

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 14, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2010AP1534-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2008CF66

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATRICIA DILLARD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dodge County: BRIAN A. PFITZINGER, Judge. *Reversed.*

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Patricia Dillard appeals a judgment convicting her of aggravated battery and an order denying her postconviction motion seeking to withdraw her no contest plea. She contends there was an insufficient factual basis to support her plea. She argues that the injury she inflicted on her then fourteen-

year-old adopted son did not constitute serious permanent disfigurement under the statutes. We agree and reverse.

BACKGROUND

¶2 Dillard was initially charged in a criminal complaint with physical abuse of a child, stemming from an incident where she was alleged to have placed a hot straightening iron on her adoptive son, F.K.D. An information was filed adding a second count of physical abuse of a child. The factual basis for this count was an allegation that Dillard hit F.K.D. with an electrical cord, causing a small permanent scar measuring one-half centimeter by one-half centimeter.

¶3 Pursuant to a plea agreement, an amended information was submitted to the court at the plea hearing changing the first count to aggravated battery with intent to cause great bodily harm, contrary to WIS. STAT. § 940.19(5) (2009-10),¹ and the second count to aggravated battery with intent to cause bodily harm, contrary to § 940.19(4). Defense counsel stipulated that the scar provided a sufficient factual basis to support the second aggravated battery charge. The court accepted Dillard's no contest plea and found her guilty on both counts.

¶4 Dillard filed a postconviction motion seeking to withdraw her plea to the second aggravated battery count on the ground that the injury suffered by F.K.D. did not constitute serious permanent disfigurement within the statutory definition.² The circuit court denied Dillard's motion. Dillard appeals.

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

² Dillard did not seek to withdraw her no contest plea to the first aggravated battery count, and she does not challenge her conviction on this count in this appeal.

DISCUSSION

¶5 When “the factual basis for the plea derives solely from a document in the record we review the issue de novo.” *State v. Peralta*, 2011 WI App 81, ¶16, Nos. 2010AP563-CR and 2010AP1334-CR.

¶6 WISCONSIN STAT. § 971.08(1)(b) requires that before accepting a no contest plea, the circuit court must ascertain “that the defendant in fact committed the crime charged.” The factual basis requirement “protect[s] a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.” *White v. State*, 85 Wis. 2d 485, 491, 271 N.W.2d 97 (1978) (citation omitted). It is not necessary to provide proof beyond a reasonable doubt to support a no contest plea. See *State v. Spears*, 147 Wis. 2d 429, 435, 433 N.W.2d 595 (Ct. App. 1988).

¶7 Dillard contends that the small scar on F.K.D.’s hip that was allegedly caused by hitting him with an electrical cord does not constitute *serious* permanent disfigurement under WIS. STAT. § 939.22(14), and therefore there was no factual basis to support her no contest plea to aggravated battery. We agree.

¶8 A person is guilty of the crime of aggravated battery under WIS. STAT. § 940.19(4) when that person intends to inflict bodily harm and causes great bodily harm to the victim. “Great bodily harm” is defined in WIS. STAT. § 939.22(14) as “bodily injury which creates a substantial risk of death, or which causes *serious permanent disfigurement*, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.” (Emphasis added).

¶9 Dillard does not dispute that the scar on F.K.D.’s hip is “permanent.” Her contention is that the scar does not constitute *serious* disfigurement under the statutory definition. She asserts that the half-centimeter scar more appropriately constitutes a lesser degree of harm, substantial bodily harm. See WIS. STAT. § 940.19(2) (“Whoever causes substantial bodily harm to another by an act done with intent to cause bodily harm to that person or another is guilty of a Class I felony.”). “Substantial bodily harm” is defined as “bodily injury that causes a laceration that requires stitches, staples, or a tissue adhesive; any fracture of a bone; a broken nose; a burn; a petechia; a temporary loss of consciousness, sight, or hearing; a concussion; or a loss or fracture of a tooth.” WIS. STAT. § 939.22(38).

¶10 Based on our review of the photograph taken of the scar on F.K.D.’s hip, we agree with Dillard that although the scar appears to be permanent, it is not “serious” within the statutory meaning. The word “serious” is not defined in the aggravated battery statute. However, the supreme court, in determining whether the phrase “or other serious bodily injury” under the definition of “great bodily harm” was unconstitutionally vague, observed that “serious” was defined at that time by WEBSTER’S NEW COLLEGIATE DICTIONARY as “having important or dangerous possible consequences” such as in “a serious injury.” *Cheatham v. State*, 85 Wis. 2d 112, 123, 270 N.W.2d 194 (1978). “Serious” is also defined as “dangerous; potentially resulting in death or other severe consequences” as in “serious bodily harm.” BLACK’S LAW DICTIONARY 1490 (9th ed. 2009). Although courts have found it difficult to attach a specific definition to “serious bodily harm,” applying the above dictionary definitions of the word “serious,” we are convinced that a half-by-half centimeter scar on a person’s hip does not constitute “serious permanent disfigurement” within the statutory definition.

¶11 The State argues that it is not clear which category of harm the scar fits into and that a reasonable jury could find that the scar fell under either category, “serious permanent disfigurement” or “substantial bodily harm.” We disagree. We conclude that the small scar on the victim’s hip clearly falls under the term “substantial bodily harm” which specifically refers to “a laceration that requires stitches, staples, or a tissue adhesive.” WIS. STAT. § 939.22(38). We acknowledge that in many cases the task of ascertaining which category of harm a scar falls under is a difficult task, but not here. A small scar innocuously located on a victim’s hip is plainly not “serious” enough to constitute “serious permanent disfigurement.”

¶12 The State further argues that the scar could also fit within the definition of “other serious bodily injury.” This phrase refers to a separate and broader category of injuries than those listed under the definition of “serious permanent disfigurement,” and are not limited to the injuries enumerated in the statutory definition of “great bodily harm.” See *La Barge v. State*, 74 Wis. 2d 327, 332-33, 246 N.W.2d 794 (1976). However, applying the same definitions of “serious” as we have with the phrase “serious permanent disfigurement,” we conclude that the scar does not fall within the category of “other serious bodily injury.”

¶13 The State appears to argue that because the scar is “permanent,” it is therefore “serious.” However, the State provides no authority for this proposition. We therefore reject this argument. See *Kruczek v. DWD*, 2005 WI App 12, ¶32, 278 Wis. 2d 563, 692 N.W.2d 286 (arguments unsupported by references to legal authority need not be addressed).

¶14 In sum, we conclude that, because there was not a factual basis for Dillard's no contest plea to the count of aggravated battery with intent to cause bodily harm, the court erred in denying the motion to withdraw the plea.

By the Court.—Judgment and order reversed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

