STATE OF WISCONSIN

COURT OF APPEALS

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 AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE TIMOTHY G. DUGAN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State agrees with defendant-appellant Anthony Davis that oral argument is not necessary. It also agrees with Davis that publication of the court's opinion is warranted. Davis correctly notes that there are no published decisions "addressing whether the injuries defined as 'substantial bodily harm' can simultaneously constitute 'great bodily harm.'" Davis's brief at 12. The only appellate

decision of which the State is aware that directly addresses this issue is an unciteable per curiam decision issued shortly after Davis filed his brief. Because this appears to be a recurring issue, the State asks the court to publish its decision in this case.

STATEMENT OF THE CASE

Given the nature of the arguments raised in the brief of defendant-appellant Anthony Davis, the State exercises its option not to present a statement of the case. *See* Wis. Stat. § (Rule) 809.19(3)(a). The relevant facts and procedural history will be discussed in the argument section of this brief.

ARGUMENT

Davis was convicted following a jury trial of two counts of physical abuse of a child by recklessly causing great bodily harm to his three-month-old daughter, L.D. (20:1; A-Ap. 101). He appeals from the judgment of conviction, arguing that the evidence is insufficient to support his convictions because "broken bones are insufficient as a matter of law to constitute great bodily harm." Davis's brief at 7 (uppercasing omitted).

In a postconviction motion, Davis sought a new trial, alleging that he was denied the effective assistance of counsel because his lawyer failed to impeach L.D.'s mother with her prior convictions (37:1; A-Ap. 113). The circuit court denied that motion in an order that Davis also appeals (44:1-6; A-Ap. 103-08).

Davis's sufficiency of the evidence claim is flawed because it is based on an erroneous interpretation of the statutory elements of the offense. His ineffective assistance of counsel claim fails because he has not demonstrated that he was prejudiced by counsel's failure to impeach the witness. Accordingly, the court should affirm the judgment of conviction and the order denying postconviction relief.

I. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT DAVIS'S CONVICTIONS.

Davis was charged in count one with recklessly causing great bodily harm to L.D., in violation of Wis. Stat. § 948.03(3)(a), by causing multiple leg fractures (4:1-2; 5:1). A physician testified at trial that the femurs in both of L.D.'s knees were fractured, that the tibia and fibula were fractured in one of her legs, and that her foot also was fractured (55:97). Davis was charged in count two with recklessly causing great bodily harm to L.D., also in violation of Wis. Stat. § 948.03(3)(a), by causing multiple rib fractures (4:1; 5:1). The physician testified that ribs four through eight on L.D.'s right side were fractured (55:94).

Davis's challenge to the sufficiency of the evidence is limited to an argument regarding the meaning of "great bodily harm." He does not argue that the evidence was insufficient to show that he caused the injuries to L.D. or that he acted recklessly. Rather, he argues that, as a matter of law, a bone fracture may not constitute "great bodily harm"

because the statutory definition of "substantial bodily harm" explicitly includes bone fractures. The court should reject that argument because the fact the statutory definition of "substantial bodily harm" includes "*any* fracture of a bone" does preclude a jury from finding that a particular bone fracture – or as in this case, the multiple bone fractures suffered by three-month-old L.D. – were a "serious bodily injury" under the definition of "great bodily harm."

Before responding to Davis's argument, though, the State will address a more fundamental problem with Davis's reliance on the definition of substantial bodily harm. The definition of substantial bodily harm is relevant in battery prosecutions, where there are three levels of battery depending on whether the defendant caused bodily harm, substantial bodily harm, or great bodily harm. *See* Wis. Stat. § 940.19. But the physical abuse of a child statute under which Davis was convicted, Wis. Stat. § 948.03, penalizes just two types of harm: bodily harm and great bodily harm. *See* Wis. Stat. § 948.03(2), (3). Because there is no offense of physical abuse of a child by causing substantial bodily harm, the statutory definition of substantial bodily harm is irrelevant in a child abuse case.

A. Applicable legal principles and standard of review.

Whether the evidence viewed most favorably to the verdict satisfies the legal elements of the crime constitutes a question of law that the court of appeals reviews de novo. *State v. Cavallari,* 214 Wis. 2d 42, 47, 571 N.W.2d 176 (Ct. App. 1997). Statutory

interpretation also presents a question of law that this court reviews de novo. *State v. Adams*, 2015 WI App 34, ¶4, 361 Wis. 2d 766, 863 N.W.2d 640.

Statutory interpretation "begins with the language of the statute." *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (quoted source omitted). Statutory language "is given its common, ordinary, and accepted meaning." *Id.* If the statute's meaning is plain, there is no ambiguity, and the statute is applied according to its terms. *Id.*, ¶ 46. However, if a statute "is capable of being understood by reasonably well-informed persons in two or more senses," the statute is ambiguous, and the court may consult extrinsic sources, such as legislative history. *Id.*, ¶ 47–48.

Statutory history is part of a plain meaning analysis. *Heritage Farms, Inc. v. Markel Ins. Co.*, 2009 WI 27, ¶50, 316 Wis. 2d 47, 762 N.W.2d 652. Statutory history encompasses the previously enacted, amended, and repealed provisions of a statute. *Id*. "'By analyzing the changes the legislature has made over the course of several years, [the court] may be assisted in arriving at the meaning of a statute.'" *Id.* (quoted source omitted). "'Therefore, statutory history is part of the context in which [the court] interpret[s] the words used in a statute.'" *Id.*

B. The statutory definition of "substantial bodily harm" is irrelevant in a child abuse prosecution under Wis. Stat. § 948.03.

The definition of "substantial bodily harm" upon which Davis rests his argument was created in 1994, when the legislature repealed and recreated the battery statute, Wis. Stat. § 940.19. *See* 1993 Wis. Act 441, §§ 1, 4. Before then, there were two types of battery depending on the degree of harm: battery (causing bodily harm) and aggravated battery (causing great bodily harm). *See* Wis. Stat. § 940.19 (1991-92). The 1994 revision to the battery statute created three types of battery: battery (causing bodily harm), substantial battery (causing substantial bodily harm), and aggravated battery (causing great bodily harm). *See* 1993 Wis. Act 441, §§ 1, 4.

Like the version of the battery statute in effect before 1994, the pre-1994 physical abuse of a child statute recognized two levels of injury, bodily harm and great bodily harm. *See* Wis. Stat. § 948.03(2), (3) (1991-92). But when the legislature amended the battery statute in 1994 to add an intermediate type of battery based on substantial bodily harm, it did not amend the child abuse statute to include an offense that uses that standard. *See* 1993 Wis. Act 441. Instead, the statute has continued to addresses only two types of bodily harm: "bodily harm" and "great bodily harm." *See* Wis. Stat. § 948.03(2), (3) (2013-14).

The absence of "substantial bodily harm" as a type of injury in Wis. Stat. § 948.03 demonstrates that the legislature did not intend to insert the new definition of "substantial bodily harm" into prosecutions for physical abuse of a child. Davis's argument that "the specifically enumerated injuries in the substantial bodily harm definition have necessarily carved a niche between bodily harm and great bodily harm," Davis's brief at 13, fails because "substantial bodily harm" is not a concept applicable to child abuse prosecutions under Wis. Stat. § 948.03.

C. The fact the definition of "substantial bodily harm" includes "any fracture of a bone" does not mean that no bone fracture or fractures, regardless of their severity, can be a "serious bodily injury" under the definition of "great bodily harm."

Even if the definition of substantial bodily harm were relevant in a child abuse prosecution under Wis. Stat. § 948.03, Davis's argument that the inclusion of bone fractures in that definition means that a bone fracture may not, as a matter of law, constitute serious bodily injury is without merit.

The general criminal definitions in Wis. Stat. § 939.22 include definitions for three types of bodily harm. They are, in order of increasing severity, bodily harm, substantial bodily harm, and great bodily harm. *See* Wis. Stat. § 939.22(4), (14), and (38). Davis was convicted of recklessly causing "great

bodily harm," which is defined as "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." Wis. Stat. § 939.22(14).

The State agrees with Davis that the bone fractures forming the factual bases for the two counts on which he was convicted do not satisfy any of the enumerated forms of injury described in that definition. If those fractures qualify as great bodily harm, they must do so as "other serious bodily injury."

Davis argues that bone fractures may not constitute "other serious bodily injury" because a bone fractures is one of the forms of injury specified in the definition of a "substantial bodily harm." That statute defines "substantial bodily harm" as "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 petechia; a temporary loss of consciousness, sight or hearing; a concussion; or a loss or fracture of a tooth." Wis. Stat. § 939.22(38) (emphasis added). Davis contends that "[t]o give each word independent meaning, great bodily harm must be read to mean something *more* than just a broken bone." Davis's brief at 8. And, he further argues, because there is no statute for recklessly causing "substantial bodily harm" to a child, the State was limited to charging him with recklessly causing "bodily harm" under Wis. Stat. § 948.03(3)(b). *See* Davis's brief at 13 n.5.

But nothing in the language in the definitions of "great" or "substantial" bodily harm compels that interpretation. Some amount of overlap between these definitions is expected. For example, burns are part of the definition of substantial bodily harm, but a burn may have effects that are specifically named in the definition of great bodily harm, such as risk of death, disfigurement, or loss of function. The legislature surely understood that some burns will meet both definitions.

Likewise, just because all fractures, no matter how minor, meet the definition of substantial bodily harm, that does not mean that a particular fracture cannot be serious enough to qualify as "other serious bodily injury" for purposes of constituting great bodily harm. Davis provides no sound linguistic or policy explanation for why a given fracture (or, as in this case, multiple fractures) may not constitute both substantial bodily harm, based on the definition of that term, and great bodily harm, by reason of its seriousness. Not every fracture will rise to the level of being "other serious bodily injury," but some will.

D. Case law and statutory history supports the conclusion that the types of injuries listed in the definition of "substantial bodily harm" may also constitute "great bodily harm."

Davis's statutory construction argument relies heavily on the statutory history of the definitions of various types of "bodily harm" and the case law

interpreting those terms. That case law and statutory history is relevant to discerning the plain meaning of the statute under which Davis was convicted, *see Heritage Farms,* 316 Wis. 2d 47, ¶50, but it does not support his statutory interpretation.

In *State v. Bronston*, 7 Wis. 2d 627, 631, 97 N.W.2d 504 (1959), *overruled by La Barge v. State*, 74 Wis. 2d 327, 246 N.W.2d 794 (1976), the supreme court observed that "[a]ggravated battery was introduced into the criminal law of this state as an offense by the new Criminal Code adopted by the 1955 legislature." *Id*. at 631. Aggravated battery required intentional causation of "great bodily harm," which was then defined as "bodily injury which creates a high probability 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." *Id*. at 632.

The issue in *Bronston* whether a two-inch laceration to the scalp that required four sutures to close constituted "great bodily harm." *Id*. Applying the rule of *ejusdem generis*, the court held that that injury was not "great bodily harm" as a matter of law because the "nervous headaches and pain in the jaw which did not endure for a protracted period that [the victim] suffered are not in the same category as 'permanent or protracted loss or impairment of the function of any bodily member or organ.'" *Id*. at 633.

The supreme court overruled *Bronston* in *La Barge*. *See La Barge*, 74 Wis. 2d at 334. The court held that its "study of the legislative history of the particular statute leads . . . 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.

The court acknowledged that "[w]hen a statute is passed which enumerates several specific items encompassed in the purview of the statute and then follows the specifics with a general phrase, it is reasonable to conclude that the general phrase was intended to cover only other items that fall within the general category of those enumerated." *Id*. But, the court said, the rule of *ejusdem generis* does not apply "where the general phrase was not a part of the original statute but was subsequently added." *Id*. at 333.

The court said that "[t]he legislative history of sec. 939.22(14), Stats., shows that the definition of 'great bodily harm' has undergone precisely that type of amendment." *Id*. The court explained:

> "Great bodily harm" appeared in the Criminal Code for the first time in ch. 623, Laws of 1953, effective July 1, 1955, and was defined in sec. 339.22(12). That definition did not contain the last phrase that now appears in the statute. The phrase, "or other serious bodily injury," was added to the definition by the Laws of 1955, ch. 696, effective July 1, 1956. The original definition, hence, was in effect for one year

> prior to the time the amendment became effective.

Id.

The court held that the legislative history of the 1955 amendment demonstrated that the phrase "other serious bodily injury" "was intended to broaden the type of injury that was to be encompassed in the definition." *Id*. "In view of this history," the court concluded, "it is apparent that the added phrase had a distinct meaning which was intended to broaden the scope of the statute. The 1955 amendment was intended to broaden the scope of the statute and was intended to include serious bodily injury of a kind not encompassed in the specifics of the original statute." *Id*. at 334. "Accordingly," the court held, "the *ejusdem generis* rationale of *Bronston* is overruled." *Id*.

The victim in *La Barge* sustained numerous stabs and wounds, twelve of which required suturing, as well as a number of minor cuts, abrasions, and bruises. *Id*. at 335. The victim was hospitalized for six days and lost a "considerable amount of blood," but "at no time was there a probability of death, and . . . no internal organs were penetrated." *Id*. The supreme court held that the evidence was sufficient to support the jury's finding that those injuries constituted great bodily harm because "the jury could reasonably conclude that the multiple cuts and stab wounds of [the victim] constituted 'serious bodily injury.'" *Id*.

In *Flores v. State*, 76 Wis. 2d 50, 250 N.W.2d 720 (1977), *overruled by State v. Richards*, 123 Wis. 2d 1,

365 N.W.2d 7 (1985), the court discussed the difference between "bodily harm" and "great bodily harm" in the context of a claim that the trial court erred by not submitting the lesser-included offense of battery to the jury. *See id*. at 55.[1] The court noted that in situations where there is "no factual dispute as to the relatively minor injury inflicted upon a victim," those minor injuries will not be sufficient to constitute aggravated battery. *Id*. at 58. And there will be other situations, the court said, "where under no reasonable view of the evidence could the undisputed injuries sustained by a victim fall below the level of 'great bodily harm' required for conviction of aggravated battery." *Id*. at 58-59. But, the court added, "in many cases the situation will fall into a twilight zone." *Id*. at 59. In those case, the court said, "whether the resultant injury constituted 'bodily harm' or 'great bodily harm' becomes as it was in *La Barge* an issue of fact for the jury to resolve." *Id*.

In *Cheatham v. State*, 85 Wis. 2d 112, 270 N.W.2d 194 (1978), the court again addressed the definition of "great bodily harm" in the context of a sufficiency of the evidence claim. *Id*. at 116. Cheatham had been tried prior to the supreme court's decision in *La Barge*. *Cheatham*, 85 Wis. 2d at

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[1]In *Richards*, the court overruled *Flores*'s holding that battery is a lesser-included offense of aggravated battery. *See Richards*, 123 Wis. 2d at 11. The legislature subsequently "trumped *Richards* by decreeing that '[a]n included crime may be . . . [a] crime which is a less serious or equally serious type of battery than the one charged.'" *State v. Ellington*, 2005 WI App 243, ¶10, 288 Wis. 2d 264, 707 N.W.2d 907 (quoting Wis. Stat. § 939.66(2m)).

117. The court held that the evidence was sufficient to support the verdict because "the jury could have reasonably found that a skull fracture which the doctor said could have caused death was of the same nature as an injury that creates a high probability of death." *Id.* at 119.

The *Cheatham* court also discussed whether the broader definition of "great bodily harm" recognized by *La Barge* rendered the statute unconstitutionally vague: "whether the phrase 'or other serious bodily injury,' without being restricted by the rule of *ejusdem generis* to the enumerated types of injury, sufficiently identifies the degree of injury necessary for a jury to convict a defendant. . . ." *Id*. at 122. It concluded that the statute was not unconstitutionally vague. "Although the line between the two is not mathematically precise," the court wrote, "it is one a jury is capable of drawing." *Id.* at 124. "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." *Id*.[2]

The most recent relevant published decision is *State v. Ellington*, 2005 WI App 243, 288 Wis. 2d 264, 707 N.W.2d 907. In *Ellington*, the trial court instructed the jury that it could find Ellington guilty of "great bodily harm" if it found that the State had proven beyond a reasonable doubt that he inflicted

[2]Davis's jury was given the full statutory definition of "great bodily harm" (56:82).

"serious bodily injury" on her. *Id*., ¶6. Ellington argued that the trial court erred "because without telling the jury the context of the phrase 'other serious bodily injury,' the jury was free . . . to find him guilty for acts that did not meet the great-bodily-harm threshold." *Id*.

The court of appeals rejected that argument. It said that, "in essence, [Ellington] seeks to have the phrase 'other serious bodily injury' limited by the preceding list, using a tool of statutory construction known as *ejusdem generis*." *Id*. But, the court held, that argument had been rejected in *La Barge*, whose holding had been reaffirmed in *Cheatham*. *Id*., ¶¶7-8.

In an unpublished opinion that Davis discusses, if only for purposes of distinguishing it, *see* Davis's brief at 13-15, the defendant argued that he should be permitted to withdraw his guilty plea to a reckless injury count because the victim's injuries did not satisfy the statutory definition of "great bodily harm" but "merely constituted 'substantial bodily harm.'" *State v. Reyes-Ortiz*, no. 2013AP268-CR, unpublished slip op. at ¶13 (Ct. App. 2013) (A-Ap. 132). He contended that "the legislature's 1994 enactment of Wis. Stat. § 939.22(38) *after LaBarge,* to define 'substantial bodily harm' by listing specific types of injuries, overruled *LaBarge's* interpretation that § 939.22(14)'s 'other serious bodily injury' expanded the definition of 'great bodily harm.'" *Id*.

The court of appeals held that "*Ellington*, . . . decided long after the enactment of Wis. Stat. § 939.22(38), disproves Reyes–Ortiz's argument." *Id*.

The court said that "*Ellington* reaffirmed *LaBarge's* holding that the 'other serious bodily injury' language in Wis. Stat. § 939.22(14) broadens what injuries may fall under the definition of 'great bodily harm.'" *Id*.

Davis argues that, unlike the defendant in *Reyes-Ortiz*, he is not arguing that the enactment of the substantial bodily harm statute overruled *La Barge*'s broader interpretation of the great bodily harm statute. *See* Davis's brief at 14. But he does argue that the enactment of the substantial bodily harm statute limited the scope of the great bodily harm statute. As a result of the enactment of the substantial bodily harm statute, he contends, "[g]reat bodily harm simply does not reach those specific injuries defined as substantial bodily harm." *Id*. at 15. That argument may not be identical to the argument the defendant made in *Reyes-Ortiz*, but the two are variations on a theme.

When the legislature created the new statutory category of "substantial bodily harm," it did not amend the definition of "great bodily harm." *See* 1993 Wis. Act 441. Even though the new definition of "substantial bodily harm" includes a "bodily injury that causes a laceration that requires stitches, staples, or a tissue adhesive," Wis. Stat. § 939.22(38), the legislature was aware of *La Barge*'s holding that lacerations that require stitches may rise to the level of "great bodily harm" but did not amend that definition. *See Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, ¶ 103, 327 Wis. 2d 572, 786 N.W.2d 177 ("The legislature is presumed to be aware of existing

laws and the courts' interpretations of those laws when it enacts a statute.") (footnotes omitted).

It bears repeating that Davis's sufficiency of the evidence argument does not address the seriousness of the multiple bone fractures he inflicted on his three-month-old daughter – five broken ribs, four broken leg bones, and a broken bone in her foot (55:94, 97). Rather, he makes a categorical argument: if the injury is a bone fracture, it cannot, as a matter of law, constitute great bodily harm. *See* Davis's brief at 12. But even though the definition of "substantial bodily harm" includes "*any* fracture of a bone," Wis. Stat. § 939.22(38) (emphasis added), some bone fractures may be serious enough to permit a jury to find that they constitute a serious bodily injury rising to the level of great bodily harm.[3]

Davis's sufficiency of the evidence argument is based on an erroneous statutory interpretation. Accordingly, the court should reject Davis's claim that the evidence was insufficient to support his convictions.

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[3] Davis argues that "[t]here 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." Davis's brief at 13. But *La Barge* establishes that injuries need not be anywhere close to "near-death injuries" to constitute serious bodily injury under the definition of great bodily harm, as court held in that cases that a jury could find that multiple cuts and stab wounds that did not penetrate any internal organs or create a probability of death constituted serious bodily injury. *La Barge*, 74 Wis. 2d at 335.

II. DAVIS'S TRIAL COUNSEL WAS NOT INEFFECTIVE.

Davis argues that his trial counsel was ineffective for not impeaching one of the State's witnesses, Lakiesha Bowie, who is L.D.'s mother, with her eight criminal convictions. For purposes of this brief, the State will assume that defense counsel performed deficiently by not impeaching Ms. Bowie with her prior convictions. But Davis is not entitled to a new trial because, as the circuit court correctly concluded, Davis was not prejudiced by that omission.

A. Applicable legal principles and standard of review.

A defendant claiming ineffective assistance of counsel must prove both that his lawyer's representation was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The *Strickland* standard establishes a "high bar" for defendants. *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. To demonstrate prejudice, the defendant must affirmatively prove that the alleged defect in counsel's performance actually had an adverse effect on the defense. *Id.* at 693. The defendant cannot meet his burden merely by showing that the error had

some conceivable effect on the outcome. *Id*. Rather, he must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694.

More recently, the Supreme Court has emphasized that "'[s]urmounting *Strickland*'s high bar is never an easy task.'" *Harrington*, 562 U.S. at 105 (quoted source omitted). The bar is high, the Court said, because "[a]n ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial." *Id*. For that reason, "the *Strickland* standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve." *Id*.

The *Harrington* Court explained the demanding nature of the prejudice prong of the *Strickland* test:

> In assessing prejudice under *Strickland,* the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Instead, *Strickland* asks whether it is "reasonably likely" the result would have been different. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters "only in the

> rarest case." *The likelihood of a different result must be substantial, not just conceivable*.

Id. at 111-12 (citations omitted; emphasis added).

Whether a lawyer rendered ineffective assistance is a mixed question of law and fact. *State v. Nielsen*, 2001 WI App 192, ¶14, 247 Wis. 2d 466, 634 N.W.2d 325. The trial court's findings of fact will be upheld unless they are clearly erroneous. *Id*. Whether the defendant's proof satisfies either the deficient performance or the prejudice prong is a question of law that an appellate court reviews without deference to the trial court's conclusions. *Id.*

B. Davis was not prejudiced by counsel's failure to impeach the witness with her prior convictions.

Davis is correct that a witness's criminal convictions provide a valuable means of impeachment. *See State v. Gary M.B.*, 2004 WI 33, ¶21, 270 Wis. 2d 62, 676 N.W.2d 475. But a defendant's failure to impeach a prosecution witness does not necessarily result in prejudice. *See State v. Tkacz*, 2002 WI App 281, ¶¶18-25, 258 Wis. 2d 611, 654 N.W.2d 37. In this case, Davis has not shown that he was prejudiced by counsel's failure to impeach Ms. Bowie with her prior convictions, as he has failed to carry his burden of demonstrating that the likelihood of a different result had the jury known of those convictions was "substantial, not just conceivable." *Harrington*, 562 U.S. at 112.

Davis argues that "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." Davis's brief at 20.

Davis provides this explanation for why impeaching Ms. Bowie with her prior convictions would have mattered:

> 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.
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> ---
>
> [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.").

Id.

That argument does not withstand scrutiny. With respect to Ms. Bowie's "co-sleeping habits with

L.D.," Davis acknowledges that Ms. Bowie testified that she slept with L.D. and that she had rolled on top of L.D. while sleeping with her (55:51, 74). Given those admissions, it would serve no purpose – indeed, it would have been counterproductive – for Davis to undermine the credibility of Ms. Bowie's testimony on that point.

Moreover, the State's medical expert, Dr. Angela Rabbitt, testified that Ms. Bowie's rolling onto L.D. while sleeping would not have exerted sufficient force to fracture a rib (55:83; 56:5-6). She testified that "we have many, many cases . . . where the infants are smothered by the parents when they roll over on top of them, and none of those cases do we see rib fractures" (56:11).

Davis attempts to minimize the import of that testimony by noting that the jury was instructed that it was not bound by expert testimony. *See* Davis's brief at 21. But he points to nothing in the record that would have given the jury any reason to question the testimony of Dr. Rabbitt, who is board certified in both pediatrics and child abuse pediatrics, on that point (55:85). It would have been sheer speculation for the jury to find that Ms. Bowie could have broken five of L.D.'s ribs by rolling on her while co-sleeping.

The State confesses that it does not understand Davis's argument that it was important to impeach Ms. Bowie's credibility because "the jury was aware that Ms. Bowie was engaging in behavior with potentially life-threatening consequences for L.D." because bed-sharing may put a baby "at risk for sudden infant death syndrome . . . and other dangers

during sleep, like suffocation." Davis's brief at 20 & n.8. Whether Ms. Bowie's co-sleeping with L.D. created a heightened risk for those types of harm is utterly irrelevant to whether she was the person who broke L.D.'s bones.

Davis also contends that impeaching Ms. Bowie's credibility was important because she denied dropping L.D. *See id*. at 20. Defense counsel asked Bowie on cross-examination if she had ever dropped L.D. "accidentally maybe either while rocking her in a chair or getting up accidentally losing hold of [L.D.] and drop her" (55:72). Bowie testified that she "never dropped" L.D. (*id*.).

Even if the jury might have been disinclined to believe Ms. Bowie on that point had it known of her convictions, Davis was not prejudiced by the failure to impeach her because there was no evidence that dropping L.D. could have caused the types of fractures she suffered. To the contrary, the State presented uncontradicted evidence that dropping L.D. could not have caused those injuries.

Dr. Rabbitt testified that L.D. suffered metaphyseal fractures to the distal femurs in both of her knees, metaphyseal fractures in her left ankle in both the tibia and the fibula, and a fracture in her foot (55:97). A metaphyseal fracture, she explained, is produced by a pulling and twisting of the limb or by shaking a child, causing the arms and legs to move violently (55:97-98). That type of injury would not be caused by a fall off of a bed, couch, or rocker, she testified, because "these very specific mechanisms of pulling and twisting does [sic] not

happen during a short fall" (55:98-99). Nor, she further testified, could those type of fractures be caused by an adult rolling on top of the child or by the adult's body striking the child as the adult moved in bed (56:10).

Davis concedes that "there was minimal evidence implicating Ms. Bowie as the abuser." Davis's brief at 20. But even that overstates the evidence implicating her. Davis has not identified any evidence in the record – because there is none – that Ms. Bowie did anything to cause any harm to L.D. As the circuit court explained in its order denying Davis's postconviction motion:

> There was no suggestion in the evidence that Ms. Bowie had done anything to L.D. that could have resulted in the injuries she sustained. The extreme injuries the child sustained were inconsistent with an injury caused by Ms. Bowie rolling onto L.D. or by a fall. The doctor found that the injuries were consistent with child abuse and concluded that the child had been physically abused.

(44:5; A-Ap. 107.)

Davis argues that the weakness of the State's case weighs in his favor when assessing prejudice. With respect to L.D.'s rib injuries, however, the evidence was stronger than Davis claims. Davis admitted at trial that the day before he and Ms. Bowie took L.D. to the hospital, he sat on her after he had used cocaine and that he weighed 315 pounds at the time (56:49, 53, 55). Dr. Rabbitt testified that L.D.'s rib fractures were "fresh," meaning that they were less than four to seven days old (55:105). She

also testified that rib fractures in infants are extremely rare, that rib fractures in infants are likely produced by squeezing or compression, that the force required to fracture an infant's rib is greater than the force that would be applied in performing CPR, and that it is possible that when a person weighing over 300 pounds sits on an infant, that could break the child's ribs (55:95, 101; 56:13, 16).

With respect to L.D.'s leg fractures, Davis argues that "[t]here was never any direct evidence connecting [him] to those fractures." Davis's brief at 22. But he does not argue that there was insufficient evidence that he caused those fractures. The State recognizes that the fact that there is sufficient evidence to convict does not mean that there cannot be prejudice. *See State v. Pitsch*, 124 Wis. 2d 628, 645-46, 369 N.W.2d 711 (1985). But in this case, there was *no* evidence that Ms. Bowie broke L.D.'s leg bones.

Davis's discussion of the evidence fails to mention that in phone calls to family members after he was charged, he said, "I fucked her up really bad" (56:67). He testified at trial that he was talking about sitting on L.D., but he also testified that he could not remember whether he knew when he made the phone calls that L.D.'s legs were broken (56:67-68). Given Davis's admission that he lied to the hospital social worker and the police about what had happened (56:58-62), the jury had plenty of reason to doubt the latter claims.

It is Davis's burden to demonstrate prejudice. *See State v. Sanchez*, 201 Wis. 2d 219, 232, 548 N.W.2d 69 (1996). To carry that burden, he must show that as

a result of counsel's failure to impeach Ms. Bowie with her prior convictions, the likelihood of a different result had the jury known of those convictions was "substantial, not just conceivable." *Harrington*, 562 U.S. at 112. Because Davis has not carried his burden, this court should conclude that Davis's trial counsel was not constitutionally ineffective.

CONCLUSION

For the reasons stated above, the court should affirm the judgment of conviction and the order denying postconviction relief.

Dated this 10th day of February, 2016.

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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 5,986 words.

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

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 10th day of February, 2016.

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