COURT OF APPEALS DECISION DATED AND FILED

August 1, 2017

Diane M. Fremgen
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. 2015AP2261-CR

Cir. Ct. No. 2012CF109

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN M. COOPER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Door County: D. T. EHLERS, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Brian Cooper appeals an amended judgment of conviction entered following a jury trial for two counts of first-degree intentional homicide and one count of third-degree sexual assault. He also appeals an order denying his motion for postconviction relief. Cooper argues: (1) his constitutional rights to counsel and due process were violated when the circuit court denied his request to substitute counsel and for an adjournment of the trial; (2) the circuit court erroneously exercised its discretion by excluding certain opinions from his expert witness, Dr. Richard Tovar; and (3) the exclusion of Tovar's opinions violated his constitutional right to present a defense. We affirm.

BACKGROUND

¶2 In September 2012, the State charged Cooper with one count of first-degree intentional homicide for the death of Alisha Bromfield; one count of first-degree intentional homicide for the death of Bromfield's unborn child; and one count of third-degree sexual assault. The trial was initially scheduled to start on January 28, 2013. On October 31, 2012, Cooper moved for an adjournment of the trial, noting that he had not yet received all requested discovery materials from the State. The circuit court granted Cooper's motion and tentatively scheduled the trial to begin on April 8, 2013.

¶3 At a December 2012 status conference, Cooper changed his plea of not guilty to a combined plea of not guilty and not guilty by reason of mental disease or defect (NGI). In addition, the circuit court confirmed the trial would begin on April 8, 2013.

¶4 On March 12, 2013, Cooper moved to adjourn the April trial. Among other things, Cooper argued an adjournment was necessary because: (1) the expert he had retained to evaluate him regarding his NGI plea believed the

issues in the case fell outside the scope of the expert's expertise; and (2) the new expert he wished to retain to evaluate him was located outside Wisconsin and would be unable to conduct an evaluation of him before the scheduled April trial. The circuit court denied Cooper's motion.

¶5 On March 25, 2013, Cooper again moved to adjourn the April trial. He asserted an adjournment was required to prevent a miscarriage of justice. The circuit court granted Cooper's motion and rescheduled the trial to begin on June 17, 2013.

¶6 Cooper retained an expert witness, Dr. Richard Tovar, and subsequently disclosed Tovar's report to the State. On May 20, 2013, the State filed a motion in limine to exclude some of Tovar's expected testimony.[1] Specifically, the State argued that Tovar's proposed testimony regarding how Cooper's alcohol consumption and THC withdrawal on the night Cooper killed Bromfield resulted in "temporary disinhibitions" that contributed to Cooper's behavior was irrelevant to the voluntary intoxication defense codified in WIS. STAT. § 939.42 (2011-12).[2] In a letter to the circuit court, Cooper responded that

[1] The State did not move to exclude Dr. Tovar's opinion as it related to estimating Cooper's blood-alcohol concentration at the time Cooper killed Bromfield.

[2] WISCONSIN STAT. § 939.42 (2011-12) states, in relevant part:

> **Intoxication.** An intoxicated or drugged condition of the actor is a defense only if such condition:
> ….
> **(2)** Negatives the existence of a state of mind essential to the crime, except as provided in [WIS. STAT. §] 939.24(3).

This statute was subsequently amended in 2013 to eliminate the *voluntary* intoxication defense. *See* 2013 Wis. Act 307, §§ 1-4.

All subsequent references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Tovar's opinion was admissible because "emotional inhibitions have everything to do with capacity to form intent as these inhibitions are a direct result of intoxicants on the cerebral cortex." Nonetheless, at the motion hearing, Cooper's counsel stated, "Dr. Tovar cannot testify about whether or not he can say to any degree of medical certainty whether or not Mr. Cooper had that ability to form that intent." The circuit court granted the State's motion in limine, but indicated it would permit Tovar to testify regarding his estimate of Cooper's blood-alcohol concentration at the time Cooper killed Bromfield and generally how alcohol affects the human body.

¶7 Prior to jury selection, Cooper withdrew his combined plea of not guilty and NGI and, instead, entered a plea of not guilty. During voir dire, Cooper's counsel intimated that an expert at trial may testify that "a person can be so intoxicated that they lack the ability to form—to form the intent to do something." The State interposed an objection. Outside the presence of the jury, Cooper's counsel argued that the circuit court's prior ruling only barred Dr. Tovar from testifying about "social behavior and disinhibitions." According to Cooper's counsel, Tovar could testify that Cooper was so intoxicated he did not have the capacity to form intent.

¶8 The circuit court ruled Dr. Tovar could not testify regarding Cooper's ability to form intent because Tovar's report did not contain an opinion regarding intent and allowing him now to offer an opinion regarding Cooper's intent would be to sanction Cooper's "sandbagging." After the court's ruling, Cooper submitted an amended report from Tovar, in which Tovar opined that "the formation of intent is highly unlikely in such a state of ethanol intoxication, due to

the aforementioned effects on a subject."[3] Cooper also moved to allow Tovar's testimony regarding Cooper's ability to form intent, arguing the failure to do so would violate Cooper's constitutional right to present a defense.

¶9 The circuit court concluded that exclusion of Dr. Tovar's opinion on intent would not violate Cooper's right to present a defense. Specifically, the court determined that the State's interest in parties complying with the applicable discovery statutes regarding timely disclosure of expert reports outweighed Cooper's right to present Tovar's untimely opinion regarding Cooper's ability to form intent.

¶10 At trial, the jury found Cooper guilty of one count of third-degree sexual assault. However, the jury could not reach a unanimous decision regarding the two counts of first-degree intentional homicide, resulting in a mistrial on those counts. After the trial, the circuit court granted Cooper's counsel's motion to withdraw from representation.

¶11 In July 2013, the State Public Defender's Office (SPD) appointed new counsel to represent Cooper. At an August 2013 status conference, the circuit court tentatively scheduled a new trial on the two counts of first-degree intentional homicide to begin on May 2, 2014. In a February 2014 letter to the parties, the court confirmed the new trial would begin on that date.

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[3] The *only* difference between Dr. Tovar's original report and his amended report is the addition of the following paragraph, which is the second-to-last paragraph in Tovar's amended report: "Finally, it is very difficult to formulate a deliberate act, or intend to do so, in such an intoxicated state. Specifically, the formation of intent is highly unlikely in such a state of ethanol intoxication, due to the aforementioned effects on a subject."

¶12 On March 25, 2014, the circuit court received correspondence from attorney Aaron Nelson, who indicated that he had recently been privately retained to represent Cooper in the upcoming trial. In that letter, Nelson also indicated he would soon be filing a formal motion for substitution of counsel and an adjournment of the scheduled May trial so he would have adequate time to prepare. On April 1, 2014, Nelson filed a formal motion for substitution of counsel and an adjournment of the scheduled May trial. The court denied the motion at a hearing the following day.

¶13 On April 8, 2014, attorney John Birdsall filed a notice of retainer and a stipulation for substitution of counsel. At a hearing held later that same day, the circuit court confirmed Birdsall would be prepared to try the case by the scheduled trial date.

¶14 Birdsall subsequently submitted a second amended report[4] from Dr. Tovar and filed a motion in limine to admit Tovar's opinion regarding Cooper's ability to form intent. In response, the State argued that Tovar's opinion regarding Cooper's ability to form intent should be excluded because his opinion that the formation of intent was "highly unlikely" did not come "close to the unequivocal opinion needed, according to [***State v. Schael***, 131 Wis. 2d 405, 388 N.W.2d 641 (Ct. App. 1986)]." At the motion hearing, the State argued:

> [Dr. Tovar's opinion] doesn't come close to what the standard is. It really is, no matter what the defendant wants to characterize it as, a diminished capacity type thing. That [Dr. Tovar] thinks that it's unlikely that a person could

[4] Except for the correction of a small typographical error and the addition of a few new factual materials Dr. Tovar used to formulate his expert opinion, this report was the same as Tovar's first amended report; his analysis and opinions were unchanged.

> form intent. That's exactly the kind of thing that you can't have.

¶15 Once again, the circuit court excluded Dr. Tovar's opinion regarding Cooper's ability to form intent. The court stated Tovar's opinion "doesn't meet the [***State v. Guiden***, 46 Wis. 2d 328, 174 N.W.2d 488 (1970)] standard of utterly incapable of forming intent. 'Highly unlikely' and 'utterly incapable' are two different standards. [Doctor] Tovar doesn't go that far and indicate that Mr. Cooper was utterly incapable of forming intent."

¶16 The jury found Cooper guilty of the two counts of first-degree intentional homicide. The circuit court imposed two consecutive sentences of life imprisonment, without the eligibility to be released to extended supervision.[5] Cooper then moved for postconviction relief, which the court denied. Cooper now appeals.

DISCUSSION

I. Right to Counsel and Due Process

¶17 "The Sixth Amendment secures [a defendant's] right to the assistance of counsel" and "includes the right to select, and be represented by, one's preferred attorney."[6] ***Carlson v. Jess***, 526 F.3d 1018, 1024 (7th Cir. 2008). Accordingly, "trial courts must recognize a presumption in favor of a defendant's counsel of choice." ***Id.*** (citing ***Wheat v. United States***, 486 U.S. 153, 164 (1988)).

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[5] The circuit court also imposed a concurrent sentence of two years' initial confinement and two years' extended supervision on the one count of third-degree sexual assault.

[6] However, "an indigent defendant generally has no right to have his [or her] counsel of choice appointed." ***Carlson v. Jess***, 526 F.3d 1018, 1025 (7th Cir. 2008) (citing ***Wheat v. United States***, 486 U.S. 153, 159 (1988)).

Additionally, "the Fourteenth Amendment prevents a court from arbitrarily or unreasonably denying a defendant the right to obtain a continuance." ***State v. Prineas***, 2009 WI App 28, ¶15, 316 Wis. 2d 414, 766 N.W.2d 206 (citation omitted). "Thus, motions for substitution of retained counsel and for a continuance can implicate both the Sixth Amendment right to counsel of choice and the Fourteenth Amendment right to due process of law." ***Carlson***, 526 F.3d at 1025 (citation omitted).

¶18 "When making a determination whether to allow the defendant's counsel of choice to participate, the circuit court must balance that right against the public's interest in the prompt and efficient administration of justice." ***Prineas***, 316 Wis. 2d 414, ¶13 (citation omitted). A circuit court utilizes several factors when making this determination, such as

> the length of delay requested; whether competent counsel is presently available and prepared to try the case; whether prior continuances have been requested and received by the defendant; the inconvenience to the parties, witnesses and the court; and whether the delay seems to be for legitimate reasons or whether its purpose is dilatory.

Id. (citation omitted).

¶19 Ultimately, a decision regarding a motion for substitution of counsel and an associated continuance lies within the sound discretion of the circuit court. *See* ***id.*** (citing ***Wheat***, 486 U.S. at 164). "The circuit court properly exercises its discretion if it applies the appropriate law and the record shows there is a reasonable factual basis for its decision." ***Spencer v. Kosir***, 2007 WI App 135, ¶13, 301 Wis. 2d 521, 733 N.W.2d 921.

¶20 Cooper argues the circuit court erroneously exercised its discretion when it denied his motion to substitute attorney Nelson as his counsel and for an adjournment of the second trial.[7] We disagree.

¶21 First, the circuit court considered the length of the delay requested by Cooper (through attorney Nelson), which was four to six months. Second, the court considered whether competent counsel was presently available and prepared to try the case; it concluded Cooper's appointed counsel from the SPD were both competent and prepared to try Cooper's case. Third, the court considered Cooper's two previous requests for adjournments that it had granted. Fourth, the court considered how the requested delay would inconvenience the parties, victims,[8] witnesses, and the court. The court emphasized that it considered the impact the requested delay would have on the victims "to be a very important factor" in its decision.[9] The court also noted questionnaires had been sent to prospective jurors and that arrangements had been made to provide transportation and housing to jurors during the upcoming trial. Finally, the circuit court considered whether the requested delay seemed to be for legitimate reasons, and it determined Cooper's request was made for dilatory purposes.

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[7] In his brief-in-chief, Cooper also argued the circuit court erroneously exercised its discretion by admitting into evidence a photograph of Bromfield's unborn child. However, Cooper withdrew that argument in his reply brief. Therefore, we do not address it.

[8] Under Wisconsin law, Bromfield's family members are victims because Bromfield is deceased. *See* WIS. STAT. § 950.02(4)(a)4.a.

[9] The impact the requested delay would have on the victims was a proper factor for the circuit court to consider when deciding Cooper's motion for an adjournment of the second trial. *See* WIS. STAT. §§ 950.04(1v)(ar), (k), 971.10(3)(b)3.; *see also* ***State v. Prineas***, 2009 WI App 28, ¶¶20, 24, 316 Wis. 2d 414, 766 N.W.2d 206; ***State v. McMorris***, 2007 WI App 231, ¶20, 306 Wis. 2d 79, 742 N.W.2d 322.

¶22 After considering these factors and balancing Cooper's presumptive right to counsel of his choice against the public's interest in the efficient administration of justice, the circuit court denied Cooper's motion to substitute counsel and adjourn the second trial. In doing so, the court applied a proper standard of law, examined the relevant facts, and reached a reasonable conclusion. Therefore, the circuit court did not erroneously exercise its discretion when it denied Cooper's motion. *See* ***Lee v. GEICO Indem. Co.***, 2009 WI App 168, ¶16, 321 Wis. 2d 698, 776 N.W.2d 622 (citing ***Schultz v. Sykes***, 2001 WI App 255, ¶8, 248 Wis. 2d 746, 638 N.W.2d 604).

¶23 Cooper nonetheless argues the circuit court erroneously exercised its discretion when it denied his motion. First, Cooper argues "a delay of six months was unsupported by the record," because Nelson informed the circuit court "that he could be ready in four months time, and the [circuit] court noted that it had availability on its calendar in that four-month window." When analyzing a defendant's motion for substitution of counsel and an associated continuance, a court is to consider, among other factors, "the length of the delay *requested*." ***Prineas***, 316 Wis. 2d 414, ¶13 (emphasis added).

¶24 Attorney Nelson advised the circuit court, "I think in general for me to get up to speed and have a trial, I think I could do it in a quick manner, in 120 days. I think a more reasonable number would be 180 days." Later, Nelson reiterated that, if needed, he thought he could be prepared for trial in 120 days. In other words, Cooper (through Nelson) was requesting a four- to six-month delay. Indeed, Nelson stated a more reasonable time in which to allow him to prepare was 180 days. Accordingly, the circuit court properly considered the length of the requested delay when deciding whether to grant Cooper's motion.

¶25 Second, Cooper argues the circuit court erroneously determined his appointed counsel from the SPD were competent and prepared to try the case. He argues the court erred because it made its determination based solely on the fact that his two attorneys were employed by the SPD, one of which was employed by the SPD in a supervisory role. The record belies Cooper's assertion. In making its determination that Cooper's appointed counsel from the SPD were both competent and prepared to try the case, the court also relied on the fact that appointed counsel had spent months preparing for Cooper's upcoming trial.

¶26 Third, Cooper argues the circuit court erroneously determined that his prior requests for adjournments weighed against his request for an adjournment of the second trial. Cooper notes that the court mentioned all of his previous requests for adjournments—including those that were denied—when making its decision. He contends the court erred by considering his prior requests for adjournments that the court had previously *denied*.

¶27 In making its decision, a circuit court may consider "whether prior continuances have been requested *and received* by the defendant." ***Id.*** (emphasis added). Thus, the circuit court properly considered Cooper's prior requests for adjournments that it had previously granted. However, a court is not necessarily limited to considering prior requests for adjournments that have been granted, as a court may also consider any other relevant factor. *See* ***State v. Lomax***, 146 Wis. 2d 356, 360, 432 N.W.2d 89 (1988). We therefore conclude the circuit court did not erroneously exercise its discretion by considering all of Cooper's previous requests for adjournments—including those that were denied—when reaching its decision.

¶28 Finally, Cooper argues the circuit court erroneously determined his request for an adjournment of the second trial was "an eleventh-hour request," given that his request was made weeks before the second trial was to begin. We agree with Cooper that his request under the circumstances was not an eleventh-hour request. However, the circuit court also determined Cooper's request was made for dilatory purposes. *See* ***Prineas***, 316 Wis. 2d 414, ¶13 (noting one factor in the analysis is "whether the [requested] delay seems to be for legitimate reasons or whether its purpose is dilatory"). The court's determination on this issue was based on Cooper's: (1) past requests for adjournments that had been denied; (2) failure to attempt contacting his appointed counsel in the three months before his request for an adjournment of the second trial; and (3) failure to inform the SPD, or the court, about the alleged breakdown in communication he had with his appointed counsel prior to his request for an adjournment of the second trial. The circuit court did not erroneously exercise its discretion in determining Cooper's request for an adjournment of the second trial was made for dilatory purposes.

II. Exclusion of Dr. Tovar's Opinion

¶29 "The admissibility of expert testimony is governed by WIS. STAT. § 907.02." ***State v. Giese***, 2014 WI App 92, ¶17, 356 Wis. 2d 796, 854 N.W.2d 687. This statute was amended in 2011 to adopt the ***Daubert***[10] standard. *See* ***State v. Kandutsch***, 2011 WI 78, ¶26 n.7, 336 Wis. 2d 478, 799 N.W.2d 865. Under the ***Daubert*** standard, a circuit court is to perform a "gate-keeper" role "to ensure that the expert's opinion is based on a reliable foundation and is relevant to the

[10] *See* ***Daubert v. Merrell Dow Pharms., Inc.***, 509 U.S. 579, 589-95 (1993).

material issues." ***Giese***, 356 Wis. 2d 796, ¶18 (citing ***Daubert v. Merrell Dow Pharms., Inc.***, 509 U.S. 579, 589 n.7 (1993)).

¶30 We review the "circuit court's decision to admit or exclude expert [opinions] under an erroneous exercise of discretion standard." ***Id.***, ¶16 (citations omitted). "A circuit court's discretionary decision will not be reversed if it has a rational basis and was made in accordance with accepted legal standards in view of the facts in the record." ***Id.*** (citation omitted).

¶31 The voluntary intoxication defense codified in WIS. STAT. § 939.42 (2011-12), provides that a person's voluntary intoxicated condition "is a defense if such a condition '(n)egatives the existence of a state of mind essential to the crime.'" ***State v. Schulz***, 102 Wis. 2d 423, 429, 307 N.W.2d 151 (1981) (citation omitted). Our supreme court has noted that the

> "intoxicated or drugged condition" to which the statute refers is not the condition of alcohol-induced incandescence or being well-lit that lowers the threshold of inhibitions or stirs the impulse to criminal adventures. It is that degree of complete drunkenness which makes a person incapable of forming intent to perform an act or commit a crime.

Guiden, 46 Wis. 2d at 331. "In order to place intoxication in issue in a given case, it will be necessary for the defendant to come forward with *some* evidence of his [or her] impaired condition." ***Schultz***, 102 Wis. 2d at 430 (emphasis added). But the "evidence must be more than a mere statement that the defendant was intoxicated." ***Id.***

¶32 "A bald statement that the defendant had been drinking or was drunk is insufficient … because it is not evidence of the right thing." ***State v. Strege***, 116 Wis. 2d 477, 486, 343 N.W.2d 100 (1984). Rather, "[t]here must be

some evidence that the defendant's mental faculties were so overcome by intoxicants that he [or she] was incapable of forming the intent requisite to the commission of the crime." ***Id.*** When attempting to place the voluntary intoxication defense at issue in a criminal case, a defendant may rely on evidence of the defendant's conduct, the defendant's self-description of his or her state of intoxication, and expert testimony regarding how the defendant's intoxicated condition negatived the defendant's ability to form intent. *See* ***State v. Flattum***, 122 Wis. 2d 282, 297-98, 361 N.W.2d 705 (1985); ***Guiden***, 46 Wis. 2d at 331.

¶33 Cooper argues the circuit court erroneously exercised its discretion when it denied his motion in limine to admit Dr. Tovar's opinion at the second trial regarding Cooper's ability to form intent due to his alcohol consumption. Specifically, Cooper argues the court erred by excluding Tovar's opinion that Cooper's intoxicated condition on the night he killed Bromfield made it "highly unlikely" he had the ability to form intent and by concluding Tovar's opinion did not meet the "utterly incapable" standard described in ***Guiden***.

¶34 In denying Cooper's motion in limine, the circuit court stated Dr. Tovar's opinion in his expert report "doesn't meet the ***Guiden*** standard of utterly incapable of forming intent. 'Highly unlikely' and 'utterly incapable' are two different standards. [Doctor] Tovar doesn't go that far and indicate that

Mr. Cooper was utterly incapable of forming intent."[11] Apparently, the circuit court was under the impression that an expert who provides an opinion on whether a defendant's voluntary intoxicated condition negatived the defendant's ability to form intent must provide an "unequivocal" opinion to that effect for the opinion to be admissible. *See supra* ¶34 n.11. That impression is not substantiated by existing case law.[12]

¶35 In ***Schael***, we stated: "[a defense] expert's testimony on the effect of intoxication upon intent, in order to be admissible, *must state that the intoxication negatived the defendant's intent*; expert testimony that falls short of this standard is not probative." ***Schael***, 131 Wis. 2d at 410 (emphasis added). It appears this statement was the foundation for the State's argument—and the circuit court's apparent conclusion—that Dr. Tovar's opinion regarding Cooper's ability to form intent needed to "unequivocally" state Cooper's intoxicated condition negatived his ability to form intent to be admissible. However, such a contention ignores our later statement in ***Schael*** that expert testimony on the issue of a defendant's intoxicated condition negativing the defendant's intent "is

[11] In addressing the admissibility of a different expert's proffered opinion regarding Cooper's ability to form intent due to alcohol consumption, the circuit court acknowledged that "[e]xperts don't have to use the language of … 'utterly incapable.'" Thus, it does not appear the circuit court excluded Dr. Tovar's opinion simply because he failed to use the precise words "utterly incapable" in his expert report. Rather, it appears the court excluded Tovar's opinion because it considered his expert opinion—i.e., that it was "highly unlikely" Cooper had the ability to form intent due to his intoxicated condition—to be "equivocal." This rationale is consistent with the State's argument opposing Cooper's motion to admit Tovar's opinion at the second trial—that is, Tovar's expert opinion does not come "close to the unequivocal opinion needed, according to [***State v. Schael***, 131 Wis. 2d 405, 388 N.W.2d 641 (Ct. App. 1986)]."

[12] An expert's opinion need not be "unequivocal" or "absolute" in nature to be admissible, as uncertainties pervade most, if not all, fields of specialized knowledge. *See, e.g.*, ***Daubert***, 509 U.S. at 590 ("[I]t would be unreasonable to conclude that the subject of scientific testimony must be 'known' to a certainty; arguably, there are no certainties in science." (citations omitted)).

admissible when it *addresses* not just the topic of partial diminishment of intent, but the [topic of] negativing of that intent." ***Id.*** at 411 (emphasis added). This later statement in ***Schael*** indicates a defense expert's opinion regarding a defendant's intoxicated condition negativing the defendant's intent need not be "unequivocal" to be admissible, so long as the expert's opinion "addresses" the topic of how the defendant's intoxicated condition negatives the defendant's intent.[13]

¶36 We therefore conclude that the apparent ground relied upon by the circuit court to exclude Dr. Tovar's expert opinion—i.e., that Tovar's opinion regarding Cooper's ability to form intent was too "equivocal" to be admissible—did not provide a proper basis for its decision. The court conflated the degree of certainty of Tovar's opinion—that it was highly unlikely Cooper could form the requisite intent—with the degree of intoxication required to negate intent—that Cooper was utterly incapable of forming intent. However, we affirm the circuit court's decision to exclude Tovar's opinion regarding Cooper's ability to form intent on other grounds. *See* ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995) (recognizing that "we may affirm on other grounds different than those relied on by the trial court"). Namely, Tovar's conclusion regarding Cooper's ability to form intent is not supported by Tovar's own report, which itself only focused on alcohol's disinhibiting effects.

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[13] In ***State v. Strege***, 116 Wis. 2d 477, 343 N.W.2d 100 (1984), our supreme court determined a defendant was not entitled to a jury instruction on the voluntary intoxication defense. *See* ***id.*** at 478, 486. In affirming the circuit court's decision to deny the defendant's request for a jury instruction on the voluntary intoxication defense, our supreme court noted: "There was no expert testimony on the *likely effect* of either or both of those drugs on a person of the defendant's size or with the defendant's drug use history." ***Id.*** at 487 (emphasis added). Thus, our supreme court appears to have sanctioned, at least implicitly, a qualified expert testifying to the *likely effects* of alcohol on a person's ability to form intent.

¶37 Doctor Tovar's original expert report did not explicitly contain an opinion regarding how Cooper's intoxicated condition affected his ability to form intent. Rather, his original report provided an opinion on how Cooper's alcohol consumption and THC withdrawal resulted in temporary social and emotional disinhibitions that contributed to Cooper's behavior on the night he killed Bromfield. The circuit court excluded this opinion from the first trial, concluding it was irrelevant to the voluntary intoxication defense. The circuit court's decision was proper, as Wisconsin case law clearly provides that evidence of intoxication that simply lowers a defendant's inhibitions is insufficient to satisfy the voluntary intoxication defense. *See* ***Guiden***, 46 Wis. 2d at 331 ("The 'intoxicated or drugged condition' to which the statute refers is not the condition of alcohol-induced incandescence or being well-lit that lowers the threshold of inhibitions or stirs the impulse to criminal adventures.").

¶38 Unlike his original report, Dr. Tovar's second amended report purportedly addressed how Cooper's intoxicated condition negatived his ability to form intent. However, except for the correction of a small typographical error and the addition of a few new factual materials Tovar used to formulate his opinion, the only difference between Tovar's original report and his second amended report is the insertion of a single paragraph. The new paragraph states: "Finally, it is very difficult to formulate a deliberate act, or intend to do so, in such an intoxicated state. *Specifically*, the formation of intent is highly unlikely in such a state of ethanol intoxication, *due to the aforementioned effects on a subject*." (Emphasis added.) Notably, "the aforementioned effects on [the] subject" are the previous references in Tovar's original report to "temporary disinhibitions."

¶39 In other words, Tovar concluded in his second amended report that it was "highly unlikely" Cooper had the ability to form intent *only* because Cooper's

consumption of alcohol and THC withdrawal resulted in "temporary disinhibitions." Tovar essentially equated intoxication that results in *disinhibition*, which is insufficient to satisfy the voluntary intoxication defense, *see* ***id.***, with intoxication that results in *an inability to form intent*. Without more, Tovar's expert opinion provides an insufficient basis for a jury to understand his stated conclusions regarding Cooper's physiological ability to form intent to commit the crimes alleged.

¶40 Our supreme court has cautioned courts to closely scrutinize expert testimony regarding a defendant's intoxicated condition negativing the defendant's intent when determining the admissibility of such testimony, as "there may be a problem with the inconsistency between the law's conception of intent and [an expert witness's] understanding of the term." ***Flattum***, 122 Wis. 2d at 297. By excluding Dr. Tovar's proffered expert opinion at the second trial regarding Cooper's ability to form intent—which was based solely on temporary disinhibitions—we determine the circuit court properly ensured the jury was not exposed to Tovar's unmoored use of the term "intent," which is incongruent with the law's conception of that term. We conclude the ultimate exclusion of Tovar's opinion regarding Cooper's ability to form intent is consistent with the purpose of the statute governing expert testimony, which was amended in 2011 to adopt the ***Daubert*** standard: to prevent the finder of fact from being exposed to "conjecture dressed up in the guise of expert opinion." *See* ***Giese***, 356 Wis. 2d 796, ¶19 (citations omitted).

III. Right to Present a Defense

¶41 By excluding Dr. Tovar's opinion regarding Cooper's ability to form intent at the second trial, Cooper argues his constitutional right to present a

defense was violated. A defendant has a constitutional right to present a defense, including one supported by expert testimony. *See* ***State v. St. George***, 2002 WI 50, ¶¶14, 52, 252 Wis. 2d 499, 643 N.W.2d 777. And the harmless error rule does not apply when a defendant's right to present a defense has been violated. *See* ***State v. Pulizzano***, 155 Wis. 2d 633, 655-56, 456 N.W.2d 325 (1990); *accord* ***State v. Stutesman***, 221 Wis. 2d 178, 187-88, 585 N.W.2d 181 (Ct. App. 1998). Thus, if Cooper's right to present a defense was violated, he is entitled to a new trial.

¶42 In the first trial, after submitting an (untimely) amended expert report from Dr. Tovar regarding Cooper's ability to form intent, Cooper argued that exclusion of Tovar's opinion would violate his constitutional right to present a defense. The circuit court disagreed. Specifically, the court concluded that the State's interest in parties' compliance with the applicable discovery statutes regarding timely disclosure of expert reports outweighed Cooper's right to present Tovar's untimely opinion regarding his ability to form intent.

¶43 After the first trial, Cooper again attempted to have admitted Dr. Tovar's opinion regarding Cooper's ability to form intent. However, unlike in his first trial, Cooper did not raise the argument that exclusion of Tovar's opinion regarding his ability to form intent would violate his constitutional right to present a defense. If Cooper had raised such an argument before the second trial, the circuit court could not have excluded Tovar's opinion on the ground it had utilized in the first trial, as Tovar's opinion on Cooper's ability to form intent was now timely disclosed to the State. By failing to raise any argument with the circuit court regarding infringement of his right to a defense before the second trial, Cooper did not inform the circuit court he was still contending that right was being violated and, thus, he forfeited such a challenge on appeal. *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." (footnote omitted)).

By the Court.—Judgment and order affirmed.

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