Dr. Plunkett.[8]

[8] Dr. Plunkett's credibility would also be a major issue at any postconviction hearing or retrial. *See* Myers, Myers on Evidence of Interpersonal Violence, § 4.14[B], p. 324. Plunkett is not a pediatrician, an ophthalmologist, a clinician, a biomechanical engineer, a physicist or a researcher. He is primarily a consultant and a hired defense expert. Several courts have found Plunkett's expert testimony incredible. *See In re Bush*, No. 300084, 2011 WL 1045649, *2 (Mich. Ct. App. Mar. 22, 2011) (trial court properly found state's medical experts more credible than Plunkett, "in light of their experience and expertise in treating pediatric patients, when compared to Dr. Plunkett's lack of similar experience"); *In re J.M.*, No. FO56366, 2009 WL 1862523, *12, *16 (Cal. Ct. App. June 29, 2009) ("As explained *ante*, the juvenile court herein found Dr. Plunkett's testimony lacked all credibility and was internally inconsistent, and the court's findings are supported by substantial evidence" (*id.* *16); *Butts v. Sheets*, No. 2:05-CV-994, 2006 WL 2612896, *4, *13 (S.D. Ohio Aug. 10, 2006) (similar expert testimony by Plunkett found by the district court to be incredible). Plunkett also caused the declaration of a mistrial, upheld by the Minnesota Supreme Court on appeal, by tampering with forensic evidence (autopsy slides). *State v. Gouleed*, 720 N.W.2d 794, 801-03 (Minn. 2006), *upheld on habeas review sub nom. Moussa Gouleed v. Wengler*, 589 F.3d 976 (8th Cir. 2009). Cramer wisely chose Dr. Young over Plunkett.

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The trial court properly determined that the real controversy, the cause of Matthew's death, was fully tried and it was not willing to order a new trial simply "because another expert has rendered an opinion similar to Dr. Young's, which the jury did not find to be credible" (49:4; A-Ap. 107). This is not one of those rare cases that warrant the award of a new trial.

CONCLUSION

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

Dated at Madison, Wisconsin, this 29th day of May, 2013.

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 10,493 words.

Dated this 29th day of May, 2013.

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I hereby certify that:

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Dated this 29th day of May, 2013.

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