STATE OF WISCONSIN

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

DISTRICT I

Case No. 2015AP2030-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTHONY DARNELL DAVIS,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and Order Denying Postconviction Relief Entered in the Milwaukee County Circuit Court, the Honorable Timothy Dugan, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Was the evidence introduced at trial insufficient as a matter of law to convict Anthony Davis of recklessly causing *great bodily harm*, where the only charged injuries were broken bones, and where the definition of *substantial bodily harm* expressly includes "any fracture of a bone"? Or must great bodily harm mean something *more* than a fractured bone in light of the definition of substantial bodily harm?

The sufficiency of the evidence is challenged for the first time on appeal, as permitted by Wis. Stat. § 974.02(2).

2. Mr. Davis filed a postconviction motion arguing that his trial attorney was ineffective for failing to impeach one of the State's witnesses with her eight prior convictions. Did the circuit court err in denying the postconviction motion without an evidentiary hearing?

The circuit court denied Mr. Davis' postconviction motion without a hearing, ruling that he was not prejudiced by trial counsel's error.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Davis requests publication to address whether an injury specifically defined as "*substantial* bodily harm" can also constitute "*great* bodily harm." Here, Mr. Davis was convicted of fracturing the victim's ribs and leg. "Substantial bodily harm" expressly means "any fracture of a bone," but Mr. Davis was convicted of the more severe, "great bodily harm." These overlapping definitions conflict with the "basic

rule of statutory construction" that the court should "give each statutory word independent meaning so that no word is redundant or superfluous." ***Pawlowski v. Am. Family Mut. Ins. Co.***, 2009 WI 105, ¶ 22, 322 Wis. 2d 21, 777 N.W.2d 67. Publication is appropriate to address whether such overlap is permissible, or if the differing degrees of harm must be read to actually mean different things.

Mr. Davis does not request oral argument, but welcomes the opportunity if the court believes it would be helpful.

STATEMENT OF FACTS

On May 18, 2013, the State filed a complaint charging Anthony Davis with one count of child abuse by recklessly causing great bodily harm, as a repeat offender, contrary to Wis. Stat. §§ 939.62(1)(c) and 948.03(3)(a). The complaint alleged that Mr. Davis' four-month-old daughter, L.D., was brought to Children's Hospital where she was found to have numerous leg fractures, bruising around the eye, subconjunctival hemorrhages (broken blood vessel in the eye), and a torn frenulum (skin beneath the tongue). (2). According to Lakiesha Bowie, the victim's mother, she and Mr. Davis were L.D.'s sole caregivers. (2:2). The complaint further alleged that Mr. Davis made a statement to police that he would play rough with L.D., but denying any intentional abuse. (2:2).

On May 28, 2013, the State filed an amended complaint, adding a second count of recklessly causing great bodily harm to L.D., as a repeat offender. (4; App. 109). The amended complaint alleged that a CT scan showed that L.D. had six rib fractures in addition to the previously identified injuries. (4:3; App. 111). The complaint specified that Count

One related to the leg fracture, and Count Two related to the rib fractures.

Trial

The case was tried before a jury in August 2013. Shortly before the trial began, the parties agreed that Ms. Bowie would admit to having eight prior convictions, and Mr. Davis, should he testify, would admit to five prior convictions. (53:3; App. 124); Wis. Stat. § 906.09(1) ("For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or adjudicated delinquent is admissible.").

At trial, the State called four witnesses. First, Officer Amy Stolowski testified that she was dispatched to Children's Hospital after L.D. was brought in and suspected to be an abuse victim. (55:26-27). She testified that Mr. Davis told her that he and Ms. Bowie were L.D.'s only caregivers. (55:28). She also testified that Mr. Davis seemed upset and surprised to hear that L.D. suffered such serious injuries, but he had no explanation for those injuries. (55:31, 33-34).

Ms. Bowie testified that she and Mr. Davis were L.D.s sole caregivers in the two weeks before the injuries were discovered. (55:45). She testified that she was not worried about police looking for evidence of abuse because she was certain no abuse had occurred. (55:47). She admitted that she slept in bed with L.D., and that she rolled over on L.D. a few nights before they went to the hospital, but she said she had been told that could not have caused the leg fractures. (55:51). During her testimony, the State played recorded jail calls from Mr. Davis, during which he admitted to using heroin and accidentally sitting on L.D. (55:53-59).

On cross-examination, Ms. Bowie testified that she would leave the house with L.D. without Mr. Davis, and that her mother watched the baby twice. (55:70-71). She testified that she never dropped the baby, but admitted again that she frequently slept with the baby. (55:74). She also testified that in the preceding months, she had taken L.D. to the hospital on five occasions, but each time L.D. was discharged after minor injuries were noted. (55:74-80).

Neither the prosecutor nor trial counsel asked Ms. Bowie if she had ever been convicted of a crime, or how many times.

Dr. Angela Rabbitt, a child abuse pediatrician, testified that she believed L.D.'s injuries were the result of abuse. She testified that bruising and fractures are very rare in young babies in the absence of abuse. (55:91, 95-97). She testified that the leg fractures would have required twisting or pulling the leg, and that the fractures could not have resulted from a fall. (55:97-98). She testified that the rib fractures may have resulted from compression, and that they "possibly" could have resulted from a 300 pound person sitting on L.D. (55:100; 56:16). She suspected that the leg fractures were less than six weeks old and that the rib fractures were four to seven days old. (55:105). She opined that rolling onto the baby would not have exerted enough force for either set of fractures. (56:5-6, 10-11). She testified that dropping a child, then falling on the child would be the type of force that could have caused the rib fractures. (56:11-12).

Finally, the State called Detective Marilyn Francis, who interviewed Ms. Bowie and Mr. Davis. She testified that during a recorded interview with Mr. Davis, he initially said he had no idea where the injuries came from, and said that Ms. Bowie always had the baby with her. (55:31). During that

statement, he admitted to using heroin and cocaine. (44:3; App. 105). He said that sometimes he was a little rough with L.D., but he did not believe he ever caused any serious injuries. He said that on one occasion, he was holding L.D.'s hands to help her walk, and she fell and he thought he heard a pop. (44:3; App. 105). Detective Francis also testified that during the interview, Mr. Davis demonstrated how he would change L.D.'s diaper. (55:34-35). Although the jury did not see this portion of the interview, she testified that "his movements just seemed to be overly exaggerated" because he spread the doll's legs far apart and brought its legs up to its chest. (55:34-35).

After the State rested, Mr. Davis decided to testify. At the outset of his testimony, he admitted that he had five prior convictions. (56:44). He denied shaking or pulling L.D., but he admitted to accidentally sitting on her once. (56:48). He stated that he weighed 315 pounds at the time. (56:58). He testified that he and his family were staying at a hotel, and he left the room to use some cocaine. (56:49). When he returned to the room, the lights were off, and he accidentally sat on L.D. (56:53). He testified that he realized she was there after only a couple seconds and quickly got up. (56:54).

As to each count, the court instructed the jury that the State had to prove Mr. Davis caused great bodily harm to L.D. (56:82). The court instructed the jury that "[g]reat bodily harm means injury which creates a substantial risk of death or which causes serious permanent disfigurement or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury." (56:82). This instruction was identical to the relevant pattern jury instruction. Wis. JI-Criminal 2111.

While deliberating, the jury submitted one question, asking the court to confirm that Count One related to the rib fractures and Count Two related to the leg fractures. (57:11). The Court, with the agreement of the parties, advised the jury that Count One related to the leg fractures, and Count Two related to the rib fractures. (57:11). The jury later returned verdicts finding Mr. Davis guilty of both counts of recklessly causing great bodily harm to L.D.

On October 8, 2013, the court sentenced Mr. Davis to two concurrent sentences of ten years in confinement, followed by five years of extended supervision. (58:42).

Postconviction

Following sentencing, Mr. Davis filed a postconviction motion for a new trial.[1] (37; App. 113). The motion argued that trial counsel was ineffective for failing to impeach Ms. Bowie with her eight prior convictions. (37:5-9; App. 117-21). The motion argued that there could be no strategic reason for failing to impeach Ms. Bowie, because a central theme of the defense was that Ms. Bowie actually abused L.D. (37:6; App. 118). The motion also argued that Mr. Davis' defense was prejudiced by this omission because it would have aided that defense, and would have been especially helpful in light of the State's weak evidence connecting him to the abuse. (37:6-9; App. 118-21).

On September 18, 2015, the circuit court entered an order denying the postconviction motion. (44; App. 103). The circuit court did not address deficiency, but ruled that Mr. Davis could not show he was prejudiced by trial counsel's

[1] The motion also asked the court to vacate a DNA surcharge. (37:9-10; App. 121-22). That request was granted and is not being appealed. (38).

failure to impeach Ms. Bowie: "there [was] no reasonable probability there would have been a different outcome had trial counsel impeached Ms. Bowie with her prior convictions." (44:4; App. 106). The court concluded:

> Based on the court's observations, Ms. Bowie came across as a credible witness and a concerned mother. The jury did not believe the defendant's suggestion that someone else was responsible for L.D.'s injuries. Likewise, the court found at sentencing that the defendant's "testimony was totally incredible." At the time the court indicated that had it been the trier of fact, it would have found the defendant guilty. Under the circumstances and based on the court's own observations of the witnesses, the court cannot conclude that there is a reasonable probability that the jury would have reached a different result had it heard about Ms. Bowie's eight convictions.

(44:5; App. 107).

Mr. Davis appeals.

ARGUMENT

I. Broken Bones Are Insufficient as a Matter of Law to Constitute Great Bodily Harm; Therefore, This Court Should Reverse Mr. Davis' Conviction.

This Court should reverse Mr. Davis' conviction for causing great bodily harm because a broken bone cannot constitute great bodily harm as a matter of law. Mr. Davis was convicted of two counts of child abuse by recklessly causing great bodily harm. Wis. Stat. § 948.03(3)(a).[2] The

[2] "Whoever recklessly causes great bodily harm to a child is guilty of a Class E felony." Wis. Stat. § 948.03(3)(a).

only injuries that were charged, and which the jury was instructed to consider, were a broken leg (Count One) and broken ribs (Count Two).

Broken bones are explicitly enumerated as one of the injuries constituting *substantial* bodily harm; therefore, they cannot simultaneously constitute the more severe *great* bodily harm. Reading both statutes to include a broken bone, without something more, would make the statutes redundant, thereby violating the basic principle of statutory interpretation that courts must "give each statutory word independent meaning so that no word is redundant or superfluous." ***Pawlowski v. Am. Family Mut. Ins. Co.***, 2009 WI 105, ¶ 22, 322 Wis. 2d 21, 777 N.W.2d 67.

To give each word independent meaning, great bodily harm must be read to mean something *more* than just a broken bone. Because Mr. Davis' conviction was based solely on breaking L.D.'s ribs and her leg, the evidence is insufficient to convict him of causing great bodily harm.

Due process demands that the State prove each element of a charged offense beyond a reasonable doubt. ***In re Winship***, 397 U.S. 358, 364 (1970). On appeal, a court must reverse a defendant's conviction where "the evidence, viewed most favorably to the state and the conviction is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

"[W]hether the evidence viewed most favorably to the verdict satisfies the legal elements of the crime constitutes a question of law, which [this court] reviews *de novo*." ***State v. Routon***, 2007 WI App 178, ¶ 17, 304 Wis. 2d 480, 736 N.W.2d 530.

Wisconsin law recognizes three distinct gradations of harm: bodily harm, substantial bodily harm, and great bodily harm. Wis. Stat. §§ 939.22 (4), (14), and (38). Bodily harm "means physical pain or injury, illness, or any impairment of physical condition." Substantial bodily harm "means bodily injury that causes a laceration that requires stitches, staples, or a tissue adhesive; *any fracture of a bone*; a broken nose; a burn; a petechial; a temporary loss of consciousness, sight or hearing; a concussion; or a loss or fracture of a tooth." (Emphasis added.) And great bodily harm "means bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury."

Each definition of harm covers a unique set of injuries. Although the jury is generally responsible for drawing the line between these definitions, they remain subject to judicial scrutiny, and the court may dismiss a conviction if the evidence is insufficient to satisfy a particular grade of harm. ***Flores v. State***, 76 Wis. 2d 50, 58, 250 N.W.2d 720 (1977) (overruled on other grounds by ***State v. Richards***, 123 Wis. 2d 1, 365 N.W.2d 7 (1985)) (citing ***State v. Bronston***, 7 Wis. 2d 627, 97 N.W.2d 504 (1959)).

In 1955, there were only two gradations: bodily harm and great bodily harm. While bodily harm was defined as it is today, great bodily harm did not originally include the last clause, "or other serious bodily injury." ***La Barge v. State***, 74 Wis. 2d 327, 333, 246 N.W.2d 794 (1976). That catch-all was added one year later. ***Id.***

In ***La Barge***, the Wisconsin Supreme Court first addressed the new definition of "great bodily harm." There, the defendant argued that his victim did not sustain great

bodily harm, so he could not be convicted of an aggravated battery requiring that result. ***Id.*** at 330. That defendant "cut and stabbed" the victim, resulting in 12 separate wounds that required stitches. ***Id.*** at 329-30. The court held that the amendment to include "or other serious bodily injury" was intended to bring a much larger range of injuries within the scope of "great bodily harm."

> Our study of the legislative history of the particular statute leads, however, to the conclusion that the phrase, "or other serious bodily injury," was designed as an intentional broadening of the scope of the statute to include bodily injuries which were serious, although not of the same type or category as those recited in the statute.

Id. at 332. Thus, the court eschewed *ejusdem generis*[3] and held that "great bodily harm" encompassed more than simply injuries akin to the "serious permanent disfigurement" and "substantial risk of death," that were otherwise included in the definition. Based on that "intentional broadening," the court held that the stabbing in that case could reasonably constitute "serious bodily injury," even if the injuries were not of the type otherwise defined as great bodily harm. ***Id.*** at 335.

Two years later, the "broadening" of great bodily harm was subject to constitutional challenge. In ***Cheatham v. State***, the defendant argued that the catch-all, as defined by ***La Barge***, was unconstitutionally vague. 85 Wis. 2d 112, 114, 270 N.W.2d 194 (1978). There, the defendant attacked a pedestrian from behind, struck her in the head, and dragged her to a parking lot. ***Id.*** The defendant fled when other

[3] "[W]hen a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed." Black's Law Dictionary (10th ed. 2014).

individuals came upon them. ***Id.*** 114-15. "[T]he victim sustained a depressed skull fracture which cut into a blood vessel in the brain and caused a neurological impairment." ***Id.*** at 115. A doctor testified that the injury was life-threatening, but the victim had fully recovered. ***Id.***

The court held that the definition of great bodily harm was not unconstitutionally vague. The court explained that even though ***La Barge***'s interpretation of "other serious bodily injury" significantly expanded the scope of the statute, that clause still derived meaning from the specific injuries that were enumerated. ***Id.*** at 124. Thus, even if the "other serious bodily injury" did not have to be the same type of injuries as those enumerated in the definition, those enumerated injuries provided enough context to save the statute from a vagueness challenge. ***Id.*** The court held:

> Presented with an instruction containing the entire statutory definition of 'great bodily harm' a jury could reasonably interpret the phrase 'other serious bodily injury' in that context, particularly so because of the preceding phrases which describe severe injuries. Even though the general phrase is not restricted to the meaning of the enumerated injuries, it acquires sufficient definition because of the nature of the injuries enumerated.

Id.

Bodily harm and great bodily harm coexisted harmoniously for the next 25 years, until the legislature created a middle grade of harm: "substantial bodily harm." Wis. Stat. § 939.22(38); 1993 Wis. Act 441. Unlike the other grades of harm, substantial bodily harm does not include a catch-all; it simply lists specific injuries. Relevant to this case, substantial bodily harm means "*any fracture of a bone . . . .*" ***Id.*** (emphasis added).

Counsel has been unable to locate any published decision addressing whether the injuries defined as "substantial bodily harm" can simultaneously constitute "great bodily harm." In 2005, this Court addressed the sufficiency of a jury instruction on "great bodily harm," but did not discuss the potential overlap of Wisconsin's three types of bodily harm. ***State v. Ellington***, 2005 WI App 243, 288 Wis. 2d 264, 707 N.W.2d 907.[4]

While the catch-all, "other serious bodily injury," has resulted in a "broadening" of great bodily harm, its reach is not boundless. There are still some injuries that, as a matter of law, cannot constitute great bodily harm. ***Flores***, 76 Wis. 2d at 58 (overruled on other grounds by ***Richards***, 123 Wis. 2d 1) (citing ***Bronston***, 7 Wis. 2d 627).

The legislature has created these three gradations of harm, and it is incumbent upon the court to construe those standards harmoniously. And in this instance, the legislature has provided considerable guidance. Broken bones, burns, concussions are all specifically defined as substantial bodily harm. Those injuries cannot also be great bodily harm. ***Pawlowski***, 322 Wis. 2d 21, ¶ 22. If a broken bone, without more, satisfies "great bodily harm," then "substantial bodily harm" becomes superfluous. Great bodily harm must necessarily mean something *more* than a broken bone (or any of the other injuries defined as substantial bodily harm).

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[4] There, the court held that because *ejusdem generis* did not apply to great bodily harm, the jury did not need to be instructed on the entire statutory definition. ***Ellington***, 288 Wis. 2d 264, ¶ 7. Instructing the jury only that the State had to prove "serious bodily injury" was sufficient. ***Id.***, ¶ 10. But the court did not address the interplay between the various types of harm.

The creation of "substantial bodily harm" did not overrule ***La Barge***. The catch-all, "other serious bodily injury," still broadly expands the definition of great bodily harm beyond the specific injuries enumerated in the statute. There are many types of injuries that fall between the specific injuries listed as substantial bodily harm, and the near-death injuries that are defined as great bodily harm. All of those injuries can fairly be construed as great bodily harm. But, the specifically enumerated injuries in the substantial bodily harm definition have necessarily carved a niche between bodily harm and great bodily harm.

As applied to this case, the evidence was insufficient to find Mr. Davis guilty of causing great bodily harm to L.D. The jury was specifically instructed (and re-instructed after submitting a question) that Count One only charged a broken leg, and Count Two only charged broken ribs. (56:80-81; 57:11). Although other (much more minor) injuries were listed in the criminal complaint, none were included in the charges, which specifically listed which count alleged which injury. Because a broken bone, without more, cannot constitute great bodily harm, the evidence was insufficient to convict Mr. Davis.[5]

This Court addressed a similar issue in an unpublished opinion. ***State v. Reyes-Ortiz***, No. 2013AP268-CR, unpublished (WI App Nov. 26, 2013). There, the defendant

[5] Had the State wanted to convict Mr. Davis, it needed to charge him with recklessly causing bodily harm. Wis. Stat § 948.03(3)(b). There is no statute for recklessly causing substantial bodily harm to a child. This is irrelevant to the issue in this case. There is no basis to argue that bodily harm, substantial bodily harm, and great bodily harm have a different meaning when applied to different statutes. The precise purpose of the definitional statutes in Wis. Stat. § 939.22 is to provide a *uniform* set of definitions for the criminal statutes.

pled guilty to first degree reckless injury, which requires proof of great bodily harm. ***Id.***, ¶ 5; Wis. Stat. § 940.23(1)(a).[6] He sought to withdraw his plea, arguing that there was no factual basis to prove that the injuries resulted in great bodily harm. ***Id.***, ¶ 11. The defendant forced his finger into the victim's vagina and anus, forced penis-to-anus intercourse, hit her "all over her body," pushed her to the ground, and punched her in the face, resulting in "bruising," "swelling," anal bleeding, a fractured eye socket, and a fractured nose. ***Reyes-Ortiz***, No. 2013AP268-CR, slip op., ¶¶ 3-4. All of this abuse resulted in one conviction for first degree reckless injury and one conviction for false imprisonment. ***Id.***, ¶ 1. The defendant argued that creation of "substantial bodily harm" essentially overruled ***La Barge***, insofar as it gave a broad reading to the "other serious bodily injury" catch-all in great bodily harm. ***Id.***, ¶ 14.

This Court rejected that argument, holding that the broad definition of great bodily harm survived the creation of substantial bodily harm. ***Id.*** Relying on ***La Barge*** and ***Ellington***, the court concluded that what constituted great bodily harm before substantial bodily harm still constituted great bodily harm. ***Id.***

Reyes-Ortiz is both unpublished, and unlike this case in numerous ways. First, Reyes-Ortiz argued that the substantial bodily harm statute overruled ***La Barge***'s broadening of the great bodily harm statute. ***Id.***, ¶ 14. Mr. Davis makes no such assertion. Rather, substantial bodily harm simply occupies a new middle ground between bodily harm and great bodily harm. Great bodily harm is not limited

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[6] "Whoever recklessly causes *great bodily harm* to another human being under circumstances which show utter disregard for human life is guilty of a Class D felony." Wis. Stat. § 940.23(1)(a) (emphasis added).

by the enumerated injuries that it defines. The "broadening" contemplated by the catch-all phrase still exists. Anything *more* than substantial bodily harm can be great bodily harm. Great bodily harm simply does not reach those specific injuries defined as substantial bodily harm.

Second, Reyes-Ortiz pled guilty. As the court pointed out, "in the context of a negotiated guilty plea, the supreme court has held that a court need not go to the same length to determine whether the facts would sustain a charge as it would where there is no negotiated plea." ***Id.***, ¶ 10 (quoting ***State v. Smith***, 202 Wis. 2d 21, 25, 549 N.W.2d 232 (1996)). The defendant waived his right to challenge the evidence against him, so he had a diminished right to assess the strength of the allegations against him. In contrast, Mr. Davis went to trial, and the State was held to its high burden to prove the sufficiency of the charges against him. Thus, the factual allegations and evidence must be much more carefully scrutinized.

Finally, Reyes-Ortiz was convicted of *much* more than bone fractures. The State grouped a significant number of injuries into one count, as contrasted with charging separate injuries as was done here. Considered alone, the facial and nasal fractures would not have constituted great bodily harm. But when considered together, and alongside the sexual assault, the bruising, and the bleeding, the defendant's conduct *clearly* constituted great bodily harm. In contrast, each of the charges here was limited to the "fracture of a bone." (56:80-81; 57:11). Although each constitutes substantial bodily harm, neither rises to great bodily harm.

If this Court finds that the evidence was insufficient as a matter of law to convict Mr. Davis of recklessly causing great bodily harm to L.D., it must remand the case with

instructions that the circuit court enter a judgment of acquittal. ***State v. Ivy***, 119 Wis. 2d 591, 608, 350 N.W.2d 622 (citing ***Burks v. United States***, 437 U.S. 1, 18 (1978)). For the reasons stated above, the evidence is insufficient to prove that Mr. Davis committed "great bodily harm;" therefore, this Court should remand to the circuit court for entry of a judgment of acquittal.

II. Mr. Davis Was Denied the Right to the Effective Assistance of Counsel Because His Trial Attorney Failed to Impeach the Victim's Mother with Her Eight Prior Criminal Convictions.

If this Court denies Mr. Davis' challenge to the sufficiency of the evidence, he seeks an evidentiary hearing on his postconviction motion for a new trial because the motion alleged sufficient facts to require a ***Machner***[7] hearing. The motion alleged that trial counsel was ineffective for failing to impeach Ms. Bowie with evidence of her eight prior criminal convictions. Ms. Bowie's credibility was squarely at issue at trial. Although Dr. Rabbitt was able to address the *types* of force necessary for the injuries, she could not say what actually caused L.D.'s injuries. Because there were no third-party witnesses, it was plausible to believe the injuries came from either Ms. Bowie or Mr. Davis, because Ms. Bowie testified they were the only two who cared for L.D., not including two times she was with Ms. Bowie's mother. (55:45-46, 70). Thus, this impeachment evidence directly assisted Mr. Davis' defense that Ms. Bowie was responsible for L.D.'s injuries. Moreover, the impeachment evidence was critical in light of the State's weak case against Mr. Davis; "a verdict or conclusion only weakly supported by the record is

[7] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

more likely to have been affected by errors than one with overwhelming record support." ***Strickland v. Washington***, 466 U.S. 668, 696 (1984). Therefore, Mr. Davis requests remand for a ***Machner*** hearing.

A. Mr. Davis is entitled to an evidentiary hearing if his postconviction motion alleged facts that, if true, would entitle him to relief.

If a postconviction motion alleges material facts that, if true, would entitle the defendant to relief, "the circuit court *must* hold an evidentiary hearing." ***State v. Allen***, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433 (emphasis added). Even if the allegations in the motion "seem to be questionable in their believability," the court must assume the facts as true. ***Id.***, ¶ 12 n.6. Whether the motion alleged facts sufficient to warrant relief is a question of law, which this Court reviews *de novo*. ***Id.***, ¶ 12.

B. Mr. Davis is entitled to an evidentiary hearing because his postconviction motion alleged facts demonstrating that his trial attorney was ineffective for failing to impeach Ms. Bowie with her eight prior convictions.

In the present case, Mr. Davis is entitled to a new trial because he was denied the right to the effective assistance of counsel at trial. Mr. Davis' right to the effective assistance of counsel is guaranteed by the Wisconsin and United States Constitutions. U.S. Const. amend VI; Wis. Const. art. I, § 7. To prove that counsel was ineffective, Mr. Davis must show that (1) his counsel's performance was deficient; and (2) the deficient performance prejudiced his defense. ***State v. Artic***, 2010 WI 83, ¶ 24, 327 Wis. 2d 392, 768 N.W.2d 430. To prove deficient performance, he must "identify the acts or omissions of counsel that are alleged not to have been the

result of reasonable professional judgment." ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). To prove prejudice, he must show that absent counsel's errors, there is a "reasonable probability" of a different outcome at trial. ***Id.*** at 694.

Here, Mr. Davis' postconviction motion alleged that trial counsel was ineffective for failing to impeach Ms. Bowie with her eight prior convictions. (37:5-9; App. 117-21). The motion alleged that trial counsel performed deficiently by forgetting to ask Ms. Bowie about her criminal record, and that there is a reasonable probability of an acquittal had she disclosed her considerable criminal record. The allegations in the complaint were sufficient to prove that Mr. Davis was denied the effective assistance of counsel; therefore, the circuit court was required to hold a ***Machner*** hearing.

1. Mr. Davis' attorney was deficient for failing to impeach Ms. Bowie with her eight prior convictions.

Ms. Davis' postconviction motion alleged that there was no conceivable strategic basis for trial counsel's failure to introduce evidence of Ms. Bowie's eight prior convictions. (37:6; App. 118). The parties agreed before trial that Ms. Bowie would admit to having eight prior convictions. (53:3; App. 124). Thus, trial counsel's error was not in his preparation, investigation, or research. It appears that counsel simply forgot to ask about Ms. Bowie's criminal record.

There would be no strategic reason to deliberately omit this impeachment. Trial counsel's defense involved discrediting her testimony with prior inconsistent statements, and showing that she may have caused L.D.'s injuries while co-sleeping. (53:4-5; 55:70, 74, 79-80). Undermining Ms. Bowie's testimony with her criminal record only would have

served to strengthen this defense. Because this failure to impeach Ms. Bowie fell below "an objective standard or reasonableness," the deficiency prong was satisfied in Mr. Davis' postconviction motion. ***State v. Behnke***, 203 Wis. 2d 43, 62, 553 N.W.2d 265 (Ct. App. 1996).

2. Mr. Davis was prejudiced by his attorney's failure to impeach Ms. Bowie with her eight prior convictions.

To prove prejudice, Mr. Davis "is not required to show 'that counsel's deficient conduct more likely than not altered the outcome of the case.'" ***State v. Moffett***, 147 Wis. 2d 343, 354, 433 N.W.2d 572 (1989) (quoting ***Strickland***, 466 U.S. at 693). Rather, "[t]he question on review is whether there is a reasonable probability that a jury viewing the evidence untainted by counsel's errors would have had a reasonable doubt respecting guilt." ***Id.*** at 357. No supplemental, abstract inquiry into the "reliability" or "fairness" of the proceedings is permissible. ***Williams v. Taylor***, 529 U.S. 362, 393-94 (2000).

Mr. Davis' postconviction motion argued that his defense would have been strengthened by impeaching Ms. Bowie with her prior convictions because "Wisconsin law presumes that criminals as a class are less truthful than persons who have not been convicted of a crime." ***State v. Gary M.B.***, 2004 WI 33, ¶ 21, 270 Wis. 2d 62, 676 N.W.2d 475.

And a witness becomes less credible with each conviction because "the more often one has been convicted, the less truthful he is presumed to be." ***State v. Nicholas***, 49 Wis. 2d 683, 688, 183 N.W.2d 11 (1971). "A person who has been convicted 11 times previously is considerably less credible than a person who has only been convicted once."

Liphord v. State, 43 Wis. 2d 367, 371, 168 N.W.2d 549 (1969) (parenthetical omitted).

In the present case, there is a reasonable probability of a different result at trial had Ms. Bowie been impeached with her eight prior criminal convictions. As ***Liphord*** reflects, eight prior convictions would have had a considerable negative effect on her credibility. And Ms. Bowie's credibility was indisputably at issue during trial. Because Ms. Bowie and Mr. Davis were L.D.'s only caregivers, the jury was left to believe that one of them was responsible for L.D.'s injuries.

Trial counsel attempted to show that Ms. Bowie was responsible for the injuries, thereby creating a reasonable doubt as to Mr. Davis' guilt. Counsel expressly sought to introduce evidence that Ms. Bowie rolled on top of L.D. and dropped her. (53:5-6). Counsel asked Ms. Bowie about her co-sleeping habits with L.D., and asked whether she ever dropped L.D. (55:71-72, 74). Although Ms. Bowie denied dropping L.D., she admitted to frequently sleeping with her daughter, and that on one occasion, she woke up to find that she had rolled on top of L.D. (55:51, 72, 74). Thus, the jury was aware that Ms. Bowie was engaging in behavior with potentially life-threatening consequences for L.D.[8] But Ms. Bowie's credibility was not further undermined with her lengthy criminal record.

Although there was minimal evidence implicating Ms. Bowie as the abuser, there was also very little evidence of Mr. Davis' guilt. The weakness of the State's case matters a great

[8] See, e.g., http://www.marchofdimes.org/baby/co-sleeping.aspx ("Bed-sharing may put your baby at risk for sudden infant death syndrome (also called SIDS) and other dangers during sleep, like suffocation.").

deal on appeal. A verdict with less factual support "is more likely to have been affected by errors than one with overwhelming record support." ***Strickland***, 466 U.S. at 696. Here, Mr. Davis admitted to sitting on L.D. on the bed, but even Dr. Rabbitt testified that it was merely "possibl[e]" that this caused the rib fractures, and she completely ruled this out as the cause of the leg fractures. (56:13, 16). Dr. Rabbitt testified generally about the type of impact or compression that could have caused the rib fractures, and suggested that something stronger than the force for CPR would have been necessary for the rib fractures. (55:100-01). Although she believed Ms. Bowie rolling onto the child would not have caused the rib fractures, the jury was expressly instructed that it was not bound by her testimony. (56:6, 90); Wis. JI-Criminal 200.

The State's case was weak as to the rib fractures, but it was virtually non-existent as to the leg fractures. Dr. Rabbitt testified that "abusive force" would have been required for the leg fractures, but the jury heard no evidence of "abusive force." (55:100). The only evidence even suggesting Mr. Davis caused the leg fractures was Detective Francis' testimony that his demonstration of changing a diaper on a doll was "exaggerated," and that he spread the legs wide and moved the doll's legs to its chest. (56:34-35). The jury never saw the video of the simulated diaper changing.

There was nothing about Detective Francis' testimony that supported the "abusive force" that Dr. Rabbitt testified would be necessary for the leg fractures. She believed that some type of "twisting and pulling" would have been necessary for these fractures, but there was never any evidence of twisting and pulling. (56:5). Moreover, Dr. Rabbitt was never asked whether she saw Mr. Davis' recorded interview, or if his diaper changing could have

possibly caused the leg fractures. There was never any direct evidence connecting Mr. Davis to those fractures.

The significance of trial counsel's error is magnified by the large number of Ms. Bowie's convictions. In ***State v. Carnemolla***, this Court held that a difference between two and three convictions was too small to make a difference. 229 Wis. 2d 648, 654-55, 600 N.W.2d 236 (Ct. App. 1999). In that case, a witness testified to two convictions, but the State failed to disclose, and trial counsel failed to unearth, a third. ***Id.*** at 652. The court acknowledged that "a higher number of convictions may suggest less credibility on the witness's part," but pointed out that "the question is one of degree." ***Id.*** at 654-55. In briefing, the State conceded that disclosing two convictions instead of three was very different from a case of "none versus some." ***Id.*** at 655. The court agreed, and held that the difference between two and three convictions was too small to matter.

This case presents precisely the hypothetical contemplated by the State in ***Carnemolla***. Trial counsel did not merely fail to mention *some* of Ms. Bowie's convictions. Rather, he failed to mention *any* of her *eight* convictions. Those convictions would have weighed considerably on her credibility at trial. Adding that deficiency to the State's weak case against Mr. Davis, there was a reasonable probability of a different result at trial.

The effect of trial counsel's error was magnified because no one forgot to ask Mr. Davis about his five prior convictions. The jury heard him admit that he had been convicted five times. (56:44). And the court instructed the jury that it could consider that evidence when assessing his credibility. (56:89). Thus, the jury was presented with two parents with conflicting stories, both blaming each other, but

only Mr. Davis' credibility weighted down by his criminal record. But Ms. Bowie's credibility should have been weighted down even *more*, because she had three more convictions than Mr. Davis.

In denying Mr. Davis' postconviction motion, the circuit court incorrectly assessed prejudice. The court denied the motion "based on the court's own observation of the witnesses," and its perception that Mr. Davis' testimony was incredible. (44:5; App. 107). However, "[i]n assessing the prejudice caused by the defense trial counsel's performance, i.e., the effect of the defense trial counsel's performance, a circuit court may not substitute its judgment for that of the jury in assessing which testimony would be more or less credible." ***State v. Jenkins***, 2014 WI 59, ¶ 64, 355 Wis. 2d 180, 848 N.W.2d 786 (emphasis omitted). Thus, it was not for the circuit court to decide that it still would have found Ms. Bowie credible, even if she had been impeached with her prior convictions. It would have been up to the jury "to determine the weight and credibility to assign to the witness's statements." ***Id.***, ¶ 65 (quoting ***State v. Guerard***, 2004 WI 85, ¶ 49, 273 Wis. 2d 250, 682 N.W.2d 12. Thus, in the absence of a reasonable strategic reason for not asking Ms. Bowie about her criminal record, Mr. Davis should be granted a new trial so the jury could decide how to weigh her credibility.

CONCLUSION

For the reasons stated above, Mr. Davis asks that this Court find that the evidence introduced at trial was insufficient to convict, reverse his convictions, and remand to the circuit court with instructions to enter judgments of acquittal.

If this Court finds that the evidence was sufficient to convict, Mr. Davis asks that the Court reverse the decision of the circuit court and remand for a ***Machner*** hearing on his postconviction motion.

Dated this 7th day of December, 2015.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 6,262 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 7th day of December, 2015.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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