COURT OF APPEALS
DECISION
DATED AND FILED

March 22, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP837-CR **Cir. Ct. No. 2013CF2198**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAKOTA R. BLACK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: STEPHEN E. EHLKE, Judge. *Affirmed*.

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

¶1 FITZPATRICK, J. Dakota Black appeals a judgment of conviction for first degree reckless homicide of five-year-old B.A.T., in violation of WIS.

STAT. § 940.02(1) (2015-16).[1] Black argues that the circuit court erred by: excluding evidence regarding a potential cause of B.A.T.'s death; failing to exclude the testimony of two of the State's expert witnesses and a rebuttal witness; and denying his post-conviction motion for ineffective assistance of counsel. Black also contends that he is entitled to a new trial in the interest of justice. We reject Black's arguments and affirm.

BACKGROUND

¶2 The following facts are gleaned from the trial record. Black was the boyfriend of B.A.T.'s mother, S.T. B.A.T. lived with Black, S.T., and their infant in the basement of the home of S.T.'s cousin, Patricia Garwo. After school on October 22, 2013, Garwo dropped off B.A.T. at home. B.A.T. was in Black's care that day until S.T. came home from work. When S.T. arrived, she went to the basement where she found B.A.T. on his bed barely breathing.

¶3 Paramedics arrived and found B.A.T. unresponsive with difficulty breathing, marks on his chest, and bruising around his buttocks. Paramedics transported B.A.T. to a hospital, where doctors noted bruising to B.A.T.'s right ear, chest, and legs. Scans revealed that B.A.T. had subdural hemorrhage on both sides of his brain. B.A.T. was transported to a children's hospital. There, doctors immediately operated to remove some of the pressure to B.A.T.'s brain. The surgery was unsuccessful, and B.A.T. passed away on October 24, 2013.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶4 Dr. Kristin Roman performed an autopsy of B.A.T. and concluded that B.A.T.'s death was a homicide as a result of blunt force trauma to the head. Dr. Roman explained that "[i]n addition to head injuries, [B.A.T.] also had forty seven contusions and two abrasions, distributed over his face, behind his right ear, on his torso, and on his extremities." Dr. Roman also observed that B.A.T. had several internal injuries and opined that these injuries would not have been sustained from a fall but, rather, were "more consistent with multiple impacts, either from striking or grabbing the child." Dr. Barbara Knox, a pediatrician board certified in child abuse issues, evaluated B.A.T. while he was in the hospital. Dr. Knox noted several contusions on B.A.T.'s body that were consistent with child maltreatment.

¶5 The State charged Black with first-degree reckless homicide. After a series of pre-trial motions and a jury trial, the circuit court convicted Black of first-degree reckless homicide. Black filed a post-conviction motion asserting that his trial counsel was ineffective, and that he was entitled to a new trial in the interest of justice. The circuit court denied Black's motion, and Black now appeals.

¶6 We will mention other material facts as relevant to particular arguments in the Discussion that follows.

DISCUSSION

¶7 Black appeals several circuit court rulings. He argues that: (1) the circuit court improperly excluded evidence related to a defense theory regarding the cause of B.A.T.'s injuries; (2) the circuit court erred in not excluding testimony of two of the State's expert witnesses; (3) the circuit court erred in allowing testimony of a rebuttal witness called by the State; (4) his trial counsel

was ineffective; and (5) he is entitled to a new trial in the interest of justice. We address, and reject, each argument in turn.

I. *The circuit court properly excluded evidence related to a defense theory.*

¶8 We first consider whether the circuit court erred in excluding evidence related to a defense theory regarding the cause of B.A.T.'s injuries. Black's primary theory of defense was that B.A.T. suffered an accidental trauma during a fall and had a period of lucidity before succumbing to his injuries. In support of that theory, Black presented two possibilities: B.A.T. fell on the playground at school; or he fell down a set of stairs. The circuit court allowed Black to present evidence regarding the stairway fall possibility. But, the circuit court did not allow Black to present two pieces of evidence regarding a possible playground fall, a child's statement and a demonstrative video. Black asserts that the circuit court's ruling excluding that evidence violated his constitutional right to present a defense. We reject Black's arguments.

¶9 The Confrontation Clause and the Compulsory Process Clause of the Sixth Amendment grant a defendant the right to present a defense. U.S. CONST. amend. VI; WIS. CONST. art. I, § 7; ***State v. Pulizzano***, 155 Wis. 2d 633, 645, 456 N.W.2d 325 (1990). However, a defendant does not have the unfettered right to present any and all evidence in support of the defendant's claims. *See* ***Chambers v. Mississippi***, 410 U.S. 284, 302 (1973); *see also* ***State v. Hammer***, 2000 WI 92, ¶¶42-43, 236 Wis. 2d 686, 613 N.W.2d 629. In determining whether the exclusion of evidence violates a defendant's right to present a defense, we consider "whether the proffered evidence was 'essential to' the defense, and whether without the proffered evidence, the defendant had 'no reasonable means of defending his [or her] case.'" ***State v. Williams***, 2002 WI 58, ¶70, 253 Wis. 2d 99, 644 N.W.2d 919

(quoting ***State v. Johnson***, 118 Wis. 2d 472, 480, 348 N.W.2d 196 (Ct. App. 1984)). Whether the exclusion of evidence violated a defendant's constitutional right to present a defense is reviewed de novo. ***State v. Dodson***, 219 Wis. 2d. 65, 69-70, 580 N.W.2d 181 (1998).

¶10 Black's first contention challenges the circuit court's exclusion of the statement of a child, N.G. N.G. was then a five-year-old girl who was with B.A.T. for a time on the day of his injuries. In a statement, N.G. claimed that "when [B.A.T. and I] were at school, he was sad" and that B.A.T. "fell off the swing … he climbed on the monkey bars, and he got a scrape." Black argues that the circuit court erred when it did not allow the defense to use N.G.'s statement to impeach the schoolyard protector who testified that she never saw B.A.T. play on, or fall off of, any playground equipment. The circuit court determined that the statement of N.G. had little relevance to the case because N.G. clarified that B.A.T. fell on his knees, not his head, and N.G.'s statement would likely confuse the issues presented.

¶11 We agree with the circuit court that N.G.'s statement claimed only that B.A.T. fell on his knees and did not support Black's theory that B.A.T.'s injury on the playground led to his demise. We conclude that the circuit court properly excluded N.G.'s statement from evidence, and that the exclusion of that evidence did not leave Black with no reasonable means to defend his case.

¶12 Black also challenges the circuit court's exclusion of "Case Study Number 5," a demonstrative video that depicted a toddler falling off playground equipment onto concrete. Black sought to enter the video into evidence to support the theory of his expert, Dr. John Plunkett, that B.A.T.'s injuries may have come from a playground fall. The circuit court determined that Black's experts could

refer to the video in their testimony, but the circuit court also ruled that the video itself was not admissible because, among other reasons, the person who made the video was unavailable for cross-examination, and there were limited details about the taking of the video or what it depicted.

¶13 Black presents no discernable argument that the jury viewing the video was essential to his defense. In addition, Black does not dispute that experts were able to discuss the "Case Study Number 5" video and its significance during their testimony before the jury. Because the video was discussed by experts at trial, and it was used in that manner as part of Black's defense, we conclude that the exclusion of the video did not leave Black with no reasonable means to defend his case.

¶14 Accordingly, we conclude that the circuit court's exclusion of N.G.'s statement and the "Case Study Number 5" video did not violate Black's constitutional right to present a defense.

II. *The circuit court did not err in denying Black's motion to exclude the State's expert witnesses' testimony.*

¶15 Black next challenges the circuit court's decision to deny Black's motions to exclude testimony of two of the State's expert witnesses regarding various aspects of B.A.T.'s injuries. Black contends that the testimony was not reliable under WIS. STAT. § 907.02(1). We conclude that the circuit court properly exercised its discretion in denying Black's motions.

¶16 The admissibility of expert testimony is governed by WIS. STAT. § 907.02. *See* ***Seifert v. Balink***, 2017 WI 2, ¶50, 372 Wis. 2d 525, 888 N.W.2d 816. Section 907.02(1) mirrors Federal Rule of Evidence 702, so we may consider federal case law when interpreting reliability standards. ***Seifert***, 372 Wis. 2d 525,

¶55 ("WISCONSIN STAT. § 907.02(1) mirrors Federal Rule of Evidence 702 as amended in 2000, and we may look for guidance and assistance in interpreting and applying § 907.02(1) to the ***Daubert*** case and its progeny, to the Advisory Committee Notes to Federal Rule of Evidence 702, and to federal and state cases interpreting the text of Rule 702 or an analogous state law."). The Federal Rules of Evidence impose a gatekeeping function to ensure that expert testimony is reliable. ***Kumho Tire Co., Ltd. v. Carmichael***, 526 U.S. 137, 147 (1999) (citing ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579, 589 (1993)). That reliability standard is similarly applied to expert testimony in Wisconsin. *See* ***Seifert***, 372 Wis. 2d 525, ¶¶50-60.

¶17 There are a broad range of factors a circuit court may consider when determining reliability. *See* ***Seifert***, 372 Wis. 2d 525, ¶¶63-64. These considerations vary by case given the variety of situations in which expert testimony arises. ***Id.***, ¶64.

¶18 The admission or rejection of evidence, including expert testimony, is within the circuit court's discretion, and we review the circuit court's decision for an erroneous exercise of discretion. ***Id.***, ¶¶92-93. An appellate court should independently review the record to determine whether it provides a basis for a circuit court's exercise of discretion. ***State v. Pharr***, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983).

¶19 Prior to the jury trial, and based on Black's assertion that the testimony was not reliable, Black brought four motions in limine requesting that the circuit court prohibit expert testimony from two of the State's witnesses regarding: whether B.A.T. suffered from abusive head trauma; B.A.T.'s cause of death, the timing of his injuries, and the amount of force needed to cause the

injuries; whether Shaken Baby Syndrome applied to B.A.T.'s injuries; and whether B.A.T.'s injuries would have been immediately debilitating. On appeal, Black challenges the circuit court's admission of the State's expert testimony on the same grounds.

¶20 The circuit court denied Black's motions regarding opinions on abusive head trauma, cause of death, timing of the injuries, and amount of force needed to cause the injuries, on "***Daubert*** grounds," but advised the parties that the requirements of foundation and qualification of expert opinions would apply to both sides, and the parties were free to make objections on those grounds at trial. The court also found that the State's experts were qualified to render opinions regarding B.A.T.'s injuries, including whether the injuries were immediately debilitating.[2] Although the circuit court's explanations of its rulings were brief, we conclude that there is sufficient information in the record to establish that the circuit court correctly exercised its gatekeeping function in admitting the State's expert witness testimony.

¶21 The State's two relevant expert witnesses at the trial were: Dr. Knox, who observed B.A.T. at the hospital and is a pediatrician board certified in child abuse issues; and Dr. Smith, a physician board certified in pediatric neuroradiology. At the outset of our analysis of these issues, we observe that, instead of attacking the specific methodology the State's experts used in their respective testimonies, Black makes categorical statements that their methods are unreliable without citing to evidence in the record supporting his conclusions.

[2] The parties agreed not to elicit testimony regarding Shaken Baby Syndrome.

¶22 Black challenges Dr. Knox's and Dr. Smith's characterization of this case as one of "abusive head trauma." Black implies that abusive head trauma is an unreliable diagnosis and is a term used interchangeably with Shaken Baby Syndrome. He also argues that experts disagree with the opinions of Dr. Knox and Dr. Smith and "scientific literature … does not support a categorical conclusion regarding causation of these injuries."

¶23 Black makes a similar categorical argument regarding Dr. Knox's and Dr. Smith's opinions that B.A.T. would have been immediately symptomatic and their opinions about the timing and cause of the injuries. His primary argument is that "[s]cientific evidence exists to refute these conclusions." In making these assertions, Black misinterprets the standards for admission of expert witness testimony.

¶24 Disagreement among experts is not, by itself, enough to exclude expert witness testimony. *See* ***Seifert***, 372 Wis. 2d 525, ¶59. Moreover, that evidence exists to dispute Dr. Knox's and Dr. Smith's conclusions is not the standard by which a circuit court determines whether evidence satisfies the reliability standard. "***Daubert*** makes the trial court a gatekeeper, not a fact finder. When credible, qualified experts disagree, a litigant is entitled to have the jury, not the trial court, decide which expert to believe." ***Id.*** (citing ***Dorn v. Burlington N. Santa Fe R.R. Co.***, 397 F.3d 1183, 1196 (9th Cir. 2005)). If we accepted Black's arguments, we would, in effect, require a level of certainty and expert consensus that is inconsistent with the standard set forth in ***Seifert*** and WIS. STAT. § 907.02(1). For those reasons, we conclude that the circuit court properly admitted the State's expert testimony on the issues of whether B.A.T. suffered from abusive head trauma, the cause and timing of B.A.T.'s injuries, and whether B.A.T. would have been symptomatic immediately.

¶25 Black also argues that the circuit court erred in permitting Dr. Knox and Dr. Smith to opine about the amount of force necessary to cause B.A.T.'s injuries. Black contends that they were not qualified to give those opinions and the opinions were not grounded in medical expertise. We reject Black's argument.

¶26 When testifying to the amount of force necessary to cause B.A.T.'s injuries, Dr. Knox and Dr. Smith recognized that there can be no studies about the amount of force needed to sustain a blunt force head injury to a child because of ethical and moral constraints of such studies. *See* ***Primiano v. Cook***, 598 F.3d 558, 565-66 (9th Cir. 2010). So, it necessarily followed that their opinions were based on their clinical experience. Black implies that this experience-based testimony is inadmissible under the ***Daubert*** standard. However, experience-based testimony with sufficient facts and reliable methods is not the type of evidence that WIS. STAT. § 907.02(1) seeks to prohibit. Medicine is rooted in science, but it includes practical and ethical components. *See* ***Seifert***, 372 Wis. 2d 525, ¶79. When testifying, physicians may "use their knowledge and experience as a basis for weighing known factors along with 'inevitable uncertainties' to 'mak[e] a sound judgment.'" ***Id.*** (quoting ***Primiano***, 598 F.3d at 565).

¶27 Here, the experience-based testimony of Dr. Knox and Dr. Smith satisfied the reliability requirement. "Instead of exclusion, the appropriate means of attacking 'shaky but admissible' experience-based medical expert testimony is by '[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof ….'" ***Seifert***, 372 Wis. 2d 525, ¶86 (citing ***Daubert***, 509 U.S. at 597). Accordingly, because Black had the opportunity to cross-examine the State's experts and present contrary evidence to the jury, we conclude that the circuit court did not err by allowing the State's expert witnesses to testify regarding the amount of force necessary to cause B.A.T.'s injuries.

¶28 Black also contends that the circuit court should have held an evidentiary hearing on his motion to exclude the State's expert witness testimony. However, a pretrial hearing is not a prerequisite when determining the admissibility of expert testimony. ***State v. Alger***, 2015 WI 3, ¶37, 360 Wis. 2d 193, 858 N.W.2d 346 (citing Daniel D. Blinka, *The Daubert Standard in Wisconsin: A Primer*, Wis. Lawyer, Mar. 2011 and ***United States v. Pena***, 586 F.3d 105, 110-11 (1st Cir. 2009)) ("But a hearing is not always required for expert testimony to be admitted under the ***Daubert*** standard."). Rather, circuit courts have "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." ***Kumho Tire Co.***, 526 U.S. at 152. In addition, Black never explains how he was prejudiced by the lack of an evidentiary hearing. We conclude that the circuit court adequately performed its gatekeeping function without a pretrial evidentiary hearing.

¶29 In sum, we conclude that the circuit court properly exercised its discretion in denying Black's motions to exclude the testimony of two of the State's expert witnesses.

III. *Any error of the circuit court in permitting testimony of a rebuttal witness was harmless.*

¶30 Black next argues that the circuit court erred by allowing Dr. Lori Frasier to testify as a rebuttal witness regarding injuries on B.A.T.'s buttocks. Black asserts that Dr. Frasier's testimony was "not truly rebuttal" testimony. We assume, without deciding, that it was error for the circuit court to allow Dr. Frasier's testimony on rebuttal. But, we conclude that any error was harmless.

¶31 Dr. Roman, who performed the autopsy, testified on cross-examination by Black's counsel that the injuries on B.A.T.'s buttocks were not

caused by spanking. Dr. Knox, who evaluated B.A.T. at the hospital, disagreed and testified that B.A.T.'s injuries indicated that he had been spanked. Due to the disagreement of two experts, the State called Dr. Frasier in rebuttal. Dr. Frasier testified that certain types of markings from a spanking found on a child's buttocks will often disappear relatively quickly. Dr. Frasier also testified that the relevant markings on B.A.T.'s buttocks may have disappeared quickly and, because Dr. Roman examined B.A.T.'s body a few days after the incident, Dr. Roman could have been mistaken when she testified that the marks she found were not caused by spanking.

¶32 Because we assume, without deciding, that there was error in allowing Dr. Frasier's testimony on rebuttal, we now consider whether the error was harmless. ***State v. Thoms***, 228 Wis. 2d 868, 872, 599 N.W.2d 84 (Ct. App. 1999); *see also* WIS. STAT. § 805.18(2). "The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction." ***Thoms***, 228 Wis. 2d at 873. In making that determination, "we focus on whether the error undermines our confidence in the case's outcome." ***Id.*** The conviction must be reversed unless we are certain that the error did not influence the jury or had such slight effect as to be de minimis. ***Id.*** We consider "the error in the context of the entire trial and consider the strength of untainted evidence." ***Id.*** The State, as the beneficiary of the error, has the burden to establish that the error is harmless. ***Id.***

¶33 After our review of the record, we conclude that the error was harmless. There was substantial evidence incriminating Black which was unrelated to any spanking issue. In the context of the evidence presented at trial, the disagreement of the experts about whether there were certain types of marks on B.A.T.'s buttocks, and whether B.A.T. was spanked, did not influence the

jury's decision. In addition, in light of the evidence presented by Black in support of his theory of defense, the rebuttal testimony from Dr. Frasier regarding the marks on the child's buttocks and how it may have affected the opinion of Dr. Roman was clearly de minimis.

IV. *The circuit court properly denied Black's claims of ineffective assistance of counsel without a hearing.*

¶34 We next consider whether Black's trial counsel was ineffective and whether Black presented sufficient evidence to warrant an evidentiary hearing on the issue. Black contends that his trial counsel was ineffective by failing to attack key witnesses, and Black contends that he raised sufficient facts in his post-conviction motion such that he was entitled to an evidentiary hearing. We conclude that Black did not present sufficient evidence that his trial counsel was ineffective, and, therefore, the circuit court was not required to hold an evidentiary hearing.

¶35 Both the United States Constitution and the Wisconsin Constitution grant criminal defendants the right to effective representation. U.S. CONST. amend. VI; WIS. CONST. art. I, § 7; ***Strickland v. Washington***, 466 U.S. 668, 686 (1984). To succeed on a claim of ineffective assistance of counsel, a defendant must demonstrate: (1) that the trial counsel's representation was deficient; and (2) that he or she was prejudiced by the deficient performance. ***Strickland***, 466 U.S. at 687; ***State v. Thiel***, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. Trial counsel's performance need not be perfect to be constitutionally adequate. ***State v. Carter,*** 2010 WI 40, ¶22, 324 Wis. 2d 640, 782 N.W.2d 695. It is almost always true that, in hindsight, trial counsel's performance could have been improved. However, our review "of counsel's performance is highly deferential and reviewed from counsel's perspective at the time of trial, not based on

hindsight." ***State v. Robinson***, 177 Wis. 2d 46, 55-56, 501 N.W.2d 831 (Ct. App. 1993). As to the prejudice prong, there must be a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694.

¶36 A claim of ineffective assistance of counsel presents a mixed question of law and fact. ***Thiel***, 264 Wis. 2d 571, ¶21. We will uphold the circuit court's findings of fact unless they are clearly erroneous. ***Id.*** Whether counsel's performance satisfies the constitutional standard of ineffective assistance is a question of law that is reviewed de novo. ***Id.***

¶37 Whether Black's ineffective assistance of counsel claim entitled him to an evidentiary hearing presents a mixed standard of review. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. First, we determine if Black alleged sufficient facts that, if true, would entitle him to relief. *See* ***id.*** This is a question of law that is reviewed de novo. ***Id.*** If the motion sufficiently raises such facts, the circuit court must hold an evidentiary hearing. ***Id.*** However, if Black's motion did not raise facts "sufficient to entitle [him] to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that [he] is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." ***Id.***

¶38 Black contends, first, that his counsel was ineffective in that his counsel did not offer more learned treatises to attack the testimony of the State's experts and to support the opinions of Black's experts. Black's argument fails because he does not explain which additional treatises should have been disclosed, how those treatises were relevant to his defense, and why the failure to introduce those treatises into evidence prejudiced his defense. Rather, Black asserts in a

conclusory fashion that additional treatises would have challenged the State's theories. Those mere conclusory assertions do not meet the bar required to demonstrate that an error by his counsel (assuming there was an error) was prejudicial.

¶39 Second, Black asserts that his counsel did not adequately impeach witness Patricia Garwo about her inconsistent statements. Garwo presented inconsistent statements regarding where B.A.T. was lying when he was discovered. In her first interview with the police, Garwo stated that B.A.T. was on the floor but, in a later interview, she stated that he was on a bed when she saw him on the day of his injuries. At trial, Garwo testified that B.A.T. was on a bed and covered with a blanket when she first saw him.

¶40 Black alleges that Garwo's statement that B.A.T. was on a bed and covered with a blanket when she first saw him was detrimental to his defense because one of the defense's theories was that B.A.T. fell down the stairs, and it would have been impossible for him to be on a bed and covered with a blanket if that occurred. However, Garwo's testimony at trial was consistent with both S.T.'s and Black's statements to the police that B.A.T. was lying on the bed. Additionally, testimony from Garwo that B.A.T. was covered with a blanket supports the defense's theory that B.A.T. may have experienced a lucid interval that allowed him to get into bed after a fall. For those reasons, Black has not explained how he was prejudiced by his counsel's failure to impeach Garwo based on inconsistent prior statements. Accordingly, we conclude that counsel's failure to impeach Garwo was not ineffective and was not prejudicial to Black's defense.

¶41 Black also contends that his trial counsel's failures cumulatively prejudiced his case, even if the errors did not harm his case individually. In cases

where there are multiple deficiencies by a trial counsel, "prejudice should be assessed based on the cumulative effect" of those deficiencies. ***Thiel***, 264 Wis. 2d 571, ¶59. However, combining otherwise non-meritorious claims does not necessarily amount to a prejudicial effect. ***Id.***, ¶61. "[I]n most cases errors … will not have a cumulative impact sufficient to undermine confidence in the outcome of the trial." ***Id.*** Here, we conclude that the two errors asserted by Black were insignificant to the outcome of the trial and did not cumulatively prejudice his defense.

¶42 Because Black failed to allege facts that, if true, would entitle him to relief, we conclude that the circuit court properly denied Black's claim of ineffective assistance of counsel without a hearing.

V. *Black is not entitled to a new trial in the interest of justice.*

¶43 Finally, Black asserts that he is entitled to a new trial in the interest of justice. Pursuant to WIS. STAT. § 752.35, this Court may exercise discretion to order a new trial when the real controversy has not been fully tried, or if it is probable that justice has been miscarried for any reason. Sec. 752.35. However, this discretionary power is to be exercised "infrequently and judiciously." ***State v. Ray***, 166 Wis. 2d 855, 874, 481 N.W.2d 288 (Ct. App. 1992). Absent exceptional circumstances, a reviewing court will not exercise its discretion to grant a new trial. ***State v. Chu***, 2002 WI App 98, ¶55, 253 Wis. 2d 666, 643 N.W.2d 878.

¶44 Black contends that the controversy was not fully tried because the jury was not given the opportunity to consider important testimony and the State's expert witness testimony should have been excluded. For the reasons already stated, we are not persuaded that the real controversy was not fully tried, and that Black has not demonstrated any extraordinary circumstances that warrant a new

trial. We conclude that Black is not entitled to a new trial under WIS. STAT. § 752.35.

CONCLUSION

¶45 Therefore, the circuit court's judgment and order are affirmed.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.