COURT OF APPEALS
DECISION
DATED AND FILED

June 29, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-0350-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD J. FALK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marquette County: RICHARD O. WRIGHT, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

¶1 VERGERONT, J. Richard Falk was convicted of two counts of child abuse in violation of WIS. STAT. § 948.03(2)(a) (1997-98).[1] Richard[2]

[1] WISCONSIN STAT. § 948.03(2)(a) provides:

(continued)

appeals his conviction and the order denying his motion for postconviction relief, arguing both trial court error and ineffective assistance of counsel. He contends the trial court erred by: (1) allowing the State to present other acts evidence, which, Richard argues, was highly prejudicial and not admissible under WIS. STAT. § 904.04(2); (2) allowing the State to show the jury photographs of the injured child when the injuries were not disputed; and (3) precluding him from introducing evidence supporting the theory that his wife, not he, committed the crime against their daughter. We conclude the trial court did not erroneously exercise its discretion on the first point and, to the extent it did on the second point, the admission of photographs was harmless error. With respect to the evidence of other acts by Richard's wife, we hold the "legitimate tendency" test we adopted in ***State v. Denny***, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984), *affirmed*, 163 Wis. 2d 352, 471 N.W.2d 606 (Wis. App. May 15, 1991) (No. 90-2019-CR), does not apply when the charged offense is child abuse, and the correct standard is the one for other acts evidence set forth in ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998), although applied less stringently than when the State seeks to introduce other acts evidence against a defendant, *see* ***State v. Scheidell***, 227 Wis. 2d 285, 304-05, 595 N.W.2d 661. Applying that standard, we conclude the trial court did not exclude relevant evidence and therefore did not violate Richard's constitutional right to present a defense.

> (2) INTENTIONAL CAUSATION OF BODILY HARM. (a) Whoever intentionally causes great bodily harm to a child is guilty of a Class C felony.

All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] Due to the fact that several people in this case have the last name of Falk, we will refer to them by their first names.

¶2 Richard also contends his trial counsel was ineffective on a number of grounds, several of which relate to the failure to gather and present evidence of Richard's wife's behavior, attitudes and psychological make-up. We conclude that Richard has not shown both deficient performance and prejudice for any ground. In particular, we conclude that the other acts evidence concerning his wife is not admissible under WIS. STAT. § 904.04(2); the character evidence, including the psychological evaluation and expert testimony is inadmissible under § 904.04(1)(c); and we decline to decide whether the character evidence is admissible under another, constitutionally required theory because the argument was not sufficiently developed. Finally, we decline to reverse and remand for a new trial in the interests of justice.

BACKGROUND

¶3 Laura Falk, the two-month-old daughter of Richard and his wife Shannon, was brought to the hospital on Friday, February 13, 1997. She had seventeen fractures in her arms, legs and ribs; she suffered from a life threatening infection resulting from those injuries; and a large blood clot had formed near her heart. The doctors who treated Laura determined the injuries had been intentionally inflicted within ten days prior to that Friday.

¶4 The police investigation focused on four suspects: Richard, Shannon, and Richard's brothers, Russell and David. Richard and Shannon lived in a trailer home with Laura and their three-year-old son Cody. Russell and David were living with them for several days prior to February 13, 1997, and stayed with the children when Richard and Shannon were out. The police questioned these four individuals and others. On March 5 Richard made a confession to Detective Thomas Schrank of the Marquette County Sheriff's Department, stating that he

had caused the injuries to his daughter on two separate occasions—a confession Richard later said was not the truth.

¶5 In his signed statement Richard told the police the following details. During the night of Monday, February 10, Laura's crying woke him. While Shannon remained sleeping, Richard tried to feed Laura a bottle, but she would not eat well. He stated that he "got mad and frustrated" and he "grabbed Laura hard by both of her wrists and picked her up very roughly and started to yell at her." He then tried to burp Laura, holding her against him and hitting her on her back. He stated that he knew he was hitting her too hard. When Laura still would not eat, Richard laid her down to change her diaper, which was difficult because Laura was crying and kicking. He then stated:

> I grabbed Laura by both of her legs very hard and pulled on them and picked her up by the legs as Laura continued to cry and kick. I know that I then twisted her legs a bit trying to get Laura to stop fighting me so I could change her diaper.

He then tried to wrap Laura in a blanket to keep her fingers out of her mouth. In doing so Richard stated that he had to "twist and force the arms into the blanket." He then put her back in the crib and went back to bed himself.

¶6 Richard stated that Shannon asked him about a bruise on Laura's leg on Tuesday and he told Shannon that maybe it was from pulling Laura out of the swing, but he "really thought it was from what I did to Laura the night before when I had grabbed the legs and twisted them."

¶7 In his statement Richard also described being awakened by Laura's crying on Wednesday night, February 12. He had just fed her two hours ago so he knew she was not hungry. He said he "grabbed her very hard along the side of the

body in the rib area and squeezed her very hard and was telling her to stop crying." He then fed her a little and put her back in the crib.

¶8 At trial Richard testified that the statement he made to Detective Schrank on March 5, 1997, was not true. The false confession was made, he testified, because he felt it was the only way to get his family back together. He said he realized he was covering for someone else, probably Shannon or Russell, but, at the time, he "really didn't think anything was done on purpose," and he thought that he "could probably handle [whatever the authorities decided to do] better than either [Shannon or Russell] could" because they are both very emotional people. Richard testified that at the time he made the confession, he was "under the understanding" he would not go to jail for his confessed actions, but would receive counseling. Richard testified that the week before he confessed he told four people—his father, his aunt and uncle, and his friend Doug Paul—that he planned to confess.

¶9 Richard's explanation at trial for how he made up the details of the confession was that he "knew Laura's condition and what all was wrong with her" and he "made sure to include it all" in his confession. His mother had relayed to him what Chief Deputy Kim Gaffney of the Marquette County Sheriff's Department had told her about how the police thought the injuries had occurred. She had told him, he testified, about the "grabbing of the wrists and holding her

only by the wrists and also by the ankles … and the intentional breaking of the legs." Richard's mother corroborated this.[3]

¶10 Chief Deputy Gaffney testified he did tell Richard's mother how the injuries could have happened based upon the information he received from the doctors at that time, which may have included the possible actions of squeezing the baby's ribs and hitting or twisting the baby's legs. He also testified he told Richard's mother that there were probably two separate incidents and that the injuries to the legs and the arms would have occurred something like Monday night or early Tuesday morning. However, when the State recalled Chief Deputy Gaffney as a rebuttal witness, he denied discussing a "dangling theory" with Richard's mother, and said that when he spoke with her the only theory he was aware of was the one the doctors had arrived at—a systematic breaking of the child's bones.

¶11 Dr. Keith Kahle, the orthopedic surgeon who treated Laura, testified that when he first observed all of the fractures in Laura, he theorized that they resulted from "a systematic, intentional taking each of the extremities at various locations, near the joints and just snapping them in certain moves…." Dr. Kahle relayed this theory to Detective Schrank at that time. When Detective Schrank later told Dr. Kahle how Richard described inflicting the injuries in his confession, Dr. Kahle stated that these actions could have caused the injuries he observed:

[3] Richard's mother, Nona Falk, testified that she met with Chief Deputy Gaffney on February 21 and he described a theory of how Laura was hurt. She stated: "He discussed someone holding her up by her wrists and her total body weight being supported by her wrists and possibly the same thing being done but with the ankles and someone, possibly, intentionally snapping her legs and squeezing her very tightly in the ribs." She relayed this information to Richard on February 24.

Richard's description was "at least equally consistent" with the injuries as his original theory of systematic breaking of the bones.

¶12 The State also presented evidence, over Richard's objection, that Richard had caused similar rib fractures to his son, Cody, a couple years earlier. Detective Schrank testified that he interviewed Richard again on March 6 and asked him about fractured ribs the doctors identified on an x-ray of Cody from when he was about ten months old. Detective Schrank testified that Richard "indicated that he was probably the one who did it" and that he remembered "squeezing Cody in a similar fashion that he squeezed Laura." Richard denied making those statements and testified it was Detective Schrank who said "You probably did it" to Richard on March 6. There is not a signed statement from the March 6 interview.

¶13 The jury found Richard guilty of two counts of child abuse and he was sentenced to a twenty-five-year prison term.

¶14 Richard brought a number of postconviction motions, including a motion for a new trial based on ineffective assistance of counsel and in the interests of justice. After lengthy postconviction proceedings, the trial court denied the motions in a written decision.

TRIAL COURT ERROR

State's Other Acts Evidence

¶15 Richard contends the trial court erred in admitting Detective Schrank's testimony that Richard confessed to causing fractures to Cody's ribs two years prior to the injuries to Laura. The trial court determined the evidence was admissible under WIS. STAT. § 904.04(2), which provides:

> (2) OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The jury was instructed to consider Cody's rib fractures only for the purpose of showing "absence of mistake or accident, that is whether the defendant acted with the state of mind required for this offense."[4]

¶16 Whether other acts evidence is admissible under this statute is determined by using the three-step analytical framework outlined in ***Sullivan***, 216 Wis. 2d at 772-73 (footnote omitted):

> (1) Is the other acts evidence offered for an acceptable purpose under Wis. Stat. § (Rule) 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?
>
> (2) Is the other acts evidence relevant, considering the two facets of relevance set forth in Wis. Stat. § (Rule) 904.01? The first consideration in assessing relevance is whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the evidence has probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence.
>
> (3) Is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by

[4] The State points out on appeal that the trial court concluded the other acts evidence was admissible to show identity in addition to absence of mistake, but the jury was not instructed on this purpose. The State did not object to the cautionary instruction, which was read to the jury twice. We therefore consider the purpose of identity to be waived by the State, *see* ***Vollmer v. Luety***, 156 Wis. 2d 1, 9, 456 N.W.2d 797 (1990), and we do not consider whether the trial court erroneously exercised its discretion in admitting the other acts evidence for the purpose of showing identity.

> considerations of undue delay, waste of time or needless presentation of cumulative evidence?

The proponent of the evidence bears the burden of persuading the circuit court that the three-step inquiry is satisfied. *See* ***Sullivan***, 216 Wis. 2d at 774. We review a circuit court's decision on admissibility under WIS. STAT. § 904.04(2) to determine whether that court properly exercised its discretion, and we affirm if the court examined the relevant facts, applied a proper standard of law and, using a demonstrative rational process, reached a conclusion that a reasonable judge could reach. *See* ***Sullivan***, 216 Wis. 2d at 780.

¶17 Under step one of the ***Sullivan*** analysis, absence of mistake or accident is an acceptable purpose under WIS. STAT. § 904.04(2). Whether this purpose is relevant under step two is disputed by the parties. The State argues that since intent is an element of the crime, showing whether Richard acted with the required state of mind is relevant, while Richard argues that whether Laura's injuries were caused by mistake or accident was not an issue at trial and is therefore not relevant.[5] We conclude that, because Richard did not stipulate to a concession of the element of intent following the procedure set forth in ***State v. Wallerman***, 203 Wis. 2d 158, 167-68, 552 N.W.2d 128 (Ct. App. 1996), the State was obligated to prove intent; therefore, evidence of absence of mistake is relevant. *See also* ***State v. Benoit***, 229 Wis. 2d 630, 638-39, 600 N.W.2d 193 (Ct. App. 1999); ***State v. DeKeyser***, 221 Wis. 2d 435, 443-44, 585 N.W.2d 668 (Ct. App. 1998).

[5] The State contends that Richard raised the issue of mistake when he testified that, at the time he confessed, he did not think anyone caused Laura's injuries on purpose. However, we need not decide whether the issue of intent was affirmatively raised by Richard because the absence of a stipulation permits the State to submit proof on the issue of intent.

¶18 We further conclude the trial court did not erroneously exercise its discretion in determining that evidence that Richard had squeezed and fractured Cody's ribs in a "similar fashion" to that in which, he told Detective Schrank, he squeezed Laura's ribs, was relevant to absence of mistake or accident. Both acts involved squeezing the ribs of a child less than one year old and resulted in fractured ribs.[6] The stronger the similarity between the other acts and the charged offense, the greater the probability that the similar result was not repeated by mere chance or coincidence. *See* ***Sullivan***, 216 Wis. 2d at 786-87.

¶19 Finally, we consider step three of the ***Sullivan*** analysis. After concluding the evidence had probative value, the trial court considered the prejudicial effect and stated that it "pales in comparison to the evidence with regard to Laura." To minimize potential unfair prejudice, the trial court instructed the jury it could "not consider this evidence to conclude that the defendant has a certain character or certain character trait and that the defendant acted in conformity with that trait with respect to the offenses charged in this case," and the other acts evidence could not be used to determine Richard is a "bad person and for that reason is guilty of the offense charged." Such a cautionary instruction reduces the risk that a jury will find an accused guilty simply because he or she is a bad person. *See* ***id.*** at 791. We conclude the trial court did not erroneously exercise its discretion in determining the probative value of the evidence was not

[6] Richard also argues "the other acts evidence of the abuse is questionable in itself"—that at the time the injury occurred to Cody (two years prior to Laura's injuries), child abuse was not noted as a possible cause of the injury, and the only evidence connecting Richard to Cody's fractured ribs is his vague, unwritten statement to Detective Schrank, which he denies making. This asserted "questionable" nature of the evidence is a consideration for the jury in weighing the value of the evidence, not one for the court in considering admissibility. *See* ***State v. Anderson***, 141 Wis. 2d 653, 665, 416 N.W.2d 276 (1987).

outweighed by the danger of unfair prejudice, and, therefore, did not err in admitting this evidence.

Admission of Photographs

¶20 Richard contends the trial court erred in admitting twenty color photographs of Laura taken in the hospital after undergoing several surgeries. Most show her with various tubes, splints and pins in her limbs. Five were poster size and displayed in the courtroom during the trial. Several others were approximately eight-by-ten inches and showed close-up views of Laura's post-surgery wounds. In the hearing on Richard's motion in limine to exclude the photographs, the prosecutor argued that they showed the various injuries Laura had sustained, and one, in particular, showed the bruise on her leg. Defense counsel countered there was no dispute over Laura's injuries or whether they constituted great bodily harm, and the photographs, especially the large ones, presented a danger of unfair prejudice because they graphically showed a small baby with pins and tubes and severe injuries, and would make the jury "cringe." The trial court concluded the photographs were not "gory" and it was only the age of the child that "makes you cringe." The court warned the State not to point out the age of the child or otherwise use the photographs in an inflammatory way.

¶21 The admission of photographs is a matter within the trial court's discretion. *See* ***Sage v. State***, 87 Wis. 2d 783, 788, 275 N.W.2d 705 (1979). The trial court should admit photographs if they will aid the jury in gaining a better understanding of material facts, and should exclude them if they are not substantially necessary to show material facts and tend to create sympathy or indignation or direct the jury's attention to improper considerations. *See* ***id.*** We do not reverse a trial court's decision to admit photographs if it has applied the

appropriate discretionary standard unless it appears from a review of the record as a whole that the decision was wholly unreasonable, or if the circumstances indicate the only purpose of the photographs was to inflame or prejudice the jury. *See* ***id.***

¶22 The fact that Richard did not dispute the element of great bodily harm does not entitle him to exclusion of the photographs. Under ***State v. Lindvig***, 205 Wis. 2d 100, 108, 555 N.W.2d 197 (Ct. App. 1996), photographs may be admissible to prove an element of the charged crime even if the defendant does not dispute it at trial. Although ***Wallerman*** established a procedure by which a defendant can stipulate to an element of the crime in order to keep out other acts evidence, that ruling does not apply to evidence of the crime charged, such as the photographs in this case. *See* ***State v. Cleveland***, 2000 WI App ___, ¶19, No. 99-2682. *See also* ***Benoit***, 229 Wis. 2d at 639 (recognizing the dramatic nature of other acts evidence).

¶23 However, we are unable to understand from the record of the hearing and from viewing the photographs how any photograph, except the one showing the bruise on Laura's leg, helped the jury understand the material facts. The photographs are post-surgery, and show Laura's repaired broken bones and injuries but they do not convey any precise information about the nature and location of those injuries, all of which were testified to in detail by the physicians at trial.

¶24 Nevertheless, even if we assume the trial court erroneously exercised its discretion in admitting all but one of the photographs, we are convinced there is no reasonable possibility their admission contributed to Richard's conviction. *See* ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222 (1985) (test for

determining harmless error is whether there is a reasonable possibility that the error contributed to the conviction). Richard acknowledged in opening and closing argument and in the presentation of his case that the injuries were brutal; his defense was he did not inflict them. We are satisfied the photographs did not contribute to the jury's decision that Richard was the person who inflicted the injuries.

Trial Court's Exclusion of Evidence Related to Shannon

¶25 The State's motion in limine asked the court to preclude evidence showing Shannon committed the crime, including evidence of Shannon's prior bad acts unless they were shown to be admissible under WIS. STAT. § 904.04(2).[7] Richard made an offer of proof that one witness would testify she saw Shannon throw Cody into a crib and into a car seat,[8] and another witness would testify she saw Shannon throw Laura into a car seat. He argued these other acts would be

[7] The State's motion also asked the court to preclude both opinion and hearsay testimony showing Shannon as the person who likely caused the injuries and who made statements regarding the difficulty of raising children. At the hearing Richard did not make an offer of proof or argue that any evidence in these areas would be admissible. We consider this in the following section on ineffective assistance of counsel.

[8] It appears from the discussion of the attorneys that Shannon had allegedly thrown Cody into the crib at a time period that was after, and therefore not related to, the rib fractures present when Cody was ten months old.

offered to show opportunity, motive in terms of the way Shannon treated her children, intent and absence of mistake.[9]

¶26 As we interpret the record of the motion hearing, the trial court did not make a specific ruling on the State's motion or on Richard's offer of proof.[10] Instead the court instructed the parties with general comments that character evidence would not be allowed to create a "mere suspicion" Shannon might have caused the injuries, and, likewise, the court would not allow other acts evidence unless Richard could show, through voir dire, a "logical and rational connection." The court did state that, "[i]n this context, [evidence that Shannon threw Cody into the crib] … does not qualify as an exception"; but also stated it would allow voir dire "to show to the court that there is a logical and rational connection."[11] During the trial the parties again discussed the potential testimony of a witness who saw Shannon throw Cody into a crib from two to three feet away, but the trial court

[9] At the same motion hearing, Richard's counsel also stated that he wanted to ask witnesses about their opinion as to how Shannon treats her children in order to impeach Shannon's statement that she never mistreated her baby. The court ruled it would not allow impeachment of Shannon in this way. The court based the ruling on WIS. STAT. § 906.08(2) which prohibits a party from attacking a witness's credibility with specific instances of conduct proved by extrinsic evidence. Richard did not make an offer of proof with any specific instances of abuse about which he planned to ask Shannon. We do not construe this ruling as one which prohibited Richard from introducing any evidence to support his theory that Shannon caused the injuries.

[10] During the portion of the motion hearing discussing the other acts evidence against Shannon, Richard also provided an offer of proof regarding evidence he wished to present that Russell had shaken Laura and this act could have caused the injuries to Laura's ribs. It is not clear when the court is referring to this potentially direct evidence that someone else committed the crime as opposed to the other acts evidence against Shannon. However, we interpret the court's comments as leaving both evidentiary rulings open and allowing voir dire at trial to establish admissibility.

[11] The court also indicated that it would not allow a witness to testify that he or she saw Shannon throw Laura into her car seat unless Richard could provide expert testimony that the force of throwing her into the car seat could have caused the injuries in this case. However, the trial court did not make a final ruling on this at the motion hearing and Richard did not attempt to have this evidence admitted at trial.

ruled the evidence was not admissible because the doctors' testimony had not established a "reasonable nexus … as to the possibility that such force would cause such injury."

¶27 Richard argues the trial court's ruling erroneously precluded him from introducing evidence at trial which would have supported his theory that Shannon, rather than Richard, caused the injuries, and therefore denied him his right to present a defense under the Sixth and Fourteenth Amendments to the United States Constitution and Art. I, § 7 of the Wisconsin Constitution. The State responds that evidence of a third party who may have committed the crime must meet the "legitimate tendency" test of ***State v. Denny***, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984), the proffered evidence does not meet the test and exclusion for this reason does not violate Richard's constitutional right to present a defense. We conclude the legitimate tendency test of ***Denny*** is not applicable to this case, but we also conclude the exclusion of this evidence does not violate Richard's Sixth Amendment right to present a defense because it is not relevant under the proper standard.

¶28 The constitutional right to present evidence is grounded in the confrontation and compulsory process clauses of Art. I, § 7 of the Wisconsin Constitution and the Sixth Amendment of the United States Constitution. *See* ***Scheidell***, 227 Wis. 2d at 293-94. An accused's right to cross-examine witnesses and to present witnesses in his or her own defense has long been recognized as fundamental and essential to a fair trial. *See* ***id.*** The right to present evidence is not absolute, however. An accused must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence and has no right, constitutional or otherwise, to present irrelevant evidence. *See* ***id.***

¶29 In ***Denny*** we considered the standard for relevancy in the context of a defendant's attempt to present evidence that a third party had a motive to commit the crime of first-degree intentional homicide. ***Denny***, 120 Wis. 2d at 622. The trial court excluded that evidence as irrelevant, and Denny appealed, contending he had a constitutional right to present evidence as part of his defense because it was relevant. *See* ***id.*** at 621-22. We examined the general rule established in other jurisdictions—that the motive of a third party to commit a crime may be excluded when there is no other proof directly connecting that person with the offense charged—in light of the definition of relevancy in WIS. STAT. § 904.01. *See* ***Denny***, 120 Wis. 2d at 622-23. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Section 904.01. We rejected the standard of other jurisdictions, according to which the evidence of a direct connection must be "substantial," and adopted a less strict standard: there must be a "legitimate tendency" that the person could have committed the crime. *See* ***Denny***, 120 Wis. 2d at 623-25.

¶30 This test, we explained, "asks whether the proffered evidence is so remote in time, place or circumstances that a direct connection cannot be made between the third person and the crime." ***Id.*** at 624. We reasoned that evidence that "simply affords a possible ground of suspicion against another person should not be admissible." ***Id.*** at 623. Otherwise "a defendant could conceivably produce evidence tending to show that hundreds of other persons had some motive or animus against the [victim]—degenerating the proceedings into a trial of collateral issues." ***Id.*** at 623-24. We concluded:

> Thus as long as motive and opportunity have been shown and as long as there is also some evidence to directly connect a third person to the crime charged which is not

> remote in time, place or circumstances, the evidence should be admissible.

Id. at 624. Applying this standard, we concluded that the evidence Denny sought to admit did not meet this standard because, although it may have established motive for a third person, it did not show opportunity or direct connection to the crime. *See* ***id.*** at 625.

¶31 Although ***Denny*** dealt with evidence of a third party's motive, we have applied it since to exclude other types of evidence offered to show that a third party committed the charged offense. *See* ***State v. Avery***, 213 Wis. 2d 228, 570 N.W.2d 573 (Ct. App. 1997) (evidence that a law enforcement officer in the course of investigation was informed that a person in another county matched the victim's description of her assailant); ***State v. Jackson***, 188 Wis. 2d 187, 191-92, 525 N.W.2d 739 (Ct. App. 1994) (evidence that the victim, after identifying the defendant in a line-up as the gun man "probably about 80 percent sure," identified another man in another line-up as "a possibility").

¶32 The supreme court has held that the ***Denny*** legitimate tendency test is not applicable to evidence that a third party has framed the defendant, while expressly reserving the question whether the legitimate tendency test is an appropriate standard for the introduction of evidence that a third party committed the crime. *See* ***State v. Richardson***, 210 Wis. 2d 694, 705 n.6, 563 N.W.2d 899 (1997). Most recently the supreme court has held the ***Denny*** legitimate tendency test is not applicable when the defendant seeks to admit evidence of a prior act committed by a third unknown person, while expressly reserving the question whether that test is the appropriate standard for introduction of third-party evidence offered to prove something other than motive. *See* ***Scheidell***, 227 Wis. 2d at 297 n. 9.

¶33 Richard contends that ***Scheidell*** supports his argument that, on constitutional grounds, the ***Denny*** legitimate tendency test may not be used to exclude the evidence of Shannon's prior acts, and the rules of evidence should be relaxed to permit their admission. In ***Scheidell*** the court did not apply the ***Denny*** legitimate tendency test, as the State there urged. The court decided that where the alleged perpetrator of the prior act is unknown, it would be "virtually impossible for the defendant to satisfy the motive or opportunity prongs of [the test]"; a defendant could not show an unknown person had a motive or the opportunity to commit the charged offense. ***Id.*** at 296. The court also rejected the standard this court adopted to resolve Scheidell's appeal, which limited the circuit court's role to determining whether a jury could reasonably find that the prior crime occurred and did not require the court to analyze the similarities and differences between the prior act and the charged offense.[12] Instead, the court concluded that

> when a defendant proffers other acts evidence committed by an unknown third party [on the issue of identity], the court … must balance the probity of the evidence, considering the similarities between the other act and the crime alleged, against the considerations contained in Wis. Stat. Sec. 904.03 [utilizing the ***Whitty/Sullivan*** framework].

Scheidell, 227 Wis. 2d at 311. However, the court also stated that the similarities between the two acts need not be as great when the defendant seeks to admit evidence of a prior act to prove the identity of a third person, as when the State seeks to admit such against the defendant: the defendant, unlike the State, need not show "imprint" or "signature," but must show similarities that do more than

[12] ***State v. Scheidell***, 220 Wis. 2d 753, 755, 584 N.W.2d 897 (Ct. App. 1998).

raise conjecture or speculation. *See* ***id.*** at 304-05.[13] The court then applied the ***Whitty/Sullivan*** framework and concluded that the proffered evidence was irrelevant and, therefore, properly excluded. *See* ***id.*** at 306-10.

¶34 We agree with Richard that ***Scheidell*** countenances an examination of the legitimate tendency test to determine whether it fits in fact situations that differ from those in ***Denny***, and we conclude it does not fit in this case. In this case—and in most if not all cases where child abuse is the charged offense—there are only a few persons who could possibly have committed the crime besides the accused, because only a few persons have the necessary opportunity: the parent or parents, the babysitter or caregiver, and a limited number of other relatives or friends. Therefore, the need to prevent evidence showing that large numbers of others had a motive to commit the crime is not a concern as it was in ***Denny***. In addition, direct evidence connecting one of those few persons to the particular abuse charged, such as witnesses other than the child victim or physical evidence, will likely be lacking.[14] In this case, for example, only four persons had the opportunity to injure Laura given the parameters established by the medical testimony. We therefore conclude that the ***Denny*** legitimate tendency test is not

[13] We understand that the less stringent standard applicable when the defendant seeks to admit the evidence takes into account the constitutional right to present a defense.

[14] We observe that another jurisdiction using the "legitimate tendency test" for evidence concerning third parties has concluded, in the context of child abuse cases, that "the fact that the victim was in the custody of the third person during the time when the injuries could have been inflicted is sufficient direct and circumstantial evidence to satisfy the [legitimate tendency] test." ***People v. Schwartz***, 678 P.2d 1000, 1009 (Colo. 1984). We think it is more consistent with the supreme court's analysis in ***Scheidell*** to conclude that the ***Denny*** legitimate tendency test is not applicable in cases of child abuse than to consider that test as somehow satisfied in a different way. However, ***Schwartz*** is useful in showing that another court has identified the same concerns we have in applying the traditional legitimate tendency test to child abuse cases.

applicable in this case, and to the extent the trial court relied on it in excluding the proffered evidence, it erred.

¶35 However ***Scheidell*** does not suggest, as Richard does, that simply because the legitimate tendency test is not applicable, the proffered evidence regarding a third party is admissible. Rather, the court adopted the ***Whitty/Sullivan*** framework as the better method for analyzing the admissibility of the evidence in that case. Using ***Scheidell*** as a guide, we conclude that the proper standard for the circuit court to apply in evaluating proffered other acts evidence concerning a third party when the charged crime is child abuse is to balance the probity of the evidence, considering the other act and the crime alleged, against the considerations contained in WIS. STAT. § 904.03 using the ***Sullivan*** framework, and using a less stringent requirement of similarity between the other act and the crime than that used when the State offers such evidence. *See* ***Scheidell***, 227 Wis. 2d at 311. Because it does not appear the trial court applied this standard, we undertake a de novo review. *See* ***Sullivan***, 216 Wis. 2d at 781. We conclude that the evidence contained in the offer of proof before the trial court was properly excluded.

¶36 As previously stated, Richard argued to the trial court that the evidence was offered to show proof of Shannon's opportunity, motive, intent and absence of mistake; on appeal he focuses on the motive of frustration. Although these are all permissible purposes under WIS. STAT. § 904.06(2), we do not see how the proffered evidence is related to the opportunity to injure Laura, and its relation to motive is weak at best. However, assuming the evidence was offered for the permissible purposes of motive or intent and lack of mistake, and assuming it relates to the proposition that Shannon rather than Richard injured Laura, we are convinced that its probative value is so low as to make it irrelevant under the

second part of step two in the ***Sullivan*** analysis. The bare bones offer of proof of the incident did not include injury or pain to Cody as a result of being thrown, or intent to cause him injury or pain, or frustration on Shannon's part.[15] The probative value of other acts evidence lies in the similarity between the other act and the charged offense. *See* ***Sullivan***, 216 Wis. 2d at 786. While we are mindful that this standard must be applied in a less stringent manner because Richard seeks to introduce the evidence in his defense, *see* ***Scheidell*** at 227 Wis. 2d at 304-05, we are satisfied that the prior act of throwing a child two or three feet onto a bed bears so little resemblance to the type of forceful act necessary to produce Laura's injuries that it is not relevant, and its exclusion does not violate Richard's constitutional right to present a defense.

INEFFECTIVE ASSISTANCE OF COUNSEL

Other Acts and Character Evidence Relating to Shannon

¶37 The primary focus of Richard's claim of ineffective assistance of counsel is that trial counsel did not, beyond the offer of proof we have just discussed, present evidence of Shannon's behavior, attitudes or psychological make-up. This would show, he contends, that it was more likely that Shannon injured Laura than that he did. The evidence which should have been presented by trial counsel and admitted by the court, according to Richard, falls generally into these categories: (1) witnesses' accounts of Shannon's behavior and attitude toward her children both before and after the injuries, of her prior abuse of animals and of her violent temper; (2) the psychological evaluation of Shannon in the CHIPS case (children in need of protection and services); and (3) expert opinion

[15] Richard's contention that more details of this incident should have been included in the offer of proof is addressed in the section on ineffective assistance of counsel.

on child abuse. Richard contends trial counsel had some information from witnesses at the time of trial but was deficient in not making sufficient offers of proof; and he did not have other information, including the psychological report and expert opinion, because of an inadequate investigation.[16]

¶38 The trial court held that counsel was not deficient because he correctly understood the court had ruled that he could not introduce "prior bad acts or other character type evidence, relating to Shannon, unless he had something to connect her with the sort of violence that could cause the severe injuries observed with baby Laura," and no evidence presented at trial or postconviction met this criteria. The court also ruled that counsel was not deficient in failing to obtain a psychological profile of Shannon to show she was more likely to mistreat Laura than was Richard. Counsel testified that he did consult a psychologist and, based on that consultation, determined he could not make the connection between what he knew of her conduct and a propensity to commit the type of injuries Laura had.

[16] Richard presents the failure to provide offers of proof or conduct adequate voir dire as a separate ground for ineffective assistance of counsel, and he contends the trial court erred in stating that failure to preserve the record for appeal is not ineffective assistance of counsel. Richard is correct that we are unable to review a claim of trial court error in excluding evidence if we do not have an adequate record of the evidence sought to be admitted. However, the failure to make an adequate record is ineffective assistance only if the defendant is prejudiced by that failure, which requires an analysis of: what the offer of proof or voir dire would have shown, whether exclusion would have been error based on that showing, and, if so, whether it is reasonably probable that admission of the testimony would have resulted in a different outcome. We believe this is what the trial court meant. Therefore, we analyze the claim that trial counsel did not make an offer of proof or conduct a voir dire not as a separate ground, but in the context of the claims that particular evidence was excluded due to counsel's deficient performance.

Richard also presents the failure to investigate as a separate ground of ineffective assistance of counsel. However, as with the failure to present an offer of proof or voir dire witnesses, a properly presented claim on this ground requires a showing of the admissible evidence that would have resulted from an adequate investigation, and an analysis whether it is reasonably probable that such evidence would have resulted in a different outcome. We therefore do not analyze this as a separate ground, but rather in the context of each piece of evidence for which Richard has developed such an argument on appeal.

The court accepted this testimony as true. Counsel also testified that although he did not have the CHIPS psychological evaluation, he knew about Shannon's temper and hostility and felt he brought this out at trial. The court agreed he had done so.

¶39 For a defendant to prevail on a claim of ineffective assistance of counsel, he or she must establish both that counsel's actions constituted deficient performance, and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). An attorney's performance is not deficient unless it is shown that he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed ... by the Sixth Amendment." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). "Review of counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight; instead, the case is reviewed from counsel's perspective at the time of trial, and the burden is ... on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." ***Id.***

¶40 To meet the prejudice test, the defendant must show that there is a reasonable probability[17] that, but for trial counsel's deficiency, the result of the proceeding would have been different. *See* ***Strickland***, 466 U.S. at 694.[18]

[17] The phrase the phrase "reasonable probability" in this context is identical in substance to the phrase "reasonable possibility" in Wisconsin's harmless error test in ***Dyess***, 124 Wis. 2d at 543. *See* ***State v. Armstrong***, 223 Wis. 2d 331, 372 n.40, 588 N.W.2d 606 (1999).

[18] The trial court's decision, when read in its entirety, shows that it did apply the correct legal standard, and we therefore reject Richard's argument to the contrary.

¶41 The trial court's findings on what the attorney did and the basis for the challenged conduct are factual and will be upheld on appeal unless they are clearly erroneous. *See* ***State v. Weber***, 174 Wis. 2d 98, 111, 496 N.W.2d 762 (Ct. App. 1993). However, whether counsel's actions were deficient and, if so, whether they prejudiced the defense, are questions of law to be determined independently by the reviewing court. *See* ***State v. Hubanks***, 173 Wis. 2d 1, 24-25, 496 N.W.2d 96 (Ct. App. 1992).[19]

¶42 We consider first the evidence that might be categorized as "other acts," all of which, the court stated in its decision, would not have been admitted because it was not relevant. If that ruling is correct, it was not deficient of counsel not to present it, or alternatively, his failure to do so was not prejudicial. We have reviewed the many instances Richard refers to that might fall into this category, and conclude that, applying the analysis we have already conducted with the offer of proof, none are admissible. By way of example, we mention specifically the instances that present the strongest argument—and even these, we hasten to add, do not present close questions: throwing Cody into his crib from the foot of the bed where she was sitting (about three feet away), saying "You better get to sleep

[19] Richard contends he did not have the opportunity to present all the evidence he wished at the ***Machner*** hearing because of time constraints and limitations imposed by the trial court and this court. Therefore, he contends, the trial court in its decision after the ***Machner*** hearing did not address all issues he intended to raise. We conclude that this court and the trial court allowed adequate time for Richard's motions to be heard, and that the structure and requirements the trial court imposed for presenting evidence were reasonable. In particular, we conclude that the court did not erroneously exercise its discretion in not permitting Richard to question trial counsel or present affidavits on trial counsel's failure to investigate points that were not previously specified in Richard's submissions. As the court explained, it had ordered trial counsel to specify by a date prior to the hearing the points to be raised at the hearing, and his failure to do so deprived the prosecutor of adequate notice. Although we could therefore limit our review to those grounds for ineffective assistance of counsel that Richard timely identified pursuant to the court's order, we nevertheless choose instead to review all grounds that are fully argued on appeal, where the record permits review and the issues presented are questions of law.

now," when he was hooked up to a pump which was hooked to a feeding tube in his stomach;[20] spanking Cody when he was one year old; losing her temper with Cody when he was three and one-half because he was not sharing his toys with his cousin, and so taking him by the arm and dragging him across the room to the corner, which caused him to cry; pinching Laura's nose and laughing when Laura cried;[21] and, when getting Laura ready to take her to the hospital on February 14, barely bending over to drop her into her car seat, which was on the floor, with the affiant, Candis Paul, averring that she saw Laura's face "and she [Laura] would have screamed if she [could]." There is little or no similarity between these acts and the type of conduct necessary to cause Laura's injuries.

¶43 We next consider the evidence that is character evidence but not "other acts evidence," such as evidence that Shannon had a temper, had not wanted to be pregnant with Laura, and was not happy being a mother. The trial court stated it would not have admitted any of this evidence. Richard acknowledges that such evidence is not admissible under WIS. STAT. § 904.04(1)(c)[22] against Shannon. But, he argues, this rule must bend to Richard's

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[20] This is the incident that was referred to in the offer of proof. It occurred when Richard and Shannon were living with Richard's mother.

[21] All these averments are contained in the affidavit of Russell Falk.

[22] WISCONSIN STAT. § 904.04(1) provides:

> (1) CHARACTER EVIDENCE GENERALLY. Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:
>
> (a) Character of accused. Evidence of a pertinent trait of the accused's character offered by an accused, or by the prosecution to rebut the same;
>
> (b) Character of victim. Except as provided in s. 972.11 (2), evidence of a pertinent trait of character of the victim of the

(continued)

right to present a defense. Richard points to the court's statement in ***Scheidell*** that § 904.04(2) should not be applied as stringently to evidence presented by the defendant and argues that we should conclude the same with respect to character evidence prohibited under § 904.04(1)(c).

¶44 We do not consider this to be a sufficient development of argument on such a complex point. There is a complete statutory prohibition on the admission of character evidence for a witness, yet Richard does not suggest what standard a court should apply to determine what character evidence is admissible against a witness to show the witness committed the crime. ***Scheidell*** does not provide guidance on this point, since that case concerned evidence of other acts, for which there is already in case law a well-defined analysis that applies to both third parties and defendants. ***Scheidell***, 227 Wis. 2d at 294-95. Richard provides no Wisconsin authority for admitting character evidence that is not other acts evidence against a third party to prove that party committed the crime, and we are aware of none. The issue of admissibility of evidence against third parties in the context of the defendant's right to present a defense is a complex one, and the approaches of jurisdictions vary;[23] and the distinct characteristics of the crime of

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> crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
>
> (c) Character of witness. Evidence of the character of a witness, as provided in ss. 906.07, 906.08 and 906.09.

[23] *See* Stephen Michael Everhart, *Putting a Burden of Production on the Defendant Before Admitting Evidence that Someone Else Committed the Crime Charged: Is It Constitutional?*, 76 NEB. L. REV. 272 (1997); David McCord, *"But Perry Mason Made It Look So Easy!": The Admissibility of Evidence Offered by a Criminal Defendant to Suggest that Someone Else is Guilty,* 63 TENN. L. Rev. 917 (1996); Ellen Yankiver Suni, *Who Stole the Cookie from the Cookie Jar?: The Law and Ethics of Shifting Blame in Criminal Cases*, 68 FORDHAM L. REV. 1643 (2000).

child abuse no doubt adds additional considerations. We decline to develop Richard's argument for him, *see* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992), and therefore do not further address the issue whether Richard is constitutionally entitled to present evidence against Shannon that is inadmissible under § 904.04(1)(c).

¶45 Finally, we consider together the psychological evaluation of Shannon in the CHIPS file and the affidavit of Jeannie Ferguson, a social worker who is an experienced supervisor for child abuse intake in Dane County. According to her affidavit, Ferguson reviewed that psychological evaluation, a letter in the CHIPS file from a psychologist concerning Cody's visit with Richard, the closing argument at trial of both the prosecutor and the defense, and the affidavits of witnesses relating information about Shannon that Richard filed with the court postconviction. Ferguson opined that Shannon would be "assessed as a very high risk of being abusive to a child in her care" based on the risk matrix she (Ferguson) uses in her work. She further opined that some of the conduct that we have mentioned as inadmissible correlate with a propensity to abuse children and some of the inadmissible character evidence indicates Shannon is a very high-risk caregiver.

¶46 We accept as not clearly erroneous the trial court's finding that trial counsel consulted a psychologist and, based on that consultation, decided he could not "make the leap" from the character evidence he had to the propensity of Shannon to brutalize her baby. Based on this finding, we agree with the trial court that counsel was not deficient for not presenting an expert at trial to give a psychological profile of Shannon concerning her propensity for child abuse.

¶47 Richard contends trial counsel was deficient in his failure to obtain a copy of the CHIPS psychological evaluation of Shannon. That is dated September 11, 1997, the last day of the trial. The trial court found that another item in the file—the letter concerning Cody's visits with Richard—was not available at the time of trial, but did not make a similar finding with respect to the psychological evaluation of Shannon. However, because there is no dispute on the date of the psychological evaluation, we find as a matter of law it was not available for use at trial and trial counsel was therefore not deficient for not obtaining it.

¶48 We also conclude that Richard has not shown that Ferguson's opinion on Shannon's propensity for child abuse, or the psychological evaluation on which it is in part based, would have been admissible. Such expert opinion testimony on Shannon's character, like other evidence on her character, is inadmissible under WIS. STAT. § 904.04(1)(c). And, as previously stated, Richard has not adequately developed an argument that such evidence is nevertheless admissible because of his constitutional right to present a defense.

Expert Testimony on False Confessions

¶49 Richard contends trial counsel was deficient in failing to present expert evidence that in cases of child abuse, people may falsely confess to protect family members. He offers statements from Ferguson's affidavit on this point, arguing that they would be admissible, and that her testimony—or similar testimony from another expert—was available and should have been presented by trial counsel. However Ferguson's affidavit does not establish that she has expertise on the subject of false confessions in child abuse cases. Moreover, most of her discussion on Richard's confession, including her credibility determination

and her more general statements (such as the various motives people have in making false confessions), do not add to what is already within the common knowledge of jurors and is therefore not admissible. *See* ***State v. Peters***, 192 Wis. 2d 674, 689, 534 N.W.2d 867 (Ct. App. 1995). We therefore conclude that Richard has not established that trial counsel was deficient in not presenting an expert on false confessions at trial.[24]

"Alibi" Testimony

¶50 Richard contends trial counsel failed to interview three people on his witness list regarding the Monday night on which, in his confession, Richard stated he injured Laura. According to Richard this is "crucial alibi testimony." The affidavits of Chuck Rieckman, Nicole Henderson and Doug Paul aver that they went with Richard and Shannon to a bar that Monday night until about 2:30 a.m. (on Tuesday), then went to Richard's and Shannon's trailer house and stayed for a couple hours with Richard while Shannon went to bed. Rieckman stated that

[24] Richard also refers in his brief to opinions in Ferguson's affidavit to the effect that, based on friends' and relatives' description of Richard, he seems less likely than Shannon to have injured Laura. However, these opinions are not based on a psychological evaluation of Richard, and Richard does not develop an argument that trial counsel was ineffective for failing to introduce a psychological profile of Richard's character to prove that he does not exhibit the character traits consistent with that of a child abuser. *See* ***State v. Richard A.P.***, 223 Wis. 2d 777, 792, 589 N.W.2d 674 (Ct. App. 1998) (holding that testimony of psychologist who evaluated defendant and concluded he did not show evidence of diagnosable sexual disorder and opined that, in absence of such disorder, it is unlikely a person would molest a child, is admissible; such testimony is character evidence of accused and admissible under WIS. STAT. § 904.04(1)(a)). We therefore do not address this issue.

We also do not address the issue of the admissibility of Ferguson's opinion that it is not uncommon for family members who have not abused a child to feel that the family member who did should get treatment rather than punishment. Richards did not present an argument on this point until the reply brief. His reference to this opinion in his statement of facts in his main brief is not sufficient to give the State a fair opportunity to respond, and we do not address arguments raised for the first time in a reply brief. *See* ***Schaeffer v. State Personnel Comm'n***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989).

he was with Richard from 9:00 p.m. on Monday until about 6:00 a.m. on Tuesday and when he left, Richard was still up playing video games with his brother. Paul stated he was with Richard until about 4:30 or 5:00 a.m. and he remembered the time because his wife was upset that he got home so late.

¶51 We do not agree this testimony provides an "alibi" and we therefore conclude Richard has not shown that trial counsel's performance was deficient. This evidence does not show that Richard could not have inflicted the injuries after his friends went home, after he went to bed and was awakened by Laura. While Richard identified that time as "late Monday night" in his confession, the fact that it might actually have been early Tuesday morning is not a significant inconsistency. Richard worked nights, four nights on and four nights off, and he testified he stayed up all night on that Monday night. He also testified at trial in response to the prosecutor's question whether he was the one who got up to feed Laura on Monday night or early Tuesday morning, "Yeah. I think I did get up with her once. I am not positive on that but I think so."

Reputation Evidence

¶52 Richard contends trial counsel failed to discover and present evidence that Shannon had a reputation for lying and Richard had a reputation for truthfulness. He presented a number of affidavits, including those of Shannon's mother, sister and two cousins, which stated that Shannon had a reputation for

dishonesty. Since the trial court did not address this issue,[25] it made no findings on what trial counsel did and did not do—a necessary predicate for deciding whether, as a matter of law, those findings constitute deficient performance. We will therefore assume without deciding that trial counsel was deficient for not presenting such reputation evidence and consider whether Richard has shown prejudice. We conclude he has not.

¶53 The jury heard Shannon's testimony on several important points contradicted by her or by other witnesses in instances that strongly suggested she was not truthful.[26] The opinion of her family members, who had many other criticisms of her, and the opinion of Richard's family and friends that she had a reputation for untruthfulness would not have been a significant addition to the basis the jury already had for questioning her credibility.

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[25] Richard's postconviction counsel did question trial counsel on this point at the ***Machner*** hearing, but the court did not rule on this, apparently because the issue had not been raised in the manner directed by the court's orders. *See* footnote 19. Trial counsel testified he and his investigator interviewed people who knew Shannon and did not get that form of reputation testimony from them, although they did get information that Shannon had a temper and was strict in disciplining her children; Shannon's family was "not particularly open to us," trial counsel testified, and Richard's mother said she did not know of Shannon's reputation for untruthfulness. He was not aware of any witnesses who would say she had a reputation as a "liar." In trial counsel's view testimony of her reputation for lying would have been useful if the witnesses had been credible. However, he felt that the inconsistencies between Shannon's testimony at trial and that of other witnesses was effective in undermining her credibility.

[26] For example, Shannon testified that she wanted to take Laura to the hospital sooner, but Richard did not want to, and she did not drive; only one car worked and Richard drove it to work; and she did not have a telephone so she had no way to call anyone. However, Richard did not work that week, Monday through Thursday; there was testimony that Shannon knew how to drive and did drive; a nearby neighbor testified that Shannon and Richard were welcome to use their phone and their car when needed and had done so in the past; Richard's mother testified she stopped by two mornings that week to take Russell to work and could have taken the baby to the hospital, and she often took Shannon places; and other friends and relatives testified that had Shannon called and said she needed to take Laura to the hospital they would have taken her.

¶54 As for Richard's reputation for honesty, the affiants so averring were his family members and friends. It was clear to the jury that Richard had lied at least once on a very important matter—he was either lying when he confessed or lying at trial. We therefore conclude it was not deficient performance for trial counsel not to present testimony that he had a reputation for truthfulness. For the same reason, we conclude it is not reasonably probable that the opinions of his family and friends that he had a reputation for truthfulness would have persuaded the jury to believe his trial testimony rather than his confession. We also observe that trial counsel presented testimony concerning Richard's reputation for peacefulness, which allowed the jury to infer that he did not injure Laura because it was inconsistent with his reputation for peacefulness.

Evidence of Shannon's Consciousness of Guilt

¶55 Richard contends trial counsel failed to ask Candis Paul, who testified at trial, about Shannon's statement to her mother just before Laura was taken to the hospital, "maybe we don't have to go to the hospital," even though the statement was in his investigator's notes. According to Richard this is important evidence of Shannon's consciousness of guilt. However, Richard does not explain why Paul's statement is not inadmissible hearsay. Moreover, Richard himself testified that Shannon wanted to take Laura to the hospital that week, but he was against it. Other omitted evidence of Shannon's guilt, Richard asserts, was contained in Candis Paul's postconviction affidavit: Shannon dropped Laura into her car seat "because Shannon was upset that we were taking the baby to the doctor," and Shannon took Laura into the bedroom to change her, which Paul thought was "strange" because she "always had the diapers in the living room and had always changed Cody in the living room." Candis Paul's statement about Laura's state of mind is not admissible. The proper foundation for her testimony

on where Shannon normally changed Laura is lacking, and even if the foundation were somehow supplied, the inference of Shannon's guilt from changing her in the bedroom is extremely weak. We conclude trial counsel was not deficient in failing to elicit any of this testimony.

Failure to Stipulate

¶56 Richard contends trial counsel should have offered to stipulate that Laura's injuries were intentionally inflicted in order to keep out evidence of the earlier injuries to Cody's ribs for the purpose of proving lack of mistake or accident under WIS. STAT. § 904.04(2). However, the State also argued that such evidence was admissible to show identity—that is, because of the similarity of the injuries, the identity of the perpetrator was the same, and according to Detective Schrank, Richard admitted he did injure Cody's ribs.[27] A stipulation that Laura's injuries were intentionally inflicted would not have entitled Richard to exclusion of the other acts evidence to prove the identity of the person who inflicted those injuries and, of course, Richard would not stipulate that he was the person who inflicted Laura's injuries. *Cf.* ***DeKeyser***, 221 Wis. 2d at 444 (noting that DeKeyser would have stipulated in order to avoid introducing other acts evidence). For this reason, we conclude Richard has not established deficient performance.

¶57 Richard also argues that trial counsel should have offered to formally stipulate to the element of great bodily harm so as to avoid admission of the photographs. However, we have already held that such a stipulation would not

[27] The trial court agreed with the State, but the purpose of identity was not included in the cautionary jury instruction. *See* footnote 4.

have entitled him to exclusion of the photographs. The failure to stipulate is therefore not deficient performance. *See* ***Cleveland***, 2000 WI App ___ at ¶20.

Failure to Object and Other Deficiencies in Examination and Cross-Examination

¶58 Richard contends trial counsel was ineffective for not objecting to the prosecutor's question to Doug Paul, a witness for the defense, concerning prior convictions, because the court did not make a ruling allowing this as required by WIS. STAT. § 906.09(3) and ***Gyrion v. Bauer***, 132 Wis. 2d 434, 393 N.W.2d 107 (Ct. App. 1986). The issue of impeachment of defense witnesses with prior convictions was raised by pretrial motion, and the court instructed the prosecutor and trial counsel to agree on the number of convictions with which Doug Paul could be impeached. No agreement was placed on the record.[28] Doug Paul's testimony was brief. He testified that he was a good friend and a neighbor of Richard's, that Richard had a peaceful character and was a loving father who never raised a hand to his child. On cross-examination, Paul acknowledged he had two prior convictions.

¶59 Doug Paul's postconviction affidavit avers he had: "Maybe a drunk driving conviction. I have had two. Or a disorderly conduct for swearing in public, or I may have been convicted of obstructing for giving a wrong name." He adds that the years for the "DUI [were] 1991 and 1996, [the] DC in 1992 and obstructing in 1995." This testimony is insufficient to establish that the trial court would have ruled the prosecutor could not ask Paul about any prior convictions or

[28] Trial counsel testified at the ***Machner*** hearing that he could not recall if he reached an agreement with the prosecutor off the record, that he did not object because he thought Doug Paul came across as a credible witness, and he decided it was better to let the matter go. He acknowledged that it would have been better if he had introduced the crimes on direct, to "soften[] the blow," and that is what he intended to do.

would have allowed evidence of one, rather than two, prior convictions. Because the 1995 conviction goes to honesty and was only two years before the trial, it is unlikely the trial court would not have allowed at least one conviction. We also conclude it is not reasonably probable that eliciting the answer on direct, rather than cross, would have changed the result of the trial. We consider here that even if the jury would have evaluated Paul's testimony on Richard as being more credible if he admitted to only one offense on direct, other defense witnesses presented the same positive testimony of Richard's character and parenting. Therefore, although it may have been deficient performance for trial counsel not to make a record of the agreement with the prosecutor and not to ask the question on direct, that failure did not prejudice Richard.

¶60 Richard also contends trial counsel failed to make use of the "open door" principle when the prosecutor asked Shannon if she ever hurt Laura and Shannon answered no, and failed to object to that question and the same question asked of David, who also answered "no." We do not understand, and Richard does not explain, why this question to Shannon is improper. The prosecutor asked Shannon to explain on redirect her previous statement that she was a strict disciplinarian of her children. Shannon answered in reference to Cody—that he could not get away with things that other kids did. The prosecutor then asked if she had ever punished Laura or ever hurt Laura, and Shannon answered "no" to both questions. Because these questions were asked in the context of clarifying what Shannon meant by being a strict disciplinarian, which trial counsel had asked about, we do not see why an objection would have been sustained. We also do not see why this question would have opened the door to the other acts evidence of Shannon's treatment of Laura, none of which relate to disciplining her. Richard fails to establish deficient performance.

¶61 As for the question to David—whether he had ever hurt Laura—Richard's defense was that Richard had not injured Laura, that Russell or Shannon had. We are therefore not persuaded trial counsel was deficient in not objecting to this question and, moreover, we are satisfied it is not reasonably probable that the failure to object contributed to Richard's conviction.

Richard's Plan to Confess

¶62 At trial Richard's counsel attempted to introduce testimony that he planned to confess in order to protect his family even though he did not do it. The prosecutor objected based on hearsay and disagreed that it was a prior consistent statement introduced to rebut an express or implied charge of recent fabrication.[29] Trial counsel understood the court to rule against him, but the court found in its written decision a misunderstanding of the ruling. However, the court concluded while this testimony was "potentially usable," it was ambiguous and did not add much because Richard already testified that he falsely confessed and why. It was ambiguous, in the court's view, because the witnesses did not say that Richard told

[29] WISCONSIN STAT. § 908.01(4)(a)2 provides:

> Definitions. (4) STATEMENTS WHICH ARE NOT HEARSAY. A statement is not hearsay if:
>
> (a) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:
>
> ….
>
> 2. Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or
>
> ….

them he was going to invent a false confession; rather, that is how they interpreted his comments. Those comments could also be explained, the court stated, as letting his friends and relatives know he was going to confess, but not being able to tell them directly that he had caused Laura's injuries.

¶63 Richard contends trial counsel was deficient because he misunderstood the court's ruling and did not persist in seeking admission of this evidence. Richard does not explain why this testimony would have been admissible. Although the court's comments at one of the postconviction hearings indicate the court would have admitted it, the court does not state this in its written decision, and we are doubtful that the testimony of these witnesses—that Richard told them he was going to confess even though he did not do it—comes within WIS. STAT. § 908.01(4)(a)2. Nothing in the prosecutor's cross-examination of Richard or opening or closing argument suggests that the prosecutor was implying that Richard was lying when he testified he told this to his friends and relatives. Of course, the prosecutor expressly charged that Richard was lying when he testified that he had not injured Laura. However, the charge that a person is lying, in itself, is insufficient to render admissible prior consistent statements. *See* ***State v. Peters***, 166 Wis. 2d 168, 177, 479 N.W.2d 198 (Ct. App. 1991) "The allegation must be that the fabrication is recent or based upon an improper influence or motive. This requirement exists because the prior consistent statements must predate the alleged recent fabrication of motive before they have probative value." ***Id.*** The purpose of the prior consistent statement is a specific one—to rebut the allegation of recent fabrication or improper influence or motive. *See* § 908.01(4)(a)2. "Absent a charge of recent fabrication or improper influence or motive, evidence of a prior consistent statement does not make courtroom testimony more credible." ***Peters***, 166 Wis. 2d at 177.

¶64 We are unable to discern from the testimony or argument that the prosecutor implied that Richard had recently fabricated his declaration of innocence, or asserted his innocence at trial because of a specific improper motive or influence. Indeed, it is apparent from the trial testimony that Richard claimed he was innocent to many people before he made the confession.

¶65 However, even if the testimony of these witnesses would have been properly admitted had defense counsel not misunderstood the court's ruling, and assuming this misunderstanding constitutes deficient performance, we agree with the trial court's analysis of prejudice. The jury heard Richard's testimony that he falsely confessed, and why he did so. Evidently the jury did not believe that testimony in light of the very detailed confession. The fact that Richard told others that he was going to confess even though he did not injure Laura proves only that he has repeated his claim of innocence and the reasons for a false confession to others; it does not detract from the persuasive force of the detailed contents of the confession.

¶66 In summary, although there are a few points on which trial counsel was deficient, or on which we assume for purposes of argument that he was deficient, Richard has not shown a reasonable probability that, but for those deficiencies, the result of the trial would have been different.

NEW TRIAL IN THE INTEREST OF JUSTICE

¶67 Richard seeks a new trial under WIS. STAT. § 752.35 which permits us to grant relief if we are convinced "that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." In order to establish that the real controversy has not been fully tried, Richard must convince us that the jury was precluded from considering "'important testimony that bore on

an important issue' or that certain evidence that was improperly received 'clouded a crucial issue' in the case." ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998). To establish a miscarriage of justice, Richard must convince us there is a substantial degree of probability that a new trial would produce a different result. *See* ***Darcy***, 218 Wis. 2d at 667.

¶68 We decline to order a new trial in the interests of justice. As we have already explained, Richard has not persuaded us that the evidence that was not presented concerning Shannon, to show she rather than Richard committed the offense, would be admissible at a new trial. Therefore, we cannot say significant evidence was not heard which should have been heard. And without that evidence, the evidence at a new trial would not differ significantly from that which

was already presented. Therefore, we cannot say there is a substantial degree of probability that a new trial would produce a different result.[30]

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

[30] Richard asks, as an alternative to a new trial, that we remand for further hearing to permit the police officers, his expert witnesses, defense counsel and Shannon to testify. We conclude there is no need for such a remand. First, Richard's postconviction counsel questioned one of the investigating officers at length in an attempt to argue that the State destroyed exculpatory evidence and their investigation of the crime was biased. He makes no argument on these points on this appeal. Second, we have assumed in this opinion that Ferguson would testify consistent with her affidavit. There is therefore no need for her testimony. If Richard means by "defense experts" a legal expert, we conclude he has already had sufficient opportunity to present such testimony. Third, postconviction counsel had a full day to examine trial counsel, and we will not remand for more examination of that witness. Finally, we agree with the trial court that Richard is not entitled to examine Shannon in postconviction proceedings to discover what she would say if asked particular questions. The purpose of an evidentiary hearing on a claim for ineffective assistance of counsel is not to conduct further discovery of witnesses but to support the specific factual assertions made in the motion, when those assertions, if true, would constitute ineffective assistance of counsel.