COURT OF APPEALS
DECISION
DATED AND FILED

March 7, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1498-CR **Cir. Ct. No. 2009CF1492**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NICHOLAS M. GIMINO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: STEPHEN A. SIMANEK and EUGENE A. GASIORKIEWICZ, Judges. *Affirmed*.

Before Lundsten, P.J., Sherman and Kloppenburg, JJ.

¶1 LUNDSTEN, P.J. Nicholas Gimino appeals a judgment of the circuit court finding him guilty after a bench trial of two counts of physical abuse of a child. He also appeals an order denying his motion for postconviction relief.[1] Gimino makes three arguments: 1) there was insufficient evidence to convict him on either of these counts; 2) the circuit court erroneously admitted expert testimony that should have been excluded because of a discovery violation; and 3) Gimino received ineffective assistance of counsel because his trial attorney failed to call an accident reconstruction expert and failed to impeach an important witness. We reject all three arguments, and affirm the circuit court.

Background

¶2 On the evening of October 11, 2009, Gimino took his two-year-old daughter, B.G., on a go-kart ride on a private road in his subdivision. The go-kart was a motorized vehicle with a frame, but no sides or roof. B.G. was not wearing a helmet or any other protective gear. Gimino may have fastened a seat belt around B.G., but, if he did, the belt was insufficiently tight to hold B.G. in place. As Gimino made a right-hand turn around a corner, B.G. fell out of the go-kart and onto hard pavement. Gimino told an investigator that he was driving ten miles per hour at the time B.G. fell out of the go-kart.

¶3 Gimino stopped the go-kart and observed that B.G.'s pants were scuffed up. Gimino carried B.G. inside his residence to inspect her for any wounds. After removing her clothing, Gimino observed road rash on B.G.'s body

[1] The Honorable Stephen A. Simanek presided over trial and entered the judgment of conviction. The Honorable Eugene A. Gasiorkiewicz entered the order denying Gimino's motion for postconviction relief.

and a puncture wound on her right leg. Gimino cleaned the wounds with a washcloth and applied an antibiotic. Gimino woke B.G. up periodically throughout the night to check on her. Gimino also gave B.G. "Motrin." He did not take B.G. to the hospital.

¶4 After observing B.G.'s injuries, Gimino called Tamara Varebrook, the aunt of B.G.'s mother, and told her that B.G. had injured herself by falling off of a bike. Gimino told Varebrook that B.G. had some road rash, but no cuts or other injuries. Gimino did not call B.G.'s mother, Carrie Willms, because there were restraining orders between Gimino and Willms.

¶5 The next morning, Willms's boyfriend, Wallace Kissh, drove to pick B.G. up from Gimino's residence. Before arriving, Kissh spoke with Gimino on the phone and could hear B.G. crying in the background. When Kissh arrived at Gimino's residence, he noticed that B.G. was whimpering. Gimino then informed Kissh that B.G. was injured while riding in his go-kart. Kissh drove B.G. back to Willms's house. Kissh and Willms then took B.G. to the hospital.

¶6 At the hospital, B.G. was treated by Dr. Mary Saunders. Dr. Saunders diagnosed B.G. as having road rash on her left side, including her flank, thigh, shin, and ankle. Dr. Saunders gave B.G. pain medication and then scrubbed out her wounds and bandaged them. Dr. Saunders observed no infection of B.G.'s wounds.

¶7 Willms later spoke with Gimino over the phone and, according to Willms, Gimino told her that B.G. was not injured from a bike accident, but rather she was injured when she fell out of his go-kart. Gimino told Willms that he was driving too fast.

¶8 Gimino was charged with two counts of physical abuse of a child. The first count was based on the go-kart incident, and the second count was based on Gimino's failure to take B.G. to the hospital.[2] After a bench trial, Gimino was found guilty of both counts. Gimino filed a motion for postconviction relief, making the same arguments he makes on appeal. The circuit court denied his motion for postconviction relief, and Gimino appealed.

Discussion

I. Sufficiency Of The Evidence For A Conviction

¶9 Gimino argues that the State did not present sufficient evidence at trial to support his convictions. The high hurdle Gimino must clear was explained in ***State v. Poellinger***, 153 Wis. 2d 493, 451 N.W.2d 752 (1990):

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

Id. at 507 (citations omitted). Thus, the question here is whether the evidence, viewed in a light most favorable to Gimino's convictions, is so lacking in probative value that no reasonable fact finder could have found Gimino guilty.

[2] Gimino was also charged with one count of neglecting a child, resulting in bodily harm, in violation of WIS. STAT. § 948.21(1)(b). The circuit court dismissed this charge after the bench trial, and it is not an issue on appeal.

¶10 Both charges here were for the same crime, "recklessly causing bodily harm to a child." *See* WIS. STAT. § 948.03(3)(b).[3] This crime has three elements:

1. "The defendant caused bodily harm to [the victim]. 'Bodily harm' means physical pain or injury, illness, or any impairment of physical condition."

2. "The defendant recklessly caused bodily harm. This requires that the defendant's conduct created a situation of unreasonable risk of harm to [the victim] and demonstrated a conscious disregard for the safety of [the victim]."

3. "[The victim] had not attained the age of 18 years at the time of the alleged offense."[4]

WIS JI—CRIMINAL 2112. In evaluating recklessness, the factors to consider include: "what the defendant was doing; why [he] was doing it; how dangerous the conduct was; how obvious the danger was; and whether the conduct showed any regard for the safety of [the victim]." ***Id.*** Proof of recklessness does not require proof that the defendant was subjectively aware of the risk to the child's safety. ***State v. Williams***, 2006 WI App 212, ¶26, 296 Wis. 2d 834, 723 N.W.2d 719.

[3] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[4] It is undisputed that B.G. is under the age of 18.

A. The Go-Kart Incident

¶11 Gimino contends that the evidence was insufficient to support his conviction relating to the go-kart incident in which B.G. was initially injured. We first explain why the evidence was sufficient, and then address Gimino's specific arguments on this topic.

¶12 Viewing the evidence most favorably to the verdict reveals the following. Gimino put two-year-old B.G. in a go-kart and drove her around his neighborhood. The go-kart had a frame, but no sides or roof. While Gimino was driving around a curve, B.G. fell out of the go-kart and sustained severe road rash injuries. Gimino admitted to B.G.'s mother that he was traveling "too fast" and that B.G. "flew out of the side" of the go-kart when he turned a corner. B.G. was not wearing a helmet or any protective gear. It is reasonable to infer from the fact that B.G. fell out of the go-kart as it rounded a turn that Gimino either did not put a seat belt on B.G. or that, if he did, it was so loose that it should have been obvious that it would not secure the child.[5]

[5] The evidence is unclear as to whether B.G. also sustained a fracture to her ankle. Willms testified that Dr. Yankavich, to whom Willms brought B.G. after seeing Dr. Saunders, put B.G.'s ankle in a cast, but other doctors, including Dr. Saunders, found no signs of a fracture in B.G.'s ankle. Gimino stated that B.G. was walking around immediately after her injury, but Willms and the investigator testified that B.G. could not walk the next day. We will ignore the possible ankle fracture for purposes of this decision. Regardless of evidence relating to the possible ankle fracture, the evidence is sufficient to support Gimino's conviction.

We note that Gimino makes two other arguments in his reply brief relating to Dr. Yankavich. Gimino argues that the State failed to obtain and disclose medical records from Dr. Yankavich in violation of discovery laws and that Gimino's trial counsel was ineffective for failing to obtain medical reports from Dr. Yankavich. Because these arguments are raised for the first time in Gimino's reply brief, we deem them forfeited. *See* ***State v. Smalley***, 2007 WI App 219, ¶7 n.3, 305 Wis. 2d 709, 741 N.W.2d 286. Moreover, Dr. Yankavich did not testify, and the possible ankle injury was a minor matter at trial. It is readily apparent that, even if these arguments had been timely, they would not warrant reversal of Gimino's conviction.

¶13 This evidence is easily sufficient to support Gimino's conviction. It shows that he failed to properly restrain a very young child in a vehicle with open sides and then drove dangerously fast around a curve, causing B.G. to fall out and sustain serious injury. This conduct created a situation of unreasonable risk of harm and demonstrated conscious disregard for B.G.'s safety.

¶14 Gimino argues that his conduct was not obviously dangerous because there is no law requiring a helmet or other protective gear when riding in a go-kart and because taking a child for a drive in a go-kart is similar to taking a child for a ride in a car or allowing a child to ride a bicycle or play on "monkey bars" at a playground. We find these analogies unhelpful because they are too vague. For example, it is certainly not criminal behavior to take a young child for a ride in a car. But it might be criminally reckless to give a very young child a ride without restraining the child and with car windows open and then driving at excessive speeds around turns, causing the child to fall out of a car window.

¶15 For similar reasons, we reject Gimino's argument that his conduct was not reckless because many families recreationally use go-karts at go-karting establishments. Gimino provides no details suggesting that such establishments create a hazard similar to the one he created for B.G. here. It may be that these establishments provide additional safety measures, such as better seat restraints, protective gear, softer road surfaces, age or size limits, or speed limits, which were not present when Gimino gave B.G. a ride in his go-kart. As with Gimino's other analogies, this one sheds no light on whether his behavior was criminally reckless.

¶16 Gimino also argues that he showed regard for B.G.'s safety by putting her in a seat belt. Gimino claimed that he put B.G. in a seat belt, but that she may have unbuckled it or gotten out of it without his knowledge. The problem

with the argument is that it does not view the evidence in a light most favorable to the circuit court's verdict. For example, Gimino ignores Willms's testimony that B.G. could not unbuckle a seat belt. And, as we have already explained, a reasonable factual inference is that B.G. was either not wearing a seat belt or that Gimino did not take care to make sure that B.G. was properly restrained.[6]

¶17 Finally, Gimino argues that "a common thread" in published cases, where courts have concluded that the "reckless" element of WIS. STAT. § 948.03(3) has been met, is that the convicted person causing injury had actual physical contact with the victim. This argument fails because, even if it were true that in every published case addressing criminal recklessness the facts involved physical contact between a defendant and a victim, it nonetheless is also true that, under the language of the statute, physical contact of this nature is not required.

¶18 In sum, the evidence is sufficient to support Gimino's conviction for recklessly causing bodily harm to B.G. relating to the go-kart incident.

B. Failure To Seek Medical Attention

¶19 With respect to his failure to seek medical attention for B.G., Gimino makes two sufficiency of the evidence arguments. He argues, first, that

[6] At trial, the circuit court pointed out that, while B.G. was supposedly sitting in the right-hand passenger seat, she may have been sitting with Gimino on the left-hand side. Gimino argues that this finding is "pure speculation," unsupported by any evidence presented at trial. While we need not rely on the circuit court's speculation on this topic, there is evidence in the record to support it. The direction of the turn Gimino took (to the right) would suggest that B.G. fell out of the go-kart on the left-hand side. The fact that B.G.'s injuries are mostly on her left side supports this conclusion. It is therefore reasonable to conclude that B.G. may have been sitting in the left-hand driver's seat along with Gimino, instead of being fastened into the right-hand passenger seat.

the evidence was insufficient to prove reckless conduct and, second, that the evidence was insufficient to prove bodily harm. We reject both arguments.[7]

1. Reckless Conduct

¶20 Gimino argues there is insufficient evidence to support a finding that his failure to take B.G. to the hospital was reckless conduct. More specifically, Gimino points to undisputed evidence that he washed B.G.'s road rash with a washcloth, administered an antibiotic, and took care to observe B.G. throughout the night to ensure that she did not have a concussion. Gimino also points to evidence that, at the hospital under Dr. Saunders' care, B.G. did not exhibit signs of brain injury, fracture, or infection. We are not persuaded.

¶21 As is readily apparent by now, the evidence supports a finding that B.G. was ejected forcefully from the go-kart onto hard pavement. The risk of an internal head injury or other internal injury is obvious. And, as to B.G.'s visible injuries, Gimino plainly created the unreasonable risk of infection and needless additional pain. Dr. Saunders testified that, due to the type of accident, there was the potential B.G. had suffered a closed head injury, a fracture, or infection if her wounds had not been properly cleaned. Even Gimino evinced an awareness of the

[7] Gimino asserts in his appellate brief that it was "his prerogative as a parent" to address B.G.'s injuries on his own rather than taking her to the hospital. Gimino does not appear to be making a constitutional argument based on his parenting rights, but, even if he was, he forfeited such an argument by not making it before the circuit court and, on appeal, he presents nothing remotely resembling developed argument on the topic. For these reasons, we decline to address whether the circuit court failed to apply law addressing Gimino's parental rights. *See* ***State v. Ndina***, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612 ("The purpose of the 'forfeiture' rule is to enable the circuit court to avoid or correct any error with minimal disruption of the judicial process, eliminating the need for appeal."); ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not consider insufficiently developed arguments).

risk of possible closed head injury because he asserted that he woke B.G. up throughout the night to check to make sure she did not have a concussion.

¶22 And, there is evidence that the reason Gimino decided not to take B.G. in for medical testing and treatment was not that he thought it unnecessary, but rather that he feared getting into trouble. Willms testified that Gimino told her that he "didn't want to get in trouble" for having B.G. in the go-kart. Gimino told the investigator that he was worried about others "freaking out" at him, and that he did not want to wait at the hospital for B.G. to be treated. Additionally, Gimino initially lied to Tamara Varebrook and Willms, telling them that B.G. had fallen off of her bike. This evidence was sufficient for the trier of fact to find that Gimino was more concerned about the consequences for him than for B.G.'s safety.

¶23 Looking at the evidence in the light most favorable to the State, there is sufficient evidence to convict Gimino of acting recklessly when he failed to seek medical treatment for B.G.

2. Bodily Harm

¶24 Gimino also argues that there is insufficient evidence of bodily harm. The bodily harm at issue here is physical pain.

¶25 Gimino again points to evidence that he cleaned B.G.'s wounds, put on an antibiotic, and checked to make sure she was okay throughout the night. Gimino argues that taking B.G. to the hospital would not have prevented her continued pain. Gimino contends that the pain medication given to B.G. the next day when her mother took her to the hospital was administered prior to Dr. Saunders cleaning B.G.'s injuries and that there is no evidence that the pain

medication had an effect on B.G.'s "continuing pain." As to continuing pain, this assertion is incorrect.

¶26 Dr. Saunders testified at trial that B.G.'s road rash would have been very painful, particularly when it was cleaned out, and that the pain would have made it difficult for B.G. to move around or sleep. For this reason, Dr. Saunders gave B.G. a narcotic pain medication (an acetaminophen and oxycodone mixture) before scrubbing out her wounds to alleviate the pain and to help B.G. sleep. Although this evidence describes what Dr. Saunders observed and did the next day, the circuit court could reasonably infer that this is the course of action a medical professional would have taken the night before if Gimino had sought medical treatment for B.G. And, contrary to Gimino's argument, this evidence does address B.G.'s pain while sleeping and supports a finding that pain medication would have given B.G. pain relief.[8]

II. Erroneous Admission Of Expert Testimony

¶27 Gimino argues that the circuit court erroneously admitted expert testimony that should have been excluded because of a discovery violation. Gimino contends that the State violated rules of discovery by failing to disclose relevant material regarding the testimony of Dr. Saunders under WIS. STAT. § 971.23(1). More specifically, Gimino argues that the State was required to

[8] Gimino asserts, albeit briefly and without development, that the two charges are multiplicitous. We agree with the State that Gimino does not develop this double jeopardy argument, and we decline to address it. *See* ***Pettit***, 171 Wis. 2d at 646-47. We also agree with the State that there are two distinguishable types of bodily harm involved here and that the counts are therefore not multiplicitous. The first harm to B.G. was the road rash that was caused by the go-kart accident. The second harm was the pain B.G. experienced due to Gimino's failure to seek medical attention for her injuries.

disclose that Dr. Saunders would testify about the pain medication administered to B.G.[9]

¶28 Under WIS. STAT. § 971.23(1)(e), the State is required to disclose to the defendant:

> Any relevant written or recorded statements of a witness …, any reports or statements of experts made in connection with the case or, if an expert does not prepare a report or statement, a written summary of the expert's findings or the subject matter of his or her testimony, and the results of any physical or mental examination, scientific test, experiment or comparison that the district attorney intends to offer in evidence at trial.

WIS. STAT. § 971.23(1)(e).[10]

¶29 The application of WIS. STAT. § 971.23(1)(e) to the facts before us presents a question of law that we review de novo. ***State v. Harris***, 2008 WI 15, ¶15, 307 Wis. 2d 555, 745 N.W.2d 397. An alleged violation of § 971.23(1)(e) is evaluated in three steps, each of which is reviewed without deference to the circuit court:

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[9] Gimino also argues that there was a discovery violation and the erroneous admission of expert testimony relating to the "mechanism" of B.G.'s injury. This is a reference to ambiguous questions and answers during Dr. Saunders' testimony. This argument is patently meritless for several reasons, and we decline to discuss it at length. It is sufficient to note here that there was no dispute about the mechanism of B.G.'s injury—she fell out of the go-kart with sufficient force that she suffered severe road rash—and, therefore, even assuming for argument's sake that Dr. Saunders gave on opinion on the topic, there is no chance that her opinion had an effect on the verdicts.

[10] We understand Gimino to be arguing that, as an expert witness, Dr. Saunders was required to disclose her reports or a summary of her findings regarding the subject matter of her testimony under WIS. STAT. § 971.23(1)(e). To the extent that Gimino might also be arguing that, as a named witness under § 971.23(1)(d), the State was required to disclose any "written or recorded statements" of Dr. Saunders, we conclude that Gimino's argument fails because the State did in fact disclose Dr. Saunders' medical reports and an email to the State regarding B.G.

> First, we decide whether the State failed to disclose information it was required to disclose under WIS. STAT. § 971.23(1). Next, we decide whether the State had good cause for any failure to disclose under § 971.23(1). Absent good cause, the undisclosed evidence must be excluded. However, if good cause exists, the circuit court may admit the evidence and grant other relief, such as a continuance. Finally, if evidence should have been excluded under the first two steps, we decide whether admission of the evidence was harmless.

State v. Rice, 2008 WI App 10, ¶14, 307 Wis. 2d 335, 743 N.W.2d 517 (WI App 2007) (citations omitted); *see also* § 971.23(7m).

¶30 It is undisputed that the State disclosed all of Dr. Saunders' medical reports regarding B.G. and that those reports contained no information regarding pain medication. Gimino asserts, however, that the State failed to disclose the subject matter of Dr. Saunders' trial testimony relating to pain medication, as required by the portion of WIS. STAT. § 971.23(1)(e) that states "or, if an expert does not prepare a report or statement, a written summary of the expert's findings or the subject matter of his or her testimony." According to Gimino, the prosecutor was required to divulge before trial "[t]he fact that B.G. was given a narcotic medication at Children's Hospital."

¶31 We agree with the State that the fact that medical reports and other materials turned over to the defense did not mention pain medication does not mean that the State failed to turn over a "written summary of [Dr. Saunders'] findings or the subject matter of ... her testimony." This language does not require that every detail be disclosed to the defense. *See* ***State v. Schroeder***, 2000 WI App 128, ¶9, 237 Wis. 2d 575, 613 N.W.2d 911 ("The statute does not require that an expert make out a report reciting in detail the bases for his or her opinion. Rather, it requires that the defense be provided with the report if one has been prepared or, if the expert does not prepare a report, a written summary of

findings."). It should have come as no surprise to Gimino or his trial attorney that the procedure and treatment of severe road rash involved pain medication. Gimino provides no case law support for the proposition that the absence of this detail in the pretrial discovery materials rises to the level of a discovery violation. In sum, we agree with the State that the fact that Dr. Saunders' medical reports did not contain any information regarding the pain medication given to B.G. might be a means of impeaching Dr. Saunders, but it is not a discovery violation.

¶32 We note that Gimino argues that the State also failed to disclose a chart and diagram drawn up by Dr. Saunders' physician assistant. Gimino states that Dr. Saunders "testified that prior to testifying she '... reviewed the chart and the diagram drawn by [Dr. Saunders'] physician assistant, Ginny Wagner, who saw [B.G.] with [Dr. Saunders].'" Gimino argues that he should have been provided with the chart and diagram prior to trial, but does not present any argument as to why this material was required to be disclosed under WIS. STAT. § 971.23(1)(e). Gimino also did not raise an objection to this testimony before the circuit court. Arguments not raised before the circuit court are forfeited on appeal. *See* ***State v. Rogers***, 196 Wis. 2d 817, 825-27, 539 N.W.2d 897 (Ct. App. 1995) (to preserve arguments for appeal, a party must raise them before the circuit court).

¶33 Because we conclude that the State did not violate any discovery rules, we need not address whether the failure to disclose was for a good cause or whether the circuit court's failure to suppress the evidence was harmless.

III. Ineffective Assistance Of Counsel

¶34 Gimino argues that his counsel was ineffective both for failing to call an accident reconstruction expert to testify about the mechanics of the accident and for failing to impeach Willms. We disagree.

¶35 Gimino has the burden of proving that his counsel's performance was deficient and prejudicial to his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). To establish deficient performance, Gimino must "overcome a strong presumption that counsel acted reasonably within professional norms." *See* ***Johnson***, 153 Wis. 2d at 127. Even if counsel's performance is found to be deficient, Gimino must also prove that this deficiency prejudiced his defense. *See* ***id.*** That is, Gimino must show that "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *See* ***id.*** at 129 (quoting ***Strickland***, 466 U.S. at 694). In evaluating a claim for ineffective assistance of counsel, we may "avoid the deficient performance analysis altogether if the defendant has failed to show prejudice." ***Id.*** at 128.

¶36 We review the circuit court's decision denying postconviction relief for ineffective assistance of counsel as a mixed question of law and fact. *See* ***id.*** at 127. Findings of fact will not be disturbed unless clearly erroneous, but the determination of whether those facts show that counsel's performance was deficient and prejudicial is a question of law that we review de novo. ***Id.*** at 127-28.

¶37 Gimino argues first that his counsel was ineffective for failing to call an accident reconstruction expert to testify about the mechanics of the go-kart

accident. According to Gimino, "failure to provide an expert on the accident reconstruction forced the court to rely on the testimony of the State's witnesses to determine if Mr. Gimino was driving recklessly." According to Gimino, because his own credibility was damaged by inconsistent statements, the judge was forced to rely on other evidence and testimony suggesting that Gimino was driving too fast, rather than on Gimino's statement to the investigator that he was driving ten miles per hour. Gimino contends that a reasonable attorney would have brought in a reconstruction expert to back up Gimino's assertion that he was driving slowly. We are not persuaded.

¶38 First, Gimino places unwarranted weight on his assertion that he was driving just ten miles per hour. Even if he was driving at this speed, it remains uncontested that he turned a corner so abruptly that the laws of physics caused his two-year-old daughter to be flung out of the side of the go-kart with sufficient force that she suffered severe road rash.

¶39 Second, Gimino has provided no evidence that any accident reconstruction expert would have supported his ten miles per hour assertion. It is pure speculation that such an expert could be found.

¶40 We turn our attention to Gimino's claim that his trial counsel was ineffective because counsel failed to adequately cross-examine Willms. Gimino explains that at trial Willms made the incriminating assertion that Gimino told her he did not take B.G. to the hospital in part because "he didn't want to get in trouble." Gimino contends that this trial testimony could have been impeached with Willms's preliminary hearing testimony that Gimino did not tell her why he failed to take B.G. to the hospital.

¶41 We agree with Gimino that a failure to adequately impeach or cross-examine a key witness can be deficient performance. *See* ***State v. Jeannie M.P.***, 2005 WI App 183, ¶¶10-12, 286 Wis. 2d 721, 703 N.W.2d 694. And, we will assume without deciding that Gimino's counsel's failure to confront Willms with her preliminary hearing statement was deficient performance. We conclude, however, that Gimino has not demonstrated that there is a reasonable probability that this omission affected the outcome of the trial.

¶42 We understand Gimino to be arguing that, if his trial counsel had impeached Willms's credibility with the inconsistent preliminary hearing testimony, it would have tended to discredit all of Willms's testimony and, in particular, her testimony that Gimino told her he was driving too fast and that he chose not to take B.G. to the hospital, in part, because he "didn't want to get in trouble."

¶43 Gimino overstates the importance of the prior inconsistent statement. For example, as to speed, it would have been apparent to the circuit court that Gimino was driving too fast based purely on the undisputed fact that B.G. was flung from the go-kart. And, as to Gimino's fear of getting into trouble, there was other evidence that this was his motivation. For example, Gimino admitted that he told Willms's aunt that B.G. injured herself by falling off of her bike.

¶44 Accordingly, assuming without deciding that Gimino's trial counsel's performance was deficient, Gimino fails to persuade us that there is a reasonable probability that this deficient performance affected the outcome.

Conclusion

¶45 For the reasons above, we affirm the judgment and order.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

¶46 SHERMAN, J. (*concurring*). I accept the inevitability of the majority opinion, given the forfeiture of the issue of parental prerogative to make decisions in the child's best interest, as noted in the majority's footnote 7. Yet, I find the prosecution of Gimino for failing to seek medical attention for his daughter so outrageously repugnant, and the potential for future mischief from not addressing it so high, that I am compelled to write separately.

¶47 In a case that involved grandparent visitation, the United States Supreme Court held, citing a long line of cases on point, that "[i]n light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." ***Troxel v. Granville***, 530 U.S. 57, 66 (2000). The Supreme Court then took note of precedent establishing a presumption that fit parents act in the best interests of their children, stating:

> [S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

Id. at 68-69.

¶48 Although ***Troxel*** involved family law, nothing about the public policy discussion or the precedents cited in ***Troxel*** leads to the conclusion that these holdings are limited to that area of the law. To the contrary, the use of the

criminal law to limit the right of a fit parent to make decisions regarding the health and welfare of his or her children would logically seem to implicate Due Process more dramatically than allowing grandparent visitation against the wishes of a parent.

¶49 Naturally, the right of parents to make decisions on behalf of children is not absolute. The United States Supreme Court engaged in balancing the parental right to make decisions with the liberty interests of the children themselves when it decided that a Georgia law permitting parents to commit their kids to mental institutions was constitutional. ***Parham v. J.R.***, 442 U.S. 584 (1979). Ultimately, it confirmed the parent's right to make the decision, but imposed some reasonable review to limit abuse:

> In defining the respective rights and prerogatives of the child and parent in the voluntary commitment setting, we conclude that our precedents permit the parents to retain a substantial, if not the dominant, role in the decision, absent a finding of neglect or abuse, and that the traditional presumption that the parents act in the best interests of their child should apply. We also conclude, however, that the child's rights and the nature of the commitment decision are such that parents cannot always have absolute and unreviewable discretion to decide whether to have a child institutionalized. They, of course, retain plenary authority to seek such care for their children, subject to a physician's independent examination and medical judgment.

Id. at 604.

¶50 Wisconsin courts have balanced the right of a fit parent to make decisions regarding grandparent visitation with the best interest of the child. Courts must apply a rebuttable presumption that the decisions made by a fit parent are in the child's best interest before applying its own view of the child's best

interest. *See* ***Rick v. Opichka***, 2010 WI App 23, ¶4, 323 Wis. 2d 510, 780 N.W.2d 159.

¶51 Surely, the decision of a parent to refrain from providing medical care in non-life-threatening situations must be accorded substantial deference, as well. Yet, other than applying the broad general holdings of cases that are not directly on point, precedent provides little guidance.

¶52 The current case is an outlier, at least as it relates to the failure to seek medical attention count.[1] Nearly all of the published cases, state and federal, concern situations where children actually died, often as the result of brutal abuse, after a parent failed to provide medical care. *See, e.g.*, ***Martineau v. Angelone,*** 25 F.3d 734, 736 (9th Cir. 1994) (defendant convicted of involuntary manslaughter for the death of her child following a delay in seeking medical treatment for the child). A very small number of cases involve life-threatening situations where the child did not actually die.

¶53 In an admittedly non-exhaustive search, I was unable to find a published state or federal case in which a parent's conviction for child abuse for not seeking medical attention was upheld on appeal, where the injuries or illness were not life-threatening.[2] In a Missouri case, a parent's conviction for

[1] Parents often engage in risky or dangerous activity with their children, whether it be horseback riding, downhill skiing, mountain climbing, or camping in remote areas. Parents in such cases are making a value judgment that participation in such activities provides their child with benefits that outweigh the risk. While I would not be comfortable in second-guessing such a decision, that is not the issue in the first count here. *See* majority opinion ¶13. I will, therefore, not address the first count and confine the discussion to the second count.

[2] I also observe that no case cited by the parties concerns non-life-threatening situations, either.

endangering the welfare of her physically abused child was reversed on the basis that the State could not prove that the child was in actual need of medical care, despite several medical examinations having been conducted at the behest of authorities. ***State v. Wilson,*** 920 S.W.2d 177 (Mo. Ct. App. 1996).

¶54 The Missouri court wrote:

> Without the requirement that there be an actual danger posed by an illness or injury to a child, a parent could be convicted of a criminal act in the wake of an illness or injury which merely suggests the possibility of a need for medical treatment. Risk to the child must not only be appreciable, it must be actual. The requirement of actual danger is necessary to draw a line "between trivial and substantial things so that erratic arrests and convictions for trivial acts and omissions will not occur."

Id. at 181 (quoted source omitted).

¶55 Because the issue of Gimino's right as a fit parent to make decisions about his child's healthcare is not before this court, I will refrain from analyzing this case in detail. I have no quibble with the majority's decision on the record before us. However, in the interest of providing guidance for future prosecutorial decisionmaking, I cannot refrain from criticizing the decision to bring the second charge in the first place. The prosecution of a parent for failure to provide medical care where the injuries are relatively minor and the only issue is how best to manage the child's pain and prevent infection, both matters which do not present serious danger to the child, is overreaching. *See* ***id.*** It is also against the great weight of both precedent and practice.

¶56 When dealing with matters of family relations, the criminal law is a blunt instrument and should be used judiciously. *See* ***United States v. Van Engel,*** 809 F.Supp. 1360, 1372 (E.D. Wis. 1992) ("An effort to use the blunt instrument

of the criminal law to second guess good faith civil negotiations in the RICO—or any other area—would be, not only unauthorized and unprecedented, but also profoundly unwise.").

¶57 I join the majority opinion, but write separately to address matters of the utmost importance not raised or discussed by the parties.