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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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

Anthony Davis was convicted of two counts of reckless child abuse. Wis. Stat. § 948.03(3)(a). The State was required to prove that he caused "great bodily harm" to the victim by breaking her leg and ribs. The parties' dispute centers on whether a broken bone can constitute great bodily harm where the statutory definition of a lesser grade of harm (substantial bodily harm) expressly includes a bodily injury that causes "any fracture of a bone." Wis. Stat. § 939.22(38).

Great bodily harm must mean something *more* than a broken bone. A broken bone cannot simultaneously mean substantial bodily harm and great bodily harm without rendering one of the two redundant and superfluous, and statutes must be interpreted to avoid such results. The catchall in great bodily harm for "other serious bodily injury" can encompass any injury that is more severe than those enumerated as substantial bodily harm, but it cannot also reach the exact injuries that constitute substantial bodily harm.

The State's first argument is that there is no problem if the definitions overlap because there is no grade of child abuse that utilizes the definition of substantial bodily harm. (Respondent's Brief at 6-7). The child abuse statute only punishes injuries resulting in bodily harm or great bodily harm. Wis. Stat. § 948.03. Adopting the State's argument would mean "great bodily harm" means one thing in battery cases, but something different in child abuse cases. Because

there is no version of child abuse that involves substantial bodily harm, the State argues that all of the injuries enumerated as substantial bodily harm can be encompassed in the definition of great bodily harm. In other words, in child abuse cases, the court can pretend that the substantial bodily harm definition does not exist. The State cites no authority to support this claim.

There is no justifiable reason for great bodily harm, a statutorily defined phrase, to mean different things in different cases. The point of the definitional statute is to ensure the phrase is given a single meaning. It defies logic for great bodily harm to mean one thing when applying Ch. 940, but something different when applying Ch. 948.

Although "substantial bodily harm" is not used in the child abuse statute, it is referenced in Ch. 948: Wis. Stat. § 948.23(3)(c)2. That statute criminalizes failing to report the disappearance of a child, and assigns different penalties depending on whether the victim suffers great bodily harm or substantial bodily harm. Wis. Stat. § 948.23(3)(c)2-3. Thus, even if substantial bodily harm is not used in the child abuse statute, it is used in ch. 948, and Wis. Stat. § 939.22 explicitly instructs that its definitions apply to the entire criminal code unless a different definition is "manifestly require[d]." There is simply no reason to assume great bodily harm has a different meaning in child abuse cases than in every other case where that definition is used.

Had the legislature intended great bodily harm to mean something different in section 948.03, it could have done so. For example, "recklessly" ordinarily has a uniform definition across the criminal statutes. Wis. Stat. § 939.24. But the legislature expressly gave "recklessly" a different definition in the child abuse statutes. Wis. Stat. § 948.03(1). The

legislature could have done the same here, and created a unique definition for great bodily harm in cases involving child abuse. But no such law exists. Consequently, there is no rational basis to interpret great bodily harm to mean one thing in Wis. Stat. § 948.03, but something different every other time that phrase is used in the criminal statutes. This means that if the enumerated injuries constituting substantial bodily harm cannot also constitute great bodily harm, that reading should apply to every use of great bodily harm.

Next, the State more directly addresses Mr. Davis' claim that the enumerated injuries of substantial bodily harm cannot also be great bodily harm. The State asserts that "[s]ome amount of overlap between these definitions is expected." (Respondent's Brief at 9). But this position is flatly contradicted by the longstanding rule that each word in a statute should have its own 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. The State offers no reason to abandon this rule of statutory construction here.

In support of its claim that certain injuries might constitute both substantial bodily harm and great bodily harm, the State discusses the overruled decision from ***State v. Flores***, 76 Wis. 2d 50, 250 N.W.2d 720 (1977); (Respondent's Brief at 13). There, the court noted that there may sometimes be a "twilight zone" between bodily harm and great bodily harm where the jury will have to resolve the appropriate level of harm. ***Flores***, 76 Wis. 2d at 59. But there is no "twilight zone" here. A broken bone is substantial bodily harm because the statute says so. There is no issue for a jury to resolve because a broken bone cannot, as a matter of law, also be great bodily harm.

This outcome promotes equitable treatment in similarly situated cases. Rather than a broken bone meaning great bodily harm in one case, but substantial bodily harm in another, each type of harm can be distinguished. Thus, instead of outcomes depending on prosecutorial decision making, they will reflect the facts of each case and the seriousness of the injuries inflicted. This approach recognizes the need for each statute to have its own meaning, and allows for easy application of the various types of harm.

Even if great bodily harm does not include the injuries already defined as substantial bodily harm, it still encompasses a huge set of injuries. The catchall in the definition of great bodily harm, allowing it to apply to any other serious bodily injury still allows for the considerable broadening that the legislature intended. ***La Barge v. State***, 74 Wis. 2d 327, 332, 246 N.W.2d 794 (1976). Great bodily harm can continue to mean anything more than the injuries defined as substantial bodily harm. It simply cannot simultaneously mean the very injuries that are already defined as substantial bodily harm.

The State notes that the legislature is presumed to be aware of existing judicial interpretations of statutes when enacting new laws. (Respondent's Brief at 16). Mr. Davis does not disagree. But rather than supporting the State's position, that means the legislature knew it was carving a niche between great bodily harm and bodily harm when it defined substantial bodily harm. By enumerating specific injuries, the legislature was unequivocally excluding those injuries from bodily harm or great bodily harm.

The State insists that "some bone fractures may be serious enough" to qualify as great bodily harm, but undertakes no attempt to show that the broken bones in this

case should qualify. (Respondent's Brief at 17). The only injuries that were charged in this case were broken bones. Had the State charged other injuries in addition to the broken bones, it may have been able to charge Mr. Davis with great bodily harm, but it chose to limit its charging to the broken bones. Broken bones mean substantial bodily harm. They cannot also be great bodily harm without rendering substantial bodily harm unnecessarily redundant. Therefore, the evidence was insufficient to prove Mr. Davis caused great bodily harm, and this Court should reverse.

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

Mr. Davis is entitled to a hearing on his postconviction motion because he was prejudiced by defense counsel's failure to impeach Lakiesha Bowie with her eight prior convictions. The evidence against Mr. Davis was especially weak in this case, so any evidence undermining her credibility was critical to his case and needed to be presented to the jury, especially where part of his defense strategy focused on implicating Ms. Bowie.

On appeal, the State focuses on the reasons the evidence at trial was insufficient to prove Ms. Bowie was guilty of abusing L.D. (Respondent's Brief at 22-24). But Mr. Davis is not required to prove that the evidence would have been enough to convict her; he need only show a reasonable probability that the jury could have a reasonable doubt as to his guilt.

Evidence of Ms. Bowie's criminal record would have weighed considerably on her credibility. *See* ***Liphord v. State***, 43 Wis. 2d 367, 371, 168 N.W.2d 549 (1969). In turn, this

would have aided trial counsel's attempts to suggest that she may have been responsible for L.D.'s injuries. Trial counsel did not need to prove Ms. Bowie was guilty; he only needed the jury to have a reasonable doubt as to Mr. Davis' guilt. Evidence of her criminal record would have undercut her claims that Mr. Davis has been meaner leading up to the hospital visit, and that she never dropped L.D. (55:43-44, 71-72). Further, when coupled with her admission that Ms. Bowie slept with the baby, this information would have lent support to a reasonable doubt as to Mr. Davis' guilt.

The effect of introducing Ms. Bowie's criminal record would have been magnified by the weakness of the State's case against Mr. Davis. Mr. Davis admitted to sitting on L.D., Dr. Angela Rabbitt only testified that someone large (like Mr. Davis) sitting on L.D. could "possibly" have resulted in the rib fractures. (56:13, 16). Nothing else suggested he was actually responsible for the rib fractures.

The State does not even bother trying to identify the evidence supporting Mr. Davis' conviction for the broken legs, presumably because there was essentially none. (Respondent's Brief at 25). As to the leg injuries, the best the State can muster is to point out that Mr. Davis has not argued the evidence was insufficient to convict, while simultaneously acknowledging that he does not need to make that argument to prove prejudice. ***State v. Pitsch***, 124 Wis. 2d 628, 645-46, 369 N.W.2d 711 (1985); (Respondent's Brief at 25). The jury heard a recorded jail call where Mr. Davis said he "fucked [L.D.] up," but nothing in the record shows that statement was made after he learned that L.D.'s legs were broken; his statement could easily be attributed only to his belief that he may have been responsible for the rib fractures after sitting on her.

The State emphasizes that Mr. Davis must prove any prejudice was "substantial," but any showing of prejudice does not even need to rise to the level of more likely than not. Mr. Davis is only required to prove that there is a "reasonable probability" of a different outcome had the jurors heard about Ms. Bowie's eight prior convictions. ***Strickland v. Washington***, 466 U.S. 668, 693-94 (1984) ("a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case."). The only question is whether there is a *reasonable probability* the verdict would have been different had Ms. Bowie's credibility been undercut with her significant criminal record.

Here, Ms. Bowie's criminal record would have had a significant effect on her credibility and would have lent support to Mr. Davis' defense that she may have been responsible for the injuries. Coupled with the State's weak case against Mr. Davis, there is a reasonable probability that a jury hearing about Ms. Bowie's record would have had a reasonable doubt as to his guilt; therefore, this court should reverse for an evidentiary hearing on Mr. Davis' postconviction motion.

CONCLUSION

For the reasons stated above and in his initial brief, Mr. Davis asks that the court find the evidence introduced at trial insufficient to support his convictions, reverse the convictions, and remand to the circuit court with instructions to enter judgments of acquittal.

If the 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 _____ day of February, 2016.

Respectfully submitted,

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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 2,020 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 _____ day of February, 2016.

Signed:

_____

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