STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2014AP2370-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

AARON SCHAFFHAUSEN,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE ST. CROIX COUNTY CIRCUIT COURT, THE HONORABLE HOWARD W. CAMERON, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

STATEMENT OF THE CASE

Defendant-appellant Aaron Schaffhausen has appealed from a judgment convicting him of three counts of first-degree intentional homicide and one count of attempted arson (475:1-5).

According to the criminal complaint, Schaffhausen went to the home of his ex-wife, J.S., where his three daughters, aged five, eight, and eleven, were being cared for by a babysitter (3:1-2). After the sitter left, Schaffhausen killed all three girls. He killed two of the girls by sharp-force injury to the neck and the third by sharp-force injury to the neck and strangulation (3:3-4).

Schaffhausen called J.S. and told her, "You can come home now because I killed the kids" (3:3). Responding officers found the bodies of the three girls lying in their beds (3:2-3). In the basement of the home, officers found a gasoline container that had been tipped forward allowing gas to pour out (3:2).

Schaffhausen was charged with three counts of first-degree intentional homicide and one count of attempted arson of a building (87:1-2). Schaffhausen entered pleas of not guilty and not guilty by reason of mental disease or defect (NGI) to all four counts (370:7).

Four days before trial, Schaffhausen entered guilty pleas to all of the counts (512:18-19), and the case proceeded to a jury trial on the responsibility phase (520:39). The jury heard from more than fifty fact witnesses over the course of ten days of testimony. It also heard from three expert witnesses who testified regarding Schaffhausen's mental state at the time of the

murders and offered opinions regarding whether Schaffhausen met the legal standard for NGI.[1]

Schaffhausen called two of the expert psychiatric witnesses: a court-appointed expert, Dr. Ralph Baker (523:1238), and Schaffhausen's retained expert, Dr. John Reid Meloy (524:1384, 1397). Dr. Baker testified that Schaffhausen had a major depressive disorder but did not lack substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law (523:1261-62, 1289-90). Dr. Meloy testified that Schaffhausen had a major depression at the time of the killings and that as a result of that major depression he lacked substantial capacity to conform his conduct to the requirements of the law (524:1407). The State's expert, Dr. Erik Knudson, testified that although Schaffhausen suffered from depression at the time of the crime, he did not lack substantial mental capacity to appreciate the wrongfulness of his conduct or to conform his conduct with the requirements of the law (528:2307, 2318, 2355-2359).

The jury unanimously found that Schaffhausen had a mental disease or defect when he committed the crimes but that he did not lack substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law (529:2611-18). The court then entered a judgment of guilty on all four counts (529:2619) and sentenced Schaffhausen to three consecutive sentences of life imprisonment without eligibility for extended

[1]The State also presented expert testimony from a DNA analyst (527:2211-2269) and the forensic pathologist who performed the autopsies of the victims (527:2275-2286).

supervision on the homicide counts and a consecutive twenty year sentence on the attempted arson count (511:76-77).

ARGUMENT

All of the issues Schaffhausen raises on appeal relate to the trial of the responsibility phase of this bifurcated proceeding. *See State v. Magett*, 2014 WI 67, ¶33, 355 Wis. 2d 617, 850 N.W.2d 42 (describing the two phases of an NGI trial). He argues that the trial court erred by not instructing the jury on expert witness qualifications and by declining to send the experts' reports to the jury room. Schaffhausen also requests a new trial in the interest of justice. Because Schaffhausen did not preserve his jury instruction claim and because all of his claims are without merit, the court should reject those arguments and affirm the judgment of conviction.

I. SCHAFFHAUSEN DID NOT PRESERVE HIS CLAIM THAT THE COURT ERRED BY NOT INSTRUCTING THE JURY REGARDING EXPERT WITNESS QUALIFICATIONS, BUT EVEN IF HE HAD, THE CLAIM IS MERITLESS.

Schaffhausen first argues that "it was plain error to tell the jurors they would decide whether two experts were qualified, promise them an instruction on the issue, and then never provide one." Schaffhausen's brief at 6. Schaffhausen did not preserve this issue because he did not object to the jury instructions. But even if the issue were preserved, Schaffhausen is not entitled to relief

because the court committed no error, much less plain error.

A. Schaffhausen has not preserved the issue for appellate review.

"It is a fundamental principle of appellate review that issues must be preserved at the circuit court." *State v. Huebner*, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. "Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal." *Id.* "The party who raises an issue on appeal bears the burden of showing that the issue was raised before the circuit court." *Id.*

Schaffhausen acknowledges that his trial counsel did not object or otherwise raise the issue – that is the reason he asks this court to review his claim for plain error. *See* Schaffhausen's brief at 7. But Schaffhausen did not file a postconviction motion raising this (or any other) issue in the circuit court.

Even if Schaffhausen had filed a postconviction motion raising the alleged instructional error, moreover, this court still would not have the power to review Schaffhausen's objection to the jury instructions for plain error because a more rigorous forfeiture standard applies to unobjected-to jury instructions. "Under Wis. Stat. § 805.13(3) the failure to object to a jury instruction the court proposes to give constitutes a waiver of any error in the proposed instruction." *State v. Cockrell*, 2007 WI App 217, ¶36, 306 Wis. 2d 52, 741

N.W.2d 267. "The plain error doctrine does not apply to review of unobjected-to jury instructions." *State v. Martinez*, 210 Wis. 2d 396, 404 n.5, 563 N.W.2d 922, 926 (Ct. App. 1997) (citing *State v. Schumacher,* 144 Wis.2d 388, 402, 424 N.W.2d 672 (1988)).

While the court of appeals "do[es] not have the common law power to review this type of waived error, [it] may exercise [its] discretionary power of reversal under Wis. Stat. § 752.35 when a waived error regarding a jury instruction results in the real controversy not being tried." *Cockrell*, 306 Wis. 2d 52, ¶36 n.12. Because Schaffhausen includes the alleged instructional error in his request for discretionary reversal, *see* Schaffhausen's brief at 12, the State will discuss why his argument is wrong.

B. Schaffhausen's jury instruction claim lacks merit.

Schaffhausen argues that the trial court erred when it told the jurors that "they would decide whether two experts were qualified, promise[d] them an instruction on the issue, and then never provide[d] one." Schaffhausen's brief at 6. Schaffhausen's claim flows from his lawyer's decision to ask the court, in the jury's presence, to qualify Drs. Baker and Meloy as experts. (The State did not do that with its expert, Dr. Knudson (528:2307-2367).) After defense counsel questioned Dr. Baker about his qualifications and had Dr. Baker identify his report (Exhibit 5), the following exchange ensued:

> [Defense counsel]: Your Honor, I'd ask that you qualify him as an expert, and I'd offer Exhibit 5.

> [The prosecutor]: I agree that he's an expert, and I agree to the admission of Exhibit 5.
>
> THE COURT: All right. I'll receive Exhibit 5. I'll let the jury decide whether he qualifies as an expert.

(523:1240; A-Ap. vol. 1, p. 22.) Defense counsel then questioned Dr. Baker about his findings and opinions (523:1240-1287).

Similarly, after defense counsel questioned Dr. Meloy about his qualifications, the following exchange occurred:

> [Defense counsel]: Judge, I'd ask that he be allowed to testify as an expert in this case.
>
> THE COURT: Members of the jury, I'll let you decide if he's an expert. I'll give you a jury instruction on it, and you make that determination.

(524:1397; A-Ap. vol. 1, p. 23.) Defense counsel then questioned Dr. Meloy at length about his findings and opinions (524:1397-1461).

As Schaffhausen notes, "[w]hether a witness is qualified to provide expert testimony is a preliminary question of fact for the judge to determine under Wis. Stat. § 901.04." *Parker v. Wisconsin Patients Comp. Fund*, 2009 WI App 42, ¶28, 317 Wis. 2d 460, 767 N.W.2d 272 (citing 7 Daniel Blinka, *Wisconsin Practice: Wisconsin Evidence* § 702.2, at 473 (2nd ed. 2001)). From that premise, Schaffhausen argues that "it was clear error to defer the issue of expert qualifications to the jury." Schaffhausen's brief at 6.

The trial court did not abdicate its responsibility to determine whether Dr. Baker or Dr. Meloy was qualified to offer their expert testimony. When the court admitted their testimony, it implicitly determined that they were qualified to give that testimony. *See State v. Pharr*, 115 Wis. 2d 334, 347, 340 N.W.2d 498 (1983) ("although the trial court did not explicitly rule that the probative value of the evidence was not substantially outweighed by its prejudicial effect, such a ruling was implicit in the trial court's decision to admit [the] evidence").

Schaffhausen's claim results from his lawyer's request that the court qualify Drs. Baker and Meloy as experts. As Professor Blinka explains, that procedure is "inappropriate and unnecessary" because, among other reasons, the jury may interpret such a ruling as providing implicit judicial imprimatur to the witness's testimony.

> There is no set procedure for qualifying an expert witness. Traditionally, the proponent elicits the witness's education, training, and experience at the start of the direct examination. Under common law practice, the proponent then asked the court to make a "finding" that the witness was an expert in an identified field. If the witness's credentials were dubious, the court might allow the opponent to voir dire the witness regarding qualifications. Before any questions were put to the witness regarding the facts of the case, the trial judge had to find that he or she was an "expert."
>
> The common-law procedure is inappropriate and unnecessary under Wis. Stat. § 907.02 for two reasons. First, a formal finding of expertise may be misinterpreted by the jury as the judge's approbation of the witness's testimony. Although the judge must

> decide the witnesses qualifications under Wis. Stat. § 901.04(1)(a), the finding need not be disclosed to the jury. Second, the thrust of the present rules has interwoven questions about the testimony's relevancy and helpfulness with that of the witness's qualifications. The issue will seldom be whether the witness is an expert in the field of medicine or economics; rather, the focus will turn on the witness's qualifications to answer the precise question put by counsel. In a sense, the witness must be qualified for each and every question. No expert has *carte blanche*.

7 Daniel Blinka, *Wisconsin Practice: Wisconsin Evidence* § 702.601, at 600-01 (3rd ed. 2008) (footnotes omitted).[2]

The gravamen of Schaffhausen's complaint is that by not following through on its promise to give the jury an instruction on how to determine whether a witness is an expert, the court implicitly told the jury to "go in there and do whatever you think is right." Schaffhausen's brief at 7. As a result, he argues, the jury was free not only to reject an expert's opinion – which he acknowledges would be proper, *see id*.[3] – but to

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[2]This passage from the Blinka treatise is from the main volume, which was written before the legislature amended Wis. Stat. § 907.02 in 2011 to adopt the *Daubert* reliability standard. *See State v. Kandutsch*, 2011 WI 78, ¶26 n.7, 336 Wis. 2d 478, 799 N.W.2d 865. The quoted passage was not deleted or altered in the treatise's 2014 supplement. *See* 7 Daniel Blinka, *Wisconsin Practice: Wisconsin Evidence* § 702.601, at 118-19 (Supp. 2014).

[3]*See also Weber v. Chicago & Nw. Transp. Co.*, 191 Wis. 2d 626, 636, 530 N.W.2d 25 (Ct. App. 1995) ("Even where one party's expert is not countered by any expert on the other side, a jury can reject an expert's opinion based on other evidence in the case.").

"simply refuse to consider it at all." *Id*. There are two problems with that argument.

First, Schaffhausen concedes that there is no such jury instruction and that he "cannot argue it was error for the court to fail to give an instruction which does not exist." *Id*. The jury was no more free to run wild in this case than it would be in any other case in which the nonexistent instruction was not given.

Second, the jury instructions that the court gave regarding expert witnesses forecloses any argument that the jury could have believed that it was free to refuse to even consider an expert's testimony. The court gave the jury the following instructions:

> Generally or ordinarily a witness may testify only about facts. However, a witness with experience in a particular field may give an opinion in that field. In determining the weight to give to this opinion, you should consider the qualifications and the credibility of the expert, the facts upon which the opinion is based, and the reasons given for the opinion. Opinion evidence is received to help you reach a conclusion; however, you are not bound by an expert's opinion. In resolving conflicts in expert testimony, weigh the different expert opinions against each other. Also consider the qualifications and credibility of the experts and the facts supporting their opinions.
>
> The court has appointed Dr. Baker to examine the defendant and to testify at trial. The same tests that apply to all other experts apply to Dr. Baker. Each party has had the opportunity to have their -- to have other experts testify.

(529:2489-2490.)

The court thus instructed the jury to "weigh the different expert opinions against each other" and to apply to Dr. Baker the same tests that apply to "all other experts" and told the jury that each party had the opportunity "to have other experts testify." No reasonable juror hearing those instructions would be believe that he or she could refuse to consider any of the expert's opinions. The jury is presumed to follow the instructions given it. *State v. Truax,* 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App.1989).

Schaffhausen also argues that the trial court's handling of the expert qualification question violated his constitutional right to present a defense, *see* Schaffhausen's brief at 8, an argument that he also never raised below. He argues that "[t]his right includes the right to jury consideration of relevant expert testimony." *Id.*

The case Schaffhausen cites for the latter proposition, the federal district court's decision in *Morgan v. Krenke*, 72 F. Supp. 2d 980 (E.D. Wis. 1999), rev'd, 232 F.3d 562 (7th Cir. 2000), provides him no assistance, if for no other reason than that it was reversed by the Seventh Circuit. *See Morgan v. Krenke*, 232 F.3d 562 (7th Cir. 2000).[4]

[4]The issue in *Morgan* was whether the trial court's exclusion of lay and expert opinion testimony regarding the defendant's mental condition during the guilt phase of her state court trial violated her constitutional rights to due process of law, to present a defense, and to testify in her own behalf. *See id.* at 563. The district court concluded that the "wholesale exclusion" of that evidence violated the defendant's constitutional right to present a defense and to testify on her own behalf, *see* 72 F. Supp. 2d at 1022, but the Seventh Circuit disagreed, holding that the exclusion of psychiatric testimony from the guilt phase of the trial did not deprive the defendant of her right to present a defense. *See* 232 F.3d at 569.

But there is a more fundamental problem with Schaffhausen's argument than his reliance on a decision that was reversed.

The State does not take issue with the general proposition that a defendant's right to present a defense may be violated by the exclusion of evidence, including expert testimony, at trial. *See State v. St. George*, 2002 WI 50, ¶¶50-53, 252 Wis. 2d 499, 643 N.W.2d 777. But Schaffhausen does not argue that any evidence relevant to his defense was improperly excluded by the trial court. Rather, his argument is that the trial court's failure to give the promised instruction "gave the jury the power to completely ignore the defense expert's testimony, thereby violating [his] fundamental substantive right to present a defense." Schaffhausen's brief at 8. As the State has explained, however, the expert witness instructions the court did give left no room for a reasonable juror to believe that he or she could "complete ignore" the testimony of the defense expert or any other expert.

II. THE TRIAL COURT DID NOT ERR WHEN IT DECLINED TO SEND THE EXPERT REPORTS TO THE DELIBERATING JURY.

Schaffhausen next argues that trial court erroneously exercised its discretion when it declined the deliberating jury's request to see the experts' reports. *See* Schaffhausen's brief at 10. He also argues that the court's decision violated his due process right to present a defense. *Id*.

Only the erroneous exercise of discretion issue is preserved for appellate review. Although

Schaffhausen argued in response to the jury's request that the court should send the reports to the jury, he never argued that the failure to do so would violate his constitutional right to present a defense (529:2602-08). Rather, he cited *State v. Hines*, 173 Wis. 2d 850, 496 N.W.2d 720 (Ct. App. 1993), a case that discusses the factors that the trial court should consider when exercising its discretion to decide whether to send an exhibit to the jury (529:2603). Because Schaffhausen did not raise his constitutional claim in the trial court, he has forfeited appellate review of that issue. *See State v. Gove*, 148 Wis. 2d 936, 943, 437 N.W.2d 218 (1989) (confrontation claim waived when objection was based only on hearsay grounds); *State v. Marshall*, 113 Wis. 2d 643, 653, 335 N.W.2d 612 (1983) (constitutional grounds for objections must be made known to the circuit court).

A. The trial court properly exercised its discretion.

"Whether an exhibit should be sent to the jury during deliberations is a discretionary decision for the trial court." *Hines*, 173 Wis. 2d at 858. A trial court's decision whether to send exhibits to the jury during deliberations is guided by three considerations: (1) whether the exhibit will aid the jury in proper consideration of the case; (2) whether a party will be unduly prejudiced by submission of the exhibit; and (3) whether the exhibit could be subjected to improper use by the jury. *Id.* at 860. A circuit court erroneously exercises its discretion if it fails to consider the relevant factors before deciding whether to send an exhibit to the jury. *Id.* However, this court will not reverse the circuit court if it determines that

facts in the record would support the circuit court's decision had it properly exercised its discretion. *Id.* at 860-61.

The record in this case demonstrates that the trial court properly exercised its discretion. When the jury asked for the expert's reports, the State, citing the *Hines* factors, opposed the request (529:2599-2600). The prosecutor noted that "[a]ll of the doctors testified at great length and much more extensively than [what] is just contained in their reports" (529:2599). He argued that the reports would not aid the jury and would be subject to improper use because providing the reports would give undue emphasis on the reports over the witnesses' testimony, including matters testified to on cross-examination (529:2599-2600). He also noted that the reports contained information that was not the subject of any testimony and information that had been excluded or was otherwise inadmissible and argued that the reports would have to be redacted (529:2600-01).

Defense counsel noted that Dr. Baker and Dr. Meloy's reports had been received without objection and that the court had reserved a ruling on Schaffhausen's objection to portions of Dr. Knudson's report (529:2602-03). Counsel first contended that the reports should go to the jury with some redactions (*id.*). He then argued that the reports should go back in their entirety under Wis. Stat. § 907.07 (528:2604). He also argued that even though "a lot of [Dr. Knudson's report] is prejudicial because it wasn't testified to," the "probative value of those reports would outweigh the prejudicial effect; so we're willing to waive that and let all the reports go in as is in lieu of the first suggestion we made" (529:2604-05).

The court then explained why it was not going to send the reports to the jury:

> First of all, 907.07 does not apply. There was no reading by the experts, so it's a nonissue. When I read the jury instructions, I said – exhibits, even if it's received, does not mean it goes back. It's still received even though it doesn't go back to the jury room. I would note that I have observed the jury. I noticed extensive note taking. Except when sometimes things got a little long and they heard the same question three or four times, I noticed they put their pens down. Additionally, you, -- I don't think you can waive any error, because I agree with [the prosecutor], they are going to come back and do an ineffective quicker than you know.
>
> * * *
>
> It will be a Machner hearing, and you are going to be back here. And you are going to say you waived it, and they are going to say you shouldn't have waived it.
>
> * * *
>
> I'm just telling you, I don't want to take time for a Machner hearing when I could avoid it I figure. Additionally, there's lots of cross-examination here that affects the reports of these doctors. I think if the reports go in, it's overemphasized.
>
> Additionally, I did see -- when [Dr. Knudson's] report came in, it was subject to the -- [defense] motion, but I never ruled on that motion; so now we have a motion, and I've got to go back on rule on it to keep it out. So I'm put in an impossible position. And I can't -- I can't redact it. I can't redact enough of anything. Even if I say your motion is right, as to Dr. Knudson, there was certain things testified to, so you have to go through his 80 pages and you have to take out certain

> things that they were testified to by certain people; and I find that -- it [is] impossible to redact the reports to be accurate. I don't find anybody to be prejudiced, because they took extensive notes, as not to send the reports back, okay? And I think it could be unduly prejudiced if they go back, overemphasize these written reports compared to the testimony of the doctors. There was extensive testimony by both Drs. Meloy and Dr. Knudson, little on Dr. Baker.

(529:2608-10; R-Ap. 101-03.)

The court's explanation demonstrates that it properly exercised its discretion. Although the circuit court did not cite *Hines*, it nevertheless applied the reasoning required by that case. The court found that the reports were not necessary because the jurors took extensive notes during the experts' testimony. Schaffhausen does not address that finding, much less challenge it. *See Schlieper v. DNR*, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (an appellant's failure to refute the grounds of the trial court's ruling is a concession of the validity of those grounds).

The court also found that sending the reports back would overemphasize the written materials compared to the witnesses' extensive testimony, including their cross-examination. Schaffhausen does not address that part of the court's rationale, but the record fully supports it.

Dr. Meloy's report, for example, is seventeen pages long (419; A-Ap. vol. 2, pp. 18-34). His trial testimony, in contrast, covers 220 pages of transcript (524:1384-1604), of which 113 pages are cross-examination (524:1465-92, 1496-1513, 1515-1581, 1601-1604). During cross-examination, the prosecutor repeatedly elicited Dr. Meloy's

acknowledgement that statements Schaffhausen made to Dr. Meloy and that Dr. Meloy included in his report were contradicted by information reported by other sources (524:1524-1537).

The prosecutor also brought out in cross-examination the fact that Dr. Meloy had not included in his report Schaffhausen's statement to Dr. Meloy that revenge may have been one of the reasons he committed the murders (524:1604). That fact sharply undercut Dr. Meloy's opinion, as stated in his report, that there was "a striking absence of any other explanations for the killing(s)" other than that "[t]hese were psychogenic killings" that "arose from within the mental disorder and personality disorder of Aaron Schaffhausen," "a recognized although rare motivation for intentional killing . . . referred to as a catathymic homicide" (419:Meloy report:8).

The court also found that it would have been too difficult to redact the reports. That was a valid reason not to send the exhibits back, because exhibits sent to the jury should not contain inadmissible evidence. *See Wilder v. Classified Risk Ins. Co.*, 47 Wis. 2d 286, 292, 177 N.W.2d 109 (1970). Schaffhausen argues that redaction was not necessary because he was willing to waive his earlier objection to Dr. Knudson's report. *See* Schaffhausen's brief at 10. But the trial court was understandably concerned, given defense counsel's acknowledgement that "a lot" of that report was prejudicial (529:2605), that such a waiver would give rise to a claim of ineffective assistance of counsel (529:2608-09; R-Ap. 101-02). Again, Schaffhausen does not address the trial court's reasoning. *See Schlieper*, 188 Wis. 2d at 322.

Schaffhausen wishes the court would have exercised its discretion differently, but that is not the test. That the trial court could have exercised its discretion differently does not constitute an erroneous exercise of discretion. *See Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981) (the reviewing court's inquiry is whether discretion was exercised, not whether it could have been exercised differently). Because the record supports the circuit court's exercise of discretion not to send the exhibits to the jury, the court should reject Schaffhausen's claim.

B. The trial court's decision not to send the reports to the jury did not violate Schaffhausen's right to present a defense.

If the court were to consider Schaffhausen's unpreserved claim that the circuit court violated his constitutional right to present a defense when it declined to send the reports to the deliberating jury, it should reject that claim.

Citing *Ellis v. Mullin*, 326 F.3d 1122 (10th Cir. 2002), Schaffhausen argues that "[t]he right to present a complete defense includes the right to present the jury a report of a psychiatrist to support an insanity defense." Schaffhausen's brief at 11. The facts of *Ellis* are readily distinguishable from this case.

In *Ellis*, the defendant, who was charged with capital murder, was ordered to undergo a competency evaluation. *See Ellis*, 326 F.3d at 1125. The psychiatrist who evaluated the defendant concluded that the defendant was competent to stand trial, noting that the

defendant's chronic paranoid-schizophrenia was in remission. *Id.* The psychiatrist's report also stated that the defendant "had a severe dissociative disorder in the past" and "may have been completely depersonalized at the time of the incident." *Id.*

The psychiatrist was unavailable to testify because he died prior to trial. *Id.* at 1126. The defense attempted to introduce his report at trial, but the trial court excluded it. *Id.* In its closing argument, the prosecution argued that the defendant had failed to establish his insanity, noting the lack of evidence from medical professionals. *Id.*

The Tenth Circuit concluded that the defendant was denied his constitutional right to present evidence critical to his defense. *See id.* at 1129-30. It noted that "[w]ith [the psychiatrist's] diagnosis and observations excluded during the guilt phase, Ellis's case for insanity was highly vulnerable to the argument, seized upon by the prosecution in its closing argument as quoted above, that Ellis only began faking mental illness around the time of the killings." *Id.* at 1129.[5] The court found it significant that "[t]he prosecution emphasized during the guilt phase that Ellis introduced no diagnosis of insanity and no testimony of medical professionals that he was insane." *Id.* The court concluded that the psychiatrist's report "would have provided the jury with objective, professional validation of Ellis's longstanding mental illness" and that it was reasonably probable that the report "would have put Ellis's other evidence of mental illness in an altogether different light to the jury." *Id.* at 1129.

[5]The sanity determination in *Ellis* was part of the guilt phase of the trial. *See Ellis*, 326 F.3d at 1125-1127.

The crucial difference between *Ellis* and this case is that because the expert in *Ellis* died before trial, exclusion of his report deprived the jury of information relevant to his insanity defense. In this case, in contrast, both of the psychiatric experts called by Schaffhausen testified at length about their findings and opinions (523:1228-1359; 524:1384-1604).

Ellis was a case in which the jury was precluded from hearing expert evidence relating to the defendant's mental state. That is not what happened here. Schaffhausen's complaint is not about the exclusion of evidence, but about the court's decision not to send the reports back to the jury.

Although not cited by Schaffhausen, this court held in *State v. Johnson*, 118 Wis. 2d 472, 348 N.W.2d 196 (Ct. App. 1984), that the circuit court's refusal to send an exhibit to the jury violated the defendant's right to present a defense. But *Johnson* also is readily distinguishable from this case.

The defendant in *Johnson* was convicted of robbery following a jury trial. *See id.* at 473. His defense was mistaken identity. *See id.* at 477. To support that defense, he presented and the court received into evidence photographs of a man who was "a look-alike." *Id.* at 475. However, the jury was not shown the picture, *id.*, and the court declined to send the picture to the deliberating jury, *id.* at 478-80.

The court of appeals reversed the conviction. It noted that this was a "one-witness identification case" and that "[t]he defense of mistaken identity was supported somewhat by the testimony of a

relative, an ex-relative and, primarily, by photographs of an alleged look-alike who happened to be the son of the resident of the house into which the purse-snatcher fled." *Id*. at 479. Without the jury's ability to view the photographs, the court concluded, the defendant "had no reasonable means of defending his case." *Id*. at 480.

Johnson is a case in which the failure to send the picture to the jury deprived the jury of the ability to consider evidence critical to the defense because the jury was not shown the picture during the evidentiary phase of the trial. In this case, however, the court's refusal to send the reports to the jury had no such effect because Schaffhausen's witnesses testified at length about their findings and opinions (523:1228-1359; 524:1384-1604).

Schaffhausen does not identify anything in any of the experts' reports that was important to his defense that was not the subject of the experts' testimony. Accordingly, the court should reject his claim that the trial court's decision to not send their reports to the deliberating jury deprived him of his constitutional right to present a defense.

III. THE REAL CONTROVERSY WAS FULLY TRIED.

In his final argument, Schaffhausen asks this court to grant him a new trial in the interest of justice. Under Wis. Stat. § 752.35, the court of appeals may order a new trial in the interest of justice on either of two grounds: "that the real controversy has not been fully tried, or that it is probable that justice has for any reason

miscarried." *State v. Cleveland*, 2000 WI App 142, ¶21, 237 Wis. 2d 558, 614 N.W.2d 543.

Schaffhausen seeks relief under the "real controversy not fully tried" branch. *See* Schaffhausen's brief at 11-12. To establish that the real controversy has not been fully tried, a defendant must demonstrate "that the jury was precluded from considering 'important testimony that bore on an important issue' or that certain evidence which was improperly received 'clouded a crucial issue' in the case." *Cleveland*, 237 Wis. 2d 558, ¶21 (quoted sources omitted).

Schaffhausen begins his discussion with a cursory description of evidence admitted at trial over his objection. *See* Schaffhausen's brief at 11. Then, after briefly discussing the State's closing argument, he asserts that "[a]llowing unrestricted presentation of State's evidence more relevant to guilt than to sanity was just icing on the State's case." *Id*. at 12. He concludes that "the real controversy of Mr. Schaffhausen's sanity defense was never tried because of these cumulative errors." *Id*.

Implicit in Schaffhausen's "cumulative errors" statement is an assertion that the trial court erred when it admitted the evidence to which he had referred. But Schaffhausen does not identify with any specificity or citations to the record the evidence he believes was erroneously admitted. *See State v. Lass,* 194 Wis. 2d 591, 604-05, 535 N.W.2d 904 (Ct. App. 1995) (court of appeals "will not consider arguments that are not supported by appropriate references to the record"). Nor does he present a developed argument explaining why that evidence should have been excluded. *See State v. Flynn,* 190 Wis. 2d 31, 39

n.2, 527 N.W.2d 343 (Ct. App. 1994) ("We will not decide issues that are not, or inadequately, briefed."). Even Schaffhausen's conclusory statement that the evidence was "more relevant to guilt than to sanity," Schaffhausen's brief at 12, falls short of an assertion that the evidence was not relevant. To the contrary, it is a tacit admission that the evidence was relevant in the responsibility phase.

In assessing Schaffhausen's request for a new trial in the interest of justice, therefore, the court should disregard his wholly unsupported assertion that the trial court improperly admitted evidence. That leaves his argument that the real controversy was not fully tried because "the State's case was focused in large part on convincing the jury it did not need the opinion of any expert doctor to decide legal sanity" and that the court "sent a not so subtle message the State's argument was correct" when it told the jury that it could decide whether the defense doctor was an expert. *See* Schaffhausen's brief at 12. There are several flaws in that argument.

First, as discussed above, no reasonable juror would have interpreted the court's instructions as giving the jury permission to ignore the experts' testimony. *See supra*, pp. 10-11.

Second, Schaffhausen snatches a few words out of context from the prosecutor's fifty page closing argument. The prosecutor's statement that Schaffhausen quotes about the jury's ability to find legal sanity "without the opinions of doctors" appears in the following portion of State's closing argument:

> On the evidence in this case I -- there just can't really be any doubt that revenge and anger motivated him to commit these crimes, not mental illness. And we -- it's clear, he told you himself, he told -- he told other people, through witnesses he told you, the doctors and these witnesses, that it was to punish J[.] for rejecting him, to make her suffer for the rest of her life. Well, mission accomplished. And notice that the form of revenge he chose hurt all the other people that he thought about killing. It hurt people she cared about, J[.], her family. They've all lost something as a result of this. He chose his revenge well. He accomplished all of his goals.
>
> *Even without the opinions of doctors or any other evidence in the case, that alone would allow you to conclude that it was revenge and not mental illness or defect that explains why he chose to do what he did*, because a person who acts for a reason to, in his words, solve a problem, whatever that problem might be, is not a person who is out of control. It's a person who is in control of their conduct, because the conduct is the product of his thought process. The conduct is exactly what he's thinking about doing and for the reason he's thinking about doing it. The person acted -- in this case, the defendant acted in order to achieve a goal; and that is pretty much the definition of capacity to conform your conduct to the requirements of law. And on that basis alone, you'd be justified in answering those verdict questions no.

(529:2552-2553) (emphasis added).

Read in context, the prosecutor was not urging the jury to ignore the defense expert. Rather, the prosecutor was arguing that even without the opinions of the experts *who supported the State's position* the jury could conclude, based

on the other evidence, it heard that Schaffhausen's acted out of anger and desire for revenge, not because he was mentally ill.

Schaffhausen similarly fails to provide any context for the other snippet of the prosecutor's argument that he cites. He states that the prosecutor argued that the "jury could find sanity 'no matter what any doctor said. They could bring in ten doctors. . . .'" Schaffhausen's brief at 12 (quoting 529:2566).[6] The prosecutor's remarks appear in this part of the State's closing argument.

> Please don't be fooled into thinking these were all just random acts. This was controlled, purposeful conduct. And, again, at this stage, before we even hear from the doctors, knowing what you know about his stated intentions to harm the children, and knowing what you know about the full -- the full spectrum of the evidence, that would be enough *no matter what any doctor said. They could bring ten doctors in, and you would be within your rights to say on the rest of the evidence, no, not legally insane*. He knew what he was doing just based upon what we know about what he did.
>
> But, of course, there is more evidence of his sanity. Now, the only evidence that they've brought in here really is the testimony of Dr. Meloy. But his opinions are not credible, and I'll tell you why, there are three basic reasons. One is his theory makes no sense, and I'll develop this for you in just a moment. Second, even if it made sense, his theory does not fit the evidence in the case; and, third, Dr. Meloy is not credible because he attempted to mislead you.

[6]Schaffhausen's brief cites to 529:2573, but the correct citation is 529:2566.

(529:2566) (emphasis added). The prosecutor then discussed Dr. Meloy's opinions at length and explained why he believed that the jury should find those opinions not credible (529:2566-2578).

Read in context, the prosecutor's comments cannot reasonably be viewed as a suggestion that the jury simply ignore the defense expert's opinions. If that were the State's argument, the prosecutor would not have spent more than twenty pages of transcript attempting to persuade the jury that Dr. Meloy's opinions were not credible.

Third, Schaffhausen's argument implies that the prosecution's argument somehow misstated the law. He provides no legal authority for that proposition, however, and the court could reject it on that basis alone. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be considered."). More importantly, the prosecutor was correct. Expert testimony is not legally required in all NGI cases, *see Magett*, 355 Wis. 2d 617, ¶¶41-48, and even when there has been expert testimony, a jury may reject it, *see Weber v. Chicago & Nw. Transp. Co.,* 191 Wis. 2d 626, 636, 530 N.W.2d 25 (Ct. App. 1995).

Schaffhausen notes in passing that the trial court denied the jury's request for a definition of "catathymia." *See* Schaffhausen's brief at 12. However, he does not provide any argument in support of his implicit contention that the court erroneously exercised its discretion when it responded to that request by instructing the jury "to rely on your collective memory" (529:2610). The court should disregard this undeveloped argument. *See Flynn,* 190 Wis. 2d at 39 n.2.

An appellate court will exercise its discretion to grant a new trial in the interest of justice "'only in exceptional cases.'" *Cleveland*, 237 Wis. 2d 558, ¶21 (quoting *State v. Cuyler*, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983)); *see also State v. Avery*, 2013 WI 13, ¶¶38, 57, 345 Wis. 2d 407, 826 N.W.2d 60 (reversing the court of appeals' grant of a new trial in the interest of justice because the fact that the jury did not hear exculpatory scientific evidence did not make the case "a truly exceptional one"). This is not such a case.

CONCLUSION

For the reasons stated above, the court should affirm the judgment of conviction.

Dated this 17th day of March, 2015.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,743 words.

_____
Jeffrey J. Kassel
Assistant Attorney General

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I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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Dated this 17th day of March, 2015.

_____
Jeffrey J. Kassel
Assistant Attorney General

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2014AP2370-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

AARON SCHAFFHAUSEN,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE ST. CROIX COUNTY CIRCUIT COURT, THE HONORABLE HOWARD W. CAMERON, PRESIDING

SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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APPENDIX CERTIFICATION

I hereby certify pursuant to Wis. Stat. § (Rule) 809.19(3)(b) that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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Dated this 17th day of March, 2015.

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