STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2017AP837-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAKOTA R. BLACK,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE DANE COUNTY CIRCUIT COURT, THE HONORABLE STEPHEN E. EHLKE, PRESIDING

BRIEF AND APPENDIX OF THE PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUES

1. Did the defendant have a constitutional right to present a defense with no basis in fact?

   The circuit court concluded that the right to present a defense does not include the right to present a possible alternative theory not supported by the facts.

2. Did the circuit court err in not conducting a *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), hearing before ruling on the defense's motion in limine and admitting the State's expert evidence?

   The circuit court did not conduct a pre-trial *Daubert* evidentiary hearing, but concluded that the State's experts were qualified and could offer their opinions so long as the proper foundation and qualifications were presented during trial.

3. Did the circuit court err in overruling the objection to rebuttal testimony on how to identify a spanking injury, an issue raised by the defense during the State's case-in-chief?

   The circuit court concluded that the State's narrowly identified topic of identification of spanking injuries was proper rebuttal testimony.

4. Did the circuit court err in denying without a hearing the claims that trial counsel was constitutionally ineffective?

   The circuit court concluded that no hearing was necessary because even if counsel performed deficiently, the defendant suffered no prejudice.

5. Even though there were no reversible errors, should this Court grant a new trial in the interest of justice?

   The circuit court considered and denied Black's request for a new trial in the interest of justice. He

does not challenge that determination, and instead appeals to this Court's authority under Wis. Stat. § 752.35.

6. Alternatively, if the circuit court did err, was the error harmless?

   This Court should conclude that any error was harmless in light of the multitude of injuries that were indicative of abuse.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. Publication may be appropriate pursuant to Wis. Stat. § (Rule) 809.23(1)(a)3. to clarify whether the State can present a rebuttal witness to discredit an implication raised by the defense during the cross-examination of a State's witness.

INTRODUCTION

This case is best defined by what it is not. It is not a shaken-baby case. It is a case of physical abuse that resulted in a severe brain injury and more than 50 other injuries to a child's body. That abuse was not identified as shaking, or a force synonymous with shaking. It was identified as blunt force trauma.

The conviction is not based on weak evidence. This is a circumstantial evidence case. But there was no reasonable doubt that this child died as the result of physical abuse.

The defense has concentrated on the child's brain injury to divert attention from the other physical evidence and discredit medical opinions. That effort ignores the totality of the injuries, which were indicative of abuse. The defendant received a fair trial. There was no miscarriage of justice, and the conviction should be affirmed.

SUPPLEMENTAL STATEMENT OF THE CASE

On a cool October day, five-year-old Bobby[1] came home from kindergarten and was left in the care of his mother's boyfriend, Dakota Black. When Bobby's mother got home from work, she discovered Bobby on his bed, barely breathing, and unresponsive. Two days later, Bobby died from a severe brain injury.

I. An overview of Bobby's medical treatment from the time of the paramedic response to the time of his death.

The afternoon of October 22, 2013, Sun Prairie police officers were assigned to respond along with Sun Prairie EMS to an unconscious child who was having difficulty breathing. (R.1:2.) Christopher Kaiser, one of the paramedics, arrived at Black's home around 4:27 p.m. and was told that the child was in the basement. (R.186:47.) He went to the basement and found Bobby lying on the floor. (R.1:2; 186:47, 53.)

Bobby was unresponsive. (R.186:49.) His eyes were open, but he was not responding to stimuli. (*Id.*) He was not breathing properly, his jaw was involuntary clenched, and he had secretions in his airway. (R.186:49, 55.) He had marks on his chest and bruising around his buttock. (R.186:50-51.)

Dr. Adam Tuite was the receiving doctor at the St. Mary's Sun Prairie Emergency Center. (R.186:69-70.) Tuite noted bruising to Bobby's ear, across his chest, and to his legs. (R.186:72.) He observed an ominous sign of brain swelling, and ordered a scan, which revealed evidence of a

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[1] Bobby is a pseudonym to protect the identity of the victim and his family.

subdural hemorrhage on both sides of the brain. (R.186:77-79.) Bobby was intubated, given a drug to try to reduce the swelling, and airlifted to Children's Hospital at the University of Wisconsin Hospital. (R.186:80-81.)

Doctors at Children's immediately operated and removed part of Bobby's skull to relieve the pressure on the brain. (R.186:124-25.) But after the surgery, Bobby's brain was not receiving blood flow; it would be unable to heal and would die. (R.186:104.) Early morning on October 24, Bobby's blood pressure dropped rapidly, he was removed from life support, and he passed away. (R.186:107-08.)

II. The investigation into Bobby's injuries and death.

Officers Brain Waldera and Michael Hartman responded along with Sun Prairie EMS to the emergency call. (R.1:2.) Bobby's mother, Sharon,[2] told Waldera that she did not know what happened. (R.186:162-63; 1:2.) She had arrived home from work around 4:20 p.m., went downstairs to use the bathroom, and found her son in the basement on his bed. (R.1:2; 186:63.) Bobby was having difficulty breathing, she thought he was having a seizure, and she called 911. (R.1:2.)

After Bobby was placed in the ambulance, Waldera helped Sharon get situated in the front seat so she could ride with Bobby to the emergency center. (R.186:165.) As Waldera was about to close the door, Black came up to Sharon and appeared to want to give her a hug or say something to her. (*Id.*) Sharon responded by saying: "Are you kidding me right now? My son's not breathing. Get the F[uck] away from me." (R.186:166.)

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[2] Also a pseudonym.

After the ambulance left, Waldera spoke with Black. (R.1:2.) Black said that Bobby got a ride home from the homeowner, Patricia, after school. (*Id*.) She had picked him up from the bus stop and arrived home around 3:15 p.m. (R.186:167.) Bobby looked like he had been crying, so Black asked him if he was alright. (R.1:2.) Black said Bobby told him that nothing was wrong and asked if he could go play at a friend's house. (*Id*.) Black approved and Bobby left, but he came back a few minutes later because his friend was not home. (*Id*.) Black said Bobby then asked to go downstairs and lie down. (*Id*.) Black approved and said that was the last time he saw Bobby until after Sharon came home. (R.186:167-68.)

Waldera later accompanied Black outside while Black smoked a cigarette. (R.186:169.) Black asked: "Do you think I did anything to the kid?" (*Id*.) Waldera told Black that the focus was to find out if there was any medical concerns or anything that could help attend to Bobby. (R.186:169-70.)

Waldera also spoke with the homeowner, Patricia. She said that Sharon, Black, Bobby, and the infant son of Black and Sharon moved into Patricia's home the month before. (R.1:3.) That day, she had picked up her children, Bobby, and Dylan,[3] a friend of the family, as they were walking home from the bus stop. (*Id*.)

Patricia then took her children to pick up Sharon from work and left Bobby and Dylan with Black. (*Id*.) Patricia estimated that she was gone for 30 to 40 minutes. (*Id*.) When they returned home, both Patricia and Sharon had to use the bathroom. (*Id*.) Patricia went upstairs and Sharon went downstairs. (*Id*.)

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[3] Also a pseudonym.

When Patricia came out of the bathroom, she went to the kitchen and heard Black come up from downstairs. (*Id.*) He asked if he could use her phone. (*Id.*) She was reluctant to give Black the phone; he did not seem panicked and she had doubts about his past behavior. (R.177:13.) Patricia then heard Sharon yell "I need you," so she went downstairs and saw Bobby on the floor and Black on the phone. (R.1:3.)

Officer Jeremy Rademacher was asked to take a statement from Black around 5:45 p.m. (R.186:176-77, 185-86.) Black did not appear to be upset in any manner: he was calm, flat, and emotionless. (R.186:187.) Rademacher specifically asked if there were any falls or roughhousing, and Black said there was not. (R.186:181.)

Black thought Bobby was downstairs for maybe 30 to 45 minutes before Sharon got home. (R.186:180.) He said he followed Sharon downstairs to talk to her about her day. (R.186:181.) When Black was walking down the stairs, he heard Sharon say: "Wake up. Oh my God." (R.186:182.) Black saw her leaning over Bobby, shaking him, trying to wake him up. (*Id.*)

Officer Hartman spoke with Sharon at the emergency center. (R.1:2.) Sharon said that when she was walking down the stairs she heard "gurgling noises." (*Id.*) When she walked into the living room area, she saw Bobby lying on his bed making those noises. (*Id.*) Sharon thought Bobby might be having some sort of seizure. (*Id.*) She could not wake him, so she had Black call 911. (*Id.*) When Hartman asked about the bruises to Bobby's chest, Sharon said she did not see any marks on Bobby's chest that morning when she helped dress Bobby for school. (R.1:2-3.)

Detective Michael Wilson was assigned to the investigation. (R.1:3.) He went to Children's Hospital and spoke with Dr. Barbara Knox, a board certified child abuse pediatrician. (R.187:80-81.) Knox met Bobby when he

arrived at Children's and stayed with him until Bobby was admitted into intensive care. (R.187:83.) When Knox first observed Bobby, she was concerned about the patterns of diffused bruising on his body. (R.187:95.) She observed Bobby's operation and told Wilson that Bobby suffered a massive injury to his brain and would likely not survive. (R.1:3.)

Wilson and Knox spoke with Sharon and asked about the marks on Bobby's chest. (*Id*.) Sharon said she saw the "marks all over his chest," and those marks were not there when she dressed Bobby that morning. (*Id*.)

Later that evening, Knox examined Bobby and informed the police that Bobby had a bilateral subdural hemorrhage, a massive intracranial injury with a possible 6 mm shift of the midline, which was indicative of violent shaking or impact to his head. (*Id*.) Knox believed the injury would have immediately incapacitated Bobby. (*Id*.) He would have been incapable of walking, talking, and playing and would have been dazed and confused causing him to "go down immediately." (*Id*.)

Detective Frank Smith interviewed Black around 10:10 p.m. at the police department. (R.186:200-01.) When asked how Bobby got hurt, Black said "I don't know but the way he is . . . on my watch." (R.1:4.) When asked what that meant, Black said "you know what that means;" "whatever happened," it happened "on my watch" and "I am responsible." (*Id*.) Black, however, denied hurting Bobby in any way. (*Id*.)

Dylan was interviewed on October 23. (R.190:5-7; 125.) Dylan explained that he had seen Bobby after school on

October 22. (R.125:16:39:30-37.)[4] Dylan said that Patricia picked Bobby and him up and drove them to her house. (R.125:16:40:30-41:22.) Dylan said that he and Bobby went to see if a neighbor boy was home, and when he wasn't home, they walked back to Patricia's house. (R.125:16:50:25-57.) Dylan heard Black ask Bobby to talk in the living room. (R.125:16:51:07-15, 16:58:25-38.) Dylan rode his bike around the cul-de-sac a few times and returned to Patricia's house. (R.125:16:45:30-45:50.) Dylan then heard Black ask Bobby to talk in the basement. (R.125:16:46:00-13.) He saw Bobby walk in front of Black and start to walk down the stairs holding the railing, and then Black told Dylan that he could either stay or go home. (R.125:16:46:10-22, 16:59:30-57.) Dylan saw Black start to walk down the stairs and close the door behind him. (R.125:16:59:57-17:00:25.)

Dr. Kristin Roman performed an autopsy on Bobby on October 25. (R.187:7.) Roman told Detective Wilson that Bobby's death was a homicide as a result of blunt force trauma to the head. (R.1:4; 187:15-16.) In her opinion letter, Roman explained: "In addition to head injuries, [Bobby] also had forty seven contusions and two abrasions, distributed over his face, behind his right ear, on his torso, and on his extremities." (R.115:4.) "Internally, he had a contusion of his omentum, which is tissue that covers and protects the intestines in the abdomen." (*Id.*) "These injuries are not distributed in a pattern that is consistent with having been sustained from a fall . . . . They are distributed over multiple separate areas of the body, including protected areas." (*Id.*) "They are more consistent with multiple impacts, either from striking or grabbing the child." (*Id.*)

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[4] The pinpoint citation is to the time date stamp located on the recording.

On November 7, Dr. Knox completed her report. (R.1:4.) Knox memorialized her findings that Bobby suffered bilateral subdural hemorrhages and a midline shift of the brain. (*Id*.) She also noted that there were multiple contusions on Bobby's body including concerning loop mark injuries. (*Id*.) Knox concluded that the combination of injuries was diagnostic of child maltreatment. (*Id*.)

On November 13, the State filed a criminal complaint charging Black with first degree reckless homicide. (R.1.)

III. Relevant pre-trial litigation.

A. The defense's short fall theory and the exclusion of the playground fall possibility.

The theory of defense was that Bobby suffered accidental trauma during a fall and had a period of lucidity before succumbing to his injuries. (R.182:25-40.) The defense offered two possibilities: Bobby fell on the playground or fell down the stairs leading to the basement. (*Id*.)

The defense was allowed to present the stairway fall possibility, but not the playground fall possibility. (R.182:42-44.) Two of Black's experts, Drs. John Plunkett and Chris Van Ee, had noted that there was a witness that alleged that Bobby fell from the monkey bars at school that day. (R.52:2; 53:2.) During the hearing on the State's motion to exclude the short fall theory, the State argued that the testimony relating to Bobby's alleged fall on the playground should be excluded because there was no reliable evidence that Bobby fell at all, let alone fell and injured his head. (R.67; 182:15.) The defense argued there was a basis in fact because Patricia's five-year-old daughter Neema[5] said that Bobby fell from the monkey bars that day. (R.182:16, 19-20.) The State

[5] Also a pseudonym.

clarified that Neema actually said that Bobby fell to his knees, and there was no mention of Bobby hitting his head. (R.182:21.)

The court initially concluded that there was no good-faith basis for alleging that Bobby suffered a head injury on the playground and such an opinion would confuse the issue. (R.182:21-22.) The court also concluded that Neema's statement was insufficiently reliable for an expert to opine that the fall described could have resulted in Bobby's injuries. (R.182:42.) The court concluded that Neema's answers were "very equivocal" and that she was trying to give a possible explanation for why Bobby was sad. (*Id*.) She never suggested that Bobby was hurt. (*Id*.)

The court also concluded that the extended period of lucidity necessary for Bobby's injuries to have occurred at school was different in nature from the defense experts' post-accident lucidity theory. (R.182:42-43.) The court reasoned "the monkey bar thing is too speculative at this point," and ruled that this "possibility argument" was nothing more than a straw man. (*Id*.)

Black moved for reconsideration and another hearing was held. (R.78.) During that hearing, the State argued that there was no supplemental information that should cause the court to alter its original conclusion. (R.183:3-6.) The court agreed and concluded that the defense needed some fact to support its argument that Bobby may have died from injuries on the playground. (R.183:8-9.) It reiterated that "the defense is not entitled to simply . . . throw out ideas or possibilities [that] something happened without . . . some tether . . . to support that possibility." (R.183:8.) The court concluded that even if it accepted Neema's statement as true and accurate, it did not provide a tether because she never mentioned a serious fall. (R.183:8-9.) "There's just nothing there that would support a position that this injury occurred by falling off of the monkey bars." (R.183:9.)

B. Black's challenge to the State's medical experts.

Black filed four motions in limine requesting that the circuit court prohibit: 1) "opinion testimony from medical personnel . . . as to cause of death or timing of injures" unless a *Daubert* hearing was held; 2) "opinion from testimony from Wilbur Smith that the child suffered from 'abusive head trauma'" unless the State established that abusive head trauma is "a specific 'medical diagnosis', . . . and that the witness is qualified to offer such an opinion;" 3) "expert testimony [that Bobby] suffered shaken baby syndrome;" and 4) "expert testimony from Dr. Knox on the issue of whether the injury . . . would have been immediately debilitating" or from any other expert without a showing that the "witness is credentialed and qualified." (R.70:4.)

Argument was held on the motions. (R.182:55-63.) Both parties agreed that testimony on shaken baby syndrome was inappropriate and motion 3 was granted. (R.182:56, 63.)

The State argued that motions 1 and 2 were interconnected, and that it was within the purview of a pediatrician "boarded in the subspecialty of child abuse" to opine as to the timing of onset of symptoms. (R.182:57.) The State noted such opinions have been routinely admitted and explained that abusive head trauma is an opinion whether the trauma is inflicted or accidental based upon a clinical evaluation and investigative facts. (R.182:57-59.) The State argued that while the nomenclature has changed within the pediatrics community to recognize shaken baby syndrome as a subset of abusive head trauma, that change does not "preclude a board-certified pediatrician from rendering an opinion" based upon her experience and training. (R.182:57-58.)

On motion 2, the State argued that Dr. Smith is one of only four or five people board-certified in pediatric neuroradiology and is uniquely qualified to render an opinion on abusive head trauma. (R.182:58.)

The court concluded "on *Daubert* grounds and based on the argument I've heard, Numbers 1 and 2 are denied." (R.182:60.) But "[t]he rules of foundation and qualifications and bases for opinions apply on both sides. They'll also continue to apply . . . . " (R.182:61.) The court then advised defense counsel to raise an objection at trial if the State failed to lay an adequate foundation. (*Id.*)

As to motion 4, the State argued that both Drs. Knox and Smith have board certifications that would allow them to opine on when Bobby would have been symptomatic of his injuries. (R.182:61-62.) Both have "looked at children who have been injured for their entire career with all kinds of past clinical history presented to them" and both have "an experimental basis and a research basis" to render such an opinion. (*Id.*) Defense counsel disagreed as to Knox and argued that she did not have the proper neurology background to form such an opinion. (R.182:62.)

The court denied motion 4, concluding that when "you get into the degrees hanging on the wall . . . that doesn't mean that one with one less degree can't offer an opinion under the Rules of Evidence." (R.182:62-63.) Rather, the amount and types of degrees went to the weight of the opinion, which is determined by the jury. (*Id.*)

IV. Relevant trial testimony and objections.

A. Testimony and argument relating to the playground fall theory.

During trial, the State presented a schoolyard proctor who testified that she did not see Bobby play on any playground equipment during lunch recess on the day he

was injured. (R.187:240.) The defense argued that the State opened the door for the defense to present the statement that Neema saw Bobby fall from the monkey bars. (R.189:4-6.) The court reserved its ruling, but said "I'm not likely to allow it because its relevance, if any, is certainly outweighed by its potential to confuse the issues here." (R.189:6.) The court went on to explain that "there's no evidence" to support that "he fell in a situation where the bruising could have been caused on his torso." (R.189:6-7.)

B. The exclusion of Dr. Plunkett's short fall video.

The defense wanted to play a short video that it believed would illustrate Dr. Plunkett's short fall theory. (R.190:32.) The video, Case Study Number 5, depicted a fall by a toddler off a plastic gym set onto a concrete floor. (R.133:10; 192:91-92, 131-32.) The defense sought to admit the video under the learned treatise exception. (R.192:92.) The court excluded the video on grounds that while "otherwise inadmissible evidence may be relied on by an expert if it's the type that is normally relied on by an expert in his or her field," "the underlying data itself is not admissible unless it fits within a recognized exception . . . to a hearsay . . . problem, or is otherwise admissible under the evidentiary code." (*Id.*)

The court went on to explain that the videotape itself was not admissible because: the person who took the video was not available for cross-examination; there were limited details about the taking of the video or what it depicts; the video probably included an element of hearsay subject to no exception; and Black had not made the case that the video's probative value substantially outweighed its prejudicial effect. (R.192:92-93.)

While the court excluded the video, it clarified that "[t]he expert can certainly testify that, 'I've studied case

studies . . . I've watched the film.'" (*Id.*) Plunkett testified about Case Study Number 5, the video, and how it played into his lucid interval theory. (R.192:131-32, 215, 217-18.) Plunkett's research article on Case Study Number 5 was admitted into evidence. (R.133.) Additionally, Case Study Number 5 was discussed at length during Dr. Van Ee's testimony. (R.193:123, 127-32.)

C. Drs. Knox's and Smith's opinion that Bobby suffered from abusive head trauma.

Dr. Knox opined that Bobby's "injuries were the definite result of inflicted child abuse . . . consistent with abusive head trauma." (R.187:97.) Her opinion was based on a review of the head CT, the diffuse swelling, and the "constellation of findings" and "types of injuries" present on Bobby's body that were inconsistent with accidental injuries. (R.187:104-07, 130.)

Dr. Smith opined that Bobby's injuries were abusive and not accidental because the explanation given for the injuries was inadequate to explain the degree of injury. (R.192:24, 37-38.) Smith explained that he did not believe that "the bruising in the body or the ear [were] related directly to the brain injury." (R.192:65.) But, his opinion that the brain injury was not accidental took those injuries into account. (R.192:66.) "[T]hey're related to the etiology of the brain injury. In other words, I believe that this child suffered multiple injuries prior to the critical injury that killed him." (*Id.*)

D. Drs. Knox's and Smith's opinion that Bobby did not experience a significant lucid interval.

During cross-examination, defense counsel asked Dr. Knox if, in her opinion, Bobby could have experienced a lucid interval and what that opinion was based upon. (R.187:167.)

Knox testified that based upon her training, experience, and review of the literature, she believed that Bobby did not have a lucid interval after his injury. (R.187:167-68.) Bobby's bleed was a significant subdural bleed, not an epidural bleed, and there was significant brain swelling. (R.187:169.) "[I]t's not the presentation that we see with lucid interval." (*Id.*) Knox admitted that a lucid interval can occur with a subdural bleed, but then clarified that it could occur with a slow-growing subdural bleed, which was not the case here. (R.187:169-70.)

When asked if there was a "wide difference of opinion" regarding lucid intervals within the "scientific community," Knox responded that the "mainstream medical population" is not in disagreement and "absolutely would not agree with many of the conclusions that have been drawn by Dr. Plunkett." (R.187:171.)

Dr. Smith expressed a similar opinion. Smith testified that Bobby's injury was so severe that there was "no significant latent interval." (R.192:25.) He explained Bobby's injury as one that resulted in a "massive hemorrhage" and blood occupying both the subdural and subarachnoid space. (R.192:31-32.) The occupation of the subarachnoid space was significant to the latent interval question, because that type of bleed causes immediate symptoms. (R.192:32.)

Smith clarified that "[l]ucid interval is an old term that was originally used to describe epidural hematomas" and talking about a lucid interval with a subarachnoid hemorrhage is "improper terminology." (R.192:83-84.) He explained that with subarachnoid bleeds, there is no latent period between the time of the bleed and the appearance of symptoms. (R.192:84.) "It's interval to symptoms that should be talked about. And if you have a subarachnoid hemorrhage, you are gonna have symptoms right away." (*Id.*)

Smith was also asked about lucid intervals with a subdural hemorrhage. (R.192:86.) Smith explained that a latent period is possible with a subdural bleed, but very uncommon because in the case of a slow subdural hemorrhage, "99.9 percent of the time it clots and just stops and stays small." (R.192:86-87.)

E. The State's experts' opinions that Bobby's injuries were not the result of a short fall.

Drs. Roman, Knox, and Smith all testified to their opinion whether Bobby's head injury could have resulted from a short fall.

Roman opined that "[a]lthough he may have traveled a short distance or traveled downstairs, I don't believe it's an accidental fall that made him land." (R.187:16.) On cross-examination Roman was asked how she could "eliminate that possibility." (R.187:69.) Roman explained that "[s]hortfalls generally don't cause big subdural hemorrhages like this, usually you need more impact and more focus to cause that; so that's the first thing." (*Id*.) More importantly, however, "looking at [Bobby]'s entire body there are injuries that are not consistent with a shortfall, and you cannot separate the injuries; they're all one thing." (*Id*.) She testified: "[i]f you're just looking at subdural hemorrhage in a vacuum, you're ignoring the evidence." (*Id*.)

Knox's opinion was similar. She reviewed the dimensions of the stairway and the type of flooring and came to the conclusion "that this degree of injury that this child had in totality was not consistent with a shortfall." (R.187:186.) Knox testified that current literature suggests that short falls generally are not fatal to children unless there is an underlying disorder, such as a bleeding disorder that "would cause [a] lesser injury to stimulate profound bleeding." (R.187:130-31.) Thus, fatalities from short falls are "[e]xtremely rare" and more typically associated with

epidural bleeding. (R.187:131.) Knox ruled out a short fall because the findings of blunt force trauma by multiple mechanisms were definitely indicative of physical abuse. (R.187:130-31.)

Knox was familiar with Dr. Plunkett's articles on short falls. (R.187:165-66, 170.) When asked on cross-examination if the literature suggests that "one can suffer a shortfall with a subdural hematoma," Knox noted that Plunkett came to that conclusion but she, and many other child abuse pediatricians, disagreed due to the flaws in Plunkett's study. (R.187:171.)

Smith also opined that Bobby's injuries could not have resulted from a short fall or fall down a carpeted staircase. (R.192:25.) The type and magnitude of Bobby's injuries were inconsistent with a short fall. (R.192:57-58.) Smith testified "[t]here are about seven really good studies of short falls" that have "independent observation." (R.192:56-57.) They consistently show that about 1 in 100 children will suffer a skull fracture from a short fall, but fewer than 1 in 10,000 will have a definable intracranial injury. (R.192:57.) In those cases, the injury is a small cranial contusion. (*Id.*) He explained that the problem of studies without independent observation, like Plunkett's, is that there is no way to confirm the actual cause of injury. (R.192:58.)

Smith did testify that "you certainly can get what are called venous epidurals with short falls. They're rare. They're very, very rare. But you can get 'em." (R.192:60.) He also agreed that one could suffer a subdural hematoma after a short fall, but it is unlikely. (*Id.*) On redirect, Smith testified that while a short fall could cause death, it is "very, very rare." (R.192:81.) And in this particular case, there were too many injuries that were too severe to be attributed to a short fall. (R.192:82.) Like Drs. Knox and Roman, Smith considered all of Bobby's injuries in reaching his conclusion. (*Id.*)

F. Drs. Knox's and Smith's opinions regarding the force exerted to cause Bobby's injuries.

The State asked Dr. Knox if she had an opinion on whether Bobby's injuries could be explained by an adult picking up a five-year-old child and forcibly throwing him onto a mattress. (R.187:101.) Knox responded: "Sure." Defense counsel challenged the basis for Knox's opinion on cross-examination. She testified that there has never been a study about the amount of force needed to sustain a blunt force head injury in a child because "no institutional review board is ever going to approve doing that to children." (R.187:177.) Thus, opinions as to the amount of force needed are based on clinical experience and what the parent identifies as the source of the injury. (*Id*.)

When asked whether another discipline could ascertain the amount of force, Knox testified that even biomechanical models "are not done on living children" and thus not completely accurate. (R.187:177-78.) Knox testified that "the type of force . . . used on . . . children[ ] to produce this degree of injury is massive force. Unquantifiable in living children, because we're never going to study it." (R.187:179.) She then explained that "it's nothing that occurs in any normal play, normal child's care, et cetera. Because think about it, kids fall all the time." (*Id*.)

Dr. Smith opined that Bobby's injury was the equivalent of a 35-40 mile-per-hour unrestrained vehicle accident. (R.192:27, 37.) His opinion was based upon three elements of Bobby's brain injury: "the brain swelling, which causes the herniation, both transfalcine and through the foramen magnum;" "the subarachnoid hemorrhage, which causes what's called vasospasm;" and "the subdural bleeding." (R.192:37-38.)

Smith also opined that Bobby's injury could not be the result of a slip and fall down the stairs because he would

have hit multiple stairs on the way down. (R.192:38.) That meant Bobby would have experienced a series of small falls and accelerated very differently. (*Id.*) However, if "somebody considerably bigger than [Bobby] propelled him and threw him so he missed the stairs and hit the floor, that's possible." (*Id.*)

Smith also opined that due to the difference in body mass, Bobby's head injury could have been the result of an adult throwing him onto a lightly padded piece of furniture. (R.187:42-43.)

Like Knox, Smith agreed that the force determination cannot be adequately studied, and thus, is not infallible. (R.187:69.)

G. Drs. Roman's and Knox's opinions regarding the identification of spanking injuries, and Dr. Frasier's rebuttal testimony.

During the cross-examination of Dr. Roman, defense counsel asked: "When someone is spanked, let's say, with a bare hand . . . is it possible to have that sort of injury, or . . . would you see, rather, a bigger bruise because of . . . the size of the hand?" (R.187:52-53.) Roman answered *from her personal experience* that "these are probably not from spanking, they're from being struck and being poked or grabbed, not spanked with a flat hand." (R.187:53.)

The next witness to testify for the State was Dr. Knox. The State showed a picture of Bobby's buttock, and Knox testified that "the key bruise to look at right here is this vertical striped pattern bruise coming right along the gluteal cleft region on this right buttock. Because . . . that demonstrates to me that this is consistent with high velocity, sheer injury from repeated spanking." (R.187:120.) She went on to testify: "It's well published in the literature, that when you spank a child horizontally . . . repeatedly . . . the butt

cheeks . . . sheer . . . against each other." (*Id.*) Due to the sheering action, "you having this vertical striped pattern . . . that occurs right along the butt cheek." (*Id.*) It was Knox's opinion that the bruising to the buttock was a "spanking related injury." (R.187:121.)

Dr. Lori Frasier, a child abuse pediatrician, was called during the State's rebuttal. (R.194:243, 245.) She testified to how a spanking injury can be identified. (R.194:254.) She did not offer an opinion on whether Bobby's injuries were consistent with spanking.

Defense counsel objected to Frasier's testimony, arguing it was improper rebuttal testimony. (R.194:252.) The State explained that it would use Frasier to rebut the inference raised by the defense during the cross-examination of Roman that bruising on the buttock was inconsistent with spanking. (R.194:252-53.) Frasier would testify on how one identifies a spanking injury. (R.194:252.) The court concluded that the State's narrowly identified area was proper rebuttal testimony. (R.194:254).

Frasier testified that "when children are struck across their buttock horizontally, and there are bruises going horizontally, there's often bruises in the gluteal cleft or where your butt cheeks come together." (R.194:255.) To identify a spanking injury, a doctor should "gently pull the butt cheeks apart" and look for striations perpendicular to any horizontal bruising. (*Id.*) Those striations disappear rather quickly. (R.194:256.) So, if a child is examined "two or three days later, often we don't see them or they're highly faded." (R.194:256-57.)

V. Relevant postconviction litigation.

Black filed a postconviction motion with a multitude of claims including, allegations of ineffective assistance of counsel. (R.166.) The parties briefed the issues and the

circuit court denied Black's motion after argument and without an evidentiary hearing. (R.167 to 172.)

At the non-evidentiary hearing, the circuit court ask for clarification of Black's argument that counsel failed to disclose and use more learned treatises specific to shaken baby syndrome. (R.197:4.) Postconviction counsel clarified that "[t]here are many other learned treatises that go to attack the causation conclusions that it's nonaccidental [sic]." (R.197:4.)

The court concluded that it was not deficient for counsel not to include learned treatises about shaken baby syndrome because that was not the theory of the State's case. (R.197:7-8.) "No one was saying that it was anything other than blunt force trauma that killed the young boy. Even Dr. Plunkett agreed that that cause of death was blunt force trauma." (R.197:8.)

Regarding articles that "further support or buttress Dr. Plunkett's testimony or other defense experts," the court concluded that even assuming it was deficient for counsel not to include such articles, there was no probability that counsel's failure "undermined confidence in the outcome." (*Id.*) "The defense was able to put in their theory of the case and explain why from the defense perspective the short fall could have caused this." (R.197:8-9.) "I don't find there would be any prejudice by the failure to have, you know, some more articles supporting that theory." (R.197:9.)

Black also argued that counsel was ineffective in failing to impeach Patricia's trial testimony that she first observed Bobby on his bed and tucked in under blankets. (*See* R.189:97.) He noted that one detail report indicated that "Patricia stated that when she went downstairs and saw that [Bobby] was now on the floor and Dakota was on the phone" (R.167:51), and that another report noted that, "Patricia advised that when she got down the stairs . . .

[Bobby] was laying on the bed with his head near the pillow and that [Sharon] was either sitting or somewhat kneeling over the side of the bed attending to him." (R.167:53.)

Black argued that not challenging her trial testimony with her prior statements was prejudicial because if Bobby fell down the stairs "it would have been impossible (or at least highly unrealistic) that he could have then lay down on the bed and tucked himself in with the blanket." (R.167:9-10.)

The circuit court disagreed and concluded that Black was not prejudiced. (R.197:12-14.) "[I]t would [not] have advanced the defense case substantially because the defense case already allowed for the little boy being able to get up off the floor and get on the bed. So even if it was [deficient] not to impeach with that one inconsistency, I don't think it would have changed the outcome of this case." (R.197:14.)

STANDARDS OF REVIEW

Whether the exclusion of evidence violated a defendant's constitutional right to present a defense is a question of law reviewed de novo review. *State v. Dodson*, 219 Wis.2d 65, 69-70, 580 N.W.2d 181 (1998).

The admission or rejection of evidence, including expert testimony and rebuttal testimony, is within the trial court's discretion and reviewed for an erroneous exercise of discretion. *See Seifert v. Balink,* 2017 WI 2, ¶¶ 92-93, 372 Wis.2d 525, 888 N.W.2d 816; *State v. Novy*, 2013 WI 23, ¶ 21, 346 Wis.2d 289, 827 N.W.2d 610.

Whether Black sufficiently pled his claim of ineffective assistance of counsel to trigger 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. This Court must first determine if Black alleged sufficient facts that, if true, would entitle him to relief. This is a question of law and is

reviewed de novo. *Id.* "If the motion fails to allege sufficient facts, the trial court has the discretion to deny the motion without an evidentiary hearing." *State v. Phillips*, 2009 WI App 179, ¶ 17, 322 Wis.2d 576, 778 N.W.2d 157 (citation omitted). "This discretionary decision will only be reversed if the trial court erroneously exercised that discretion." *Id.*

ARGUMENT

Black offers a slew of claims with little legal authority and few citations to the record. To do justice for the young victim here, the State has attempted to identify and develop Black's undeveloped arguments. In doing so, the State requests that the Court consider the merits of Black's claims, which will aid in preventing successive challenges to Black's conviction and bring finality to this litigation.

I. The court properly excluded defense evidence related to the alleged monkey bar incident and the video of Case Study Number 5.

The theory of defense was that Bobby suffered accidental trauma during a fall and had a period of lucidity before succumbing to his injuries. (R.182:25-40.) The defense offered two possibilities: Bobby fell on the playground, or he fell down the stairs. (*Id.*) The defense was allowed to present only the stairway fall possibility. (R.184:42-44.) Black argues that the court denied him his constitutional right to present a defense by excluding expert testimony about a possible playground fall, lay testimony that Bobby fell on the playground, and a demonstrative video, referred to as Case Study Number 5.

A. The constitutional right to present a defense.

The rights bestowed by the confrontation and compulsory process clauses of the Sixth Amendment grant

the defendant a constitutional right to present a defense. *State v. Pulizzano*, 155 Wis.2d 633, 645, 456 N.W.2d 325 (1990). However, a criminal defendant does not have the constitutional right to present any and all evidence in support of his claim. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *State v. Hammer*, 2000 WI 92, ¶¶ 42-43, 236 Wis.2d 686, 613 N.W.2d 629.

"[T]he test for whether the exclusion of evidence violates the right to present a defense has been stated as an inquiry into whether the proffered evidence was 'essential to' the defense, and whether without the proffered evidence, the defendant had 'no reasonable means of defending his case.'" *State v. Williams*, 2002 WI 58, ¶ 70, 253 Wis.2d 99, 644 N.W.2d 919 (citation omitted).

There is a "two-part framework for analyzing whether the exclusion of expert testimony violates a defendant's right to present a defense." *Id.* The first part has four factors that a defendant must show through an offer of proof. *State v. St. George*, 2002 WI 50, ¶ 54, 252 Wis.2d 499, 643 N.W.2d 777. The defendant must show that the expert's testimony: 1) "met the standards of Wis. Stat. § 907.02;" 2) "was clearly relevant to a material issue in this case;" 3) "was necessary to the defendant's case;" and 4) had "probative value" that outweighed "its prejudicial effect." *Id.* ¶ 54. If all four factors are met, the second part requires the court to determine, "whether the defendant's right to present the proffered evidence is nonetheless outweighed by the State's compelling interest to exclude the evidence." *Id.* ¶ 55.

The right to present a defense includes the right to present alternative theories. However, expert testimony must be based in fact. Section 907.02 requires that an expert's opinion be "based upon sufficient facts or data" and the product of applying "principles and methods reliably to the facts of the case." Wis. Stat. § 907.02(1).

B. The court properly excluded any expert opinion that Bobby's injury could have been the result of a playground fall.

The circuit court concluded that an expert could not opine at trial that Bobby's injuries resulted from a fall from the monkey bars because that opinion was not sufficiently based in fact. (R.182:21-22.) Neema's statement contained no fact that would suggest that Bobby hit his head when he fell at the playground. (R.182:42-43.) Thus, any expert opinion that that fall caused Bobby's head injury lacked a factual basis and was inadmissible under section 907.02. Excluding that testimony did not violate Black's right to present a defense.

The defense experts testified about research suggesting that short falls from playground equipment can cause fatal head injuries. What they could not do was opine that Bobby could have died after falling from the monkey bars at his school. That is a far cry from leaving Black with no reasonable means of defending his case. And Black *did* present a specific short fall defense. Black had a reasonable means of defending his case, the possibility of the stairway fall, and there is no dispute that he fully presented that possibility to the jury.

C. The court properly excluded Neema's statement that she saw Bobby fall on the playground that day.

In one sentence, without citation to the record or any legal authority, Black implies that the court erred when it did not allow the defense to use Neema's statement to impeach a schoolyard proctor. (Black's Br. 12.) During trial, the State presented a schoolyard proctor who testified that she never saw Bobby play on specific playground equipment, including the monkey bars. (R.187:252.) The defense argued that the State opened the door to present Neema's statement

or alternatively that the statement could explain some of the bruising to Bobby's body. (R.189:4-6.)

The court reserved its ruling, but said "I'm not likely to allow it because its relevance, if any, is certainly outweighed by its potential to confuse the issues here." (R.189:6.) Even if the monkey bar fall was relevant to some extent, the information contained within Neema's statement was not relevant to the material issue of abusive trauma: "there's no evidence" to support that the bruising that was indicative of abuse, e.g. the bruising to the torso, could have been caused by the fall. (*Id.*)

It is unclear whether Black is asserting that the court abused its discretion in disallowing Neema's statement for these two purposes or that the court prevented him from presenting a defense. Either way, his argument should be rejected. First, the State's expert, Dr. Roman, was clear about what was normal, accidental bruising and was not. (R.187:30-31.) She explicitly testified that the bruising to the front of Bobby's knees could have been the result of an accidental fall. (R.187:50.) And the playground proctor testified that she did not see Bobby every second of every recess. (R.187:245.) There was no need to admit Neema's testimony to explain the bruising to Bobby's knees or to refute the categorical statement that the proctor never saw Bobby play on the monkey bars.

Furthermore, excluding Neema's statement did not prevent Black from presenting a defense. He presented the short fall defense to the jury and was not entitled to present any and all evidence that he believed supported his case.

D. The court properly excluded the video of Case Study Number 5.

The videotape of Case Study Number 5 was clearly inadmissible and properly excluded from trial. The video depicted a toddler falling off a gym set onto a concrete floor.

(R.133:10; 192:91-92, 131-32.) The defense wanted to play this video to illustrate Dr. Plunkett's short fall theory. (R.190:32.)

Black does not challenge the court's discretionary decision to exclude the video. The video was just an example of a short fall, something that the jury could visualize without a demonstrative aid. And while the court excluded the video itself, the defense experts discussed the significance of Case Study Number 5. (R.192:131-32, 215-18; 193:123, 127-32.) The exclusion of the video did not impact Black's ability to present his short fall defense.

II. The court properly admitted the State's experts' testimony.

Black argues that the court erred in admitting the State's experts' testimony because they offered "a conclusion without any methodology." (Black's Br. 13.) Black then faults the court for not holding an evidentiary hearing and announces that abusive head trauma is synonymous with shaken baby syndrome, and thus, unreliable. (Black's Br. 14-15.) Black also takes issue with the State's experts' opinions on lucid intervals, short falls, and the amount of force required to produce Bobby's head injury. (Black's Br. 14-16.) Black fails to provide a basis upon which to overturn the circuit court's discretionary decision to admit the evidence.

A. The *Daubert* reliability standard.

Black seems to challenge the reliability of the opinions offered by the State's experts. (Black's Br. 13-16.) "The reliability standard 'entails a preliminary assessment of whether the reasoning or methodology is scientifically valid.'" *Seifert,* 372 Wis.2d 525, ¶ 61 (quoting *Daubert*, 509 U.S. at 592-93). Our supreme court has noted a variety of factors for establishing reliability in *Seifert*. *Id.* ¶¶ 62-63. Some of those factors are: whether the methodology can and

has been tested; whether it has been subjected to peer review and publication; whether it has been generally accepted in the scientific community; the known or potential rate of error of the methodology; and whether the expert accounted for obvious alternative explanations. *Id.* (citations omitted). There is, however, no exhaustive list of factors and the circuit court is given wide latitude in determining reliability. *Id.* ¶ 64.

The *Daubert* standard is not meant to exclude "medical expert testimony that is supported by extensive relevant medical experience." *Seifert*, 372 Wis.2d 525, ¶ 85. Rather than excluding that evidence, the appropriate response is attack experience-based medical expert testimony through vigorous cross-examination. *Id.* ¶ 86. "That *Daubert* lends its analysis more favorably to more objective sciences does not bar the testimony of physicians applying their experience and clinical methods. That the knowledge is uncertain does not preclude the introduction of medical expert opinion testimony when medical knowledge permits the assertion of a reasonable opinion." *Id.* ¶ 80 (footnote omitted) (citation omitted).

When a *Daubert* challenge is raised, there is no requirement that a court hold a pre-trial evidentiary hearing. *See State v. Chough*, 2016AP406-CR, 2017 WL 389856, ¶ 19 (Ct. App. Jan. 25, 2017) (unpublished) (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999)). (R-App. 104.)

B. The court properly evaluated the experts' methodology even though the court did not take testimony at the *Daubert* hearing.

The circuit court held argument on Black's motions in limine to exclude expert testimony. (R.182:55-63.) The court concluded "on *Daubert* grounds" to admit the State's experts after argument on methodology and qualifications.

(R.182:60-63.) The court explicitly held that "[t]he rules of foundation and qualifications and bases for opinions apply on both sides." (R.182:61.) And advised defense counsel to raise an objection at trial if the State failed to lay an adequate foundation for the expert's opinion. (*Id.*)

Black does not allege what, if anything, would have been revealed at a pre-trial evidentiary hearing that would have disqualified any of the State's experts or resulted in a limitation on their testimony. (Black's Br. 13-14.) Because a pre-trial hearing is not a requirement, there is no basis to conclude that the court erred in not holding one.

C. There was no error in permitting Drs. Knox and Smith to opine that Bobby suffered from abusive head trauma.

The question is whether abusive head trauma is a significantly reliable diagnosis to meet the *Daubert* reliability standard.[6] That answer to that question is yes.

Both Drs. Knox and Smith opined that Bobby suffered from abusive rather than accidental head trauma. Black appears to argue that abusive head trauma is never a reliable diagnosis, not that Knox's and Smith's opinions were specifically unreliable. (Black's Br. 14.)

The reliability of abusive head trauma as a diagnosis based on a constellation of findings was recently tested and decided in *Wolfe v. State,* 509 S.W.3d 325, 334-41 (Crim. App. Tex. 2017). "[A]cceptance of a scientific theory by other courts is a relevant consideration in assessing a trial judge's ruling on questions of reliability." *Id.* at 337.

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[6] Black's motion in limine appeared to be specific to Dr. Smith, but his claim on appeal is stated in broad terms and cites to testimony given by Dr. Knox. (Compare R.70:4 with Black's Br. 14.)

The *Wolfe* court determined that abusive head trauma, as a diagnosis by a pediatrician, meets the *Daubert* reliability standard. The court relied on a multitude of factors, including mainstream acceptance of the diagnosis in the medical community and its acceptance as reliable in other jurisdictions, training in pediatric medicine and experience in treating pediatric patients that present with head injuries that is sufficient to diagnose abusive head trauma, support in scholarly literature for the validity of the abusive head trauma diagnosis, including Sandeep Narang's *A Daubert Analysis of Abusive Head Trauma/Shaken Baby Syndrome,* 11 Hous. J. Health L. & Pol'y 505 (2011), which referenced "over 700 peer-reviewed, clinical medical articles published by over 1,000 different medical authors in twenty-eight countries," the vigorous testing of the underlying theory that limited the potential for misdiagnosis, and the acceptance of differential diagnoses as a "reliable method of ascertaining causation." *Id.* at 337-40.

Black asserts that "[s]cientific literature . . . does not support a categorical conclusion regarding causation of these injuries." (Black's Br. 14.) That cuts both ways. If certainty is a bar to expert testimony, then Black's experts were improperly permitted to discuss the possibility that a short fall caused Bobby's injury. And *Daubert* does not require infallibility. The diagnosis of abusive head trauma, based on a constellation of findings, is not inherently unreliable. And it was not unreliable here.

Black repeatedly equates the diagnosis of abusive head trauma with shaken baby syndrome. "Shaken baby syndrome is a subset of [abusive head trauma]," but not all abusive head trauma diagnoses are shaken baby diagnoses. Christian, Cindy W., MD, et al., *Abusive Head Trauma in Infants and Children,* 123 Pediatrics 1409, 1409-10 (May 2009). (R-App. 107-09.) The use of the phrase "abusive head trauma" by the medical community was not a bait and

switch, as Black implies, but rather occurred to combat the misuse of the phrase "shaken baby syndrome" in public discourse. *Id.* at 1410. (R-App. 108.)

Experts on both sides opined whether Bobby's head trauma was inflicted or accidental. The diagnosis of abusive head trauma is the opinion of the experts as to whether, clinically speaking, the clinical presentation and investigative facts were consistent with inflicted head trauma. That diagnosis was not rendered unreliable by the mere presence of criticism or an opposing opinion.

D. There was no error in permitting Drs. Knox and Smith to opine that Bobby would have been immediately symptomatic.

Drs. Knox and Smith were clear on the basis for their opinions that Bobby would have been immediately symptomatic. Black does not challenge their methodology; he only makes an unsupported conclusory statement that "[s]cientific evidence exists to refute [that] conclusion[ ]." (Black's Br. 14.)

Even if this Court accepts Black's statement as true, it is unclear how the existence of some scientific evidence to the contrary would preclude the State from presenting medical expert testimony.[7] Knox's and Smith's opinions were not "shaky;" they were based upon experience, research, and review of accepted scientific literature. But even if they were, "the appropriate means of attacking 'shaky but admissible' experience-based medical expert testimony is by

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[7] The relevant testimony of Dr. Knox was elicited on cross-examination. But since the testimony is clearly admissible expert testimony, the State asks the Court to decide the merits of Black's assertion. The same is true of most of the testimony discussed in subsection E.

'[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.'" *Seifert*, 372 Wis.2d 525, ¶ 86 (quoting *Daubert,* 509 U.S. at 596). That is exactly what occurred here.

E. There was no error in permitting Drs. Knox and Smith to opine that a short fall could not have caused Bobby's injuries.

The State's experts opined that the constellation of Bobby's injuries was not the result of a short fall. Black implies that their opinions were formed based upon brain injuries alone, but that was not the case. (Black Br. 14-15.) The State's experts agreed that, while a short fall can have fatal consequences, a short fall could not have caused Bobby's injuries.

Black relies on shaken baby syndrome literature and homes in on the characteristics of a brain injury. But here, the State's experts took into account the totality of Bobby's injuries. And even if there is legitimate disagreement whether a short fall could cause injuries similar to Bobby's, *Daubert* is not meant to exclude "medical expert testimony that is supported by extensive relevant medical experience." *Seifert,* 372 Wis.2d 525, ¶ 85.

"Short falls can cause injury, usually the normal bumps and bruises of childhood. The occasional short fall results in a broken bone or simple skull fracture. It is the devastating or fatal head injury that a guilty conscience so often attributes a short fall." John E. B. Myers, *Myers On Evidence of Interpersonal Violence*, § 4.13[B], "Head Injury" (6th ed. 2016) (footnotes omitted).

F. There was no error in permitting Drs. Knox and Smith to opine about the amount of force necessary to cause Bobby's head injury.

Drs. Knox and Smith were qualified to opine to the amount of force necessary to cause Bobby's injuries, and those opinions were sufficiently grounded in medical expertise.

Drs. Knox and Smith recognized that there can be no studies about the amount of force needed to sustain a blunt force head injury in a child. (R.187:177, 179; 192:69.) Thus, their opinions were based on their clinical experience. (*Id.*) Black seems to think that because Knox and Smith were not biomechanical engineers, they could not testify to the amount of force necessary to cause injuries. (Black's Br. 16.) That is a mischaracterization of *Daubert*. *See Seifert*, 372 Wis.2d 525, ¶ 80.

Black also suggests that their opinions were unreliable because the severity of a brain injury does not indicate the amount or type of force that caused the injury. (Black's Br. 16.) But the article he cites, Steinbok, Paul, et al., *Early Hypodensity on Computed Tomographic Scan of the Brain in an Accidental Pediatric Head Injury,* 60 Neurosurgery 689 (2007) (R-App. 110-16), has nothing to do with force. It concerns the accuracy of head injury dating based upon CT hypodensity. *Id.* And thus, his argument should be rejected.

The State's experts were properly permitted to offer a reasonable opinion based upon their extensive training and experience and based upon the facts of this case.

III. The court did not err in admitting rebuttal testimony by Dr. Frasier.

Testimony is bona fide rebuttal evidence if it was not necessary for the State's case-in-chief, but becomes

necessary after the defense made its case. *Novy,* 346 Wis.2d 289, ¶ 34. "Bona fide rebuttal evidence is not determined by asking whether the evidence could have been admitted in the State's case-in-chief, but rather whether the evidence became necessary and appropriate because it controverts the defendant's case." *Id.* "Once the defendant raises a particular theory, . . . the credibility of that theory become[s] relevant . . . ." *Id.* ¶ 35. It is inconsequential whether "the defense theory was raised on cross-examination during the State's case-in-chief, as opposed to during the [defense's] case-in-chief." *State v. Hatcher*, 2015AP297-CR, 2016 WL 4325309, ¶ 35 (Ct. App. Aug. 16, 2016) (unpublished). (R-App. 124.)

Here, defense counsel elicited on cross-examination that the medical examiner, Dr. Roman, did not believe that the injuries to Bobby's buttock were caused by spanking. (R.187:52-53.) The State's next witness, Dr. Knox, disagreed. (R.187:120-21.)

Due to the cross-examination of Roman, the State's two experts were in disagreement and the State had to explain why that was so. That is how Dr. Frasier came into play. Frasier testified that the relevant markings in the gluteal cleft disappear rather quickly. (R.194:255-57.) That explained how Roman could have been mistaken about the cause of the injury to the buttock when she examined Bobby multiple days after the incident.

Black faults the State for not presenting this evidence during its case-in-chief. (Black's Br. 17.) Black's argument misses the mark. The State is not "barred from putting on legitimate rebuttal evidence simply because it [could have] anticipated the defense." *State v. Konkol*, 2002 WI App 174, ¶ 16, 256 Wis.2d 725, 649 N.W.2d 300.

Evidence about the dissipation of the indicia of spanking became relevant only *after* the defense raised the

theory that the injuries to the buttock were inconsistent with spanking on cross-examination. Thus it is bona fide rebuttal testimony, and there is nothing in the record to challenge the circuit court's exercise of discretion in admitting Frasier's limited testimony.

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

Given the standard of review, this Court looks to the postconviction motion and oral argument on that motion to determine whether the circuit court's decision should be upheld. A postconviction motion alleging ineffective assistance of counsel does not automatically trigger a hearing. *Phillips*, 322 Wis.2d 576, ¶ 17. "[N]o hearing is required if the defendant fails to allege sufficient facts in his or her motion, if the defendant presents only conclusory allegations or subjective opinions, or if the record conclusively demonstrates that he or she is not entitled to relief." *Id.* (citing *State v. Bentley*, 201 Wis.2d 303, 309-10, 548 N.W.2d 50 (1996)).

Sufficient facts are facts that establish deficient performance and prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). *Allen,* 274 Wis.2d 568, ¶¶ 12, 26. An ineffective assistance motion must contain sufficient facts to establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. It must also allege sufficient facts to establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A defendant's subjective opinion that trial counsel failed in some manner and the defendant was prejudiced by these failures are insufficient grounds for a hearing. *Allen,* 274 Wis.2d 568, ¶¶ 18, 21-23.

A. Black's assertions that counsel should have disclosed and used more learned treatises was insufficient to warrant an evidentiary hearing.

Black's first argument is that counsel was ineffective because there were "potential" treatises[8] that counsel could have investigated or sought to admit. Black's argument is based on a misunderstanding of the record.

Black was not prohibited from using or referencing any particular literature in his examination of experts. The sustained objection at issue was an objection to moving undisclosed learned treatises into evidence. (R.193:105-06.)

Black's postconviction pleading did not establish any material fact that would establish why he is entitled to relief. Black failed to allege what learned treatises should have been disclosed, how the treatises were relevant to his defense, and why not being able to move a treatise into evidence prejudiced him. Instead, Black simply alleged that it "was a problem" and he "lacked ammunition" to fully question the experts on some undisclosed subject. (R.167:3-4.)

What Black's postconviction motion did address was the alleged controversy surrounding a shaken baby syndrome diagnosis, a topic specifically excluded from trial. (R.167:4-5; 182:56, 63.) The State's case was not predicated upon shaken baby syndrome; rather, the identified cause of death was blunt force trauma. Black's postconviction

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[8] Black did not assert that D.A. Moran, et al, *Shaken Baby Syndrome, Abusive Head Trauma, and Actual Innocence: Getting It Right*, 12 Hous. J. Health L. & Pol'y 209 (2012), is a potential treatise that should have been disclosed; rather, he asserted that counsel should have used it to find potential treatises. (R.170:2; Black's Br. 21.)

argument assumed that because some literature conflated abusive head trauma and shaken baby syndrome, those treatises would be relevant and admissible. (R.167:5.) But again, he failed to identify what treatises were to be used and how counsel's alleged failures affected his ability to use them.

During argument on the motion, postconviction counsel argued that the failure to disclose more learned treatises prevented trial counsel from attacking the State's witnesses on their determination about the cause of Bobby's injuries. (R.197:4.) That argument ignores the facts. It was the constellation of Bobby's injuries that led to the abusive trauma diagnosis. The State's experts did not opine that Bobby suffered from abusive trauma based solely on his brain injury. It was not prejudicial for counsel not to look for and disclose treatises regarding diagnosing abusive head trauma through examination of a brain injury alone.

And Black never explained how the only specified treatise in his postconviction motion also referenced on appeal, Van Ee, Chris, et al., *Child ATD Reconstruction of a Fatal Pediatric Fall*, Proc. ASME (2009) (R-App. 133-38), would have been used during the examination of Dr. Van Ee. (R.167:4.) The study, not included his filings, is about the value of an anthropomorphic testing device called the CRABI-18. The use of such testing devices was not an issue at trial. And, Black fails to mention that Van Ee did testify about this study, which was excerpted in an exhibit. (R.193:128-29; 133:10.) Thus, Black's claim that he could not use it is contrary to the record.

B. Black's assertion that trial counsel should have impeached Patricia was insufficient to warrant a hearing.

Black argued that trial counsel was ineffective for not confronting Patricia with a prior statement that when she

first saw Bobby, he was on the floor. (R.167:9-10.) This argument is without merit.

Black alleged no material facts establishing how this alleged failure had a pronounced effect on the outcome. Patricia's testimony that Bobby was initially found on his bed was consistent with the testimony of Sharon (*see, e.g.*, R.186:163) and with Black's statements to the police. It was also consistent with the defense theory that Bobby had a lucid interval that allowed him to get up after falling down the stairs and walk to his bed. Because Black did not allege sufficient material facts, it was appropriate for the court to deny his claim without a hearing.

C. Black has no claim of cumulative prejudice.

Black asserts that there is cumulative prejudice from all of his claims. (Black's Br. 22.) He cites to *State v. Thiel*, 2003 WI 111, 264 Wis.2d 571, 665 N.W.2d 305, which held that the cumulative prejudice from deficiencies in counsel's performance could reach the threshold, even if taken individually they did not. *Id*. ¶ 59.

Here, the alleged failings of counsel were insignificant. Aggregating the prejudice computation of each non-meritorious claim does not add up to cumulative merit. *Id*. There cannot be cumulative prejudice when there is no prejudice to accumulate.

V. There is no reason to grant Black a new trial in the interest of justice.

A. The real controversy was fully tried.

Black seeks a new trial in the interest of justice on grounds that the alleged errors prevented the real controversy from being fully tried. (Black's Br. 22-23.) 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, without first concluding that the outcome would be different on retrial. *Vollmer v. Luety*, 156 Wis.2d 1, 19, 456 N.W.2d 797 (1990). However, the power of discretionary reversal in the interest of justice is to be exercised "infrequently and judiciously." *State v. Ray*, 166 Wis.2d 855, 874, 481 N.W.2d 288 (Ct. App. 1992). A reviewing court "will exercise its discretion to grant a new trial in the interest of justice 'only in exceptional cases.'" *State v. Chu*, 2002 WI App 98, ¶ 55, 253 Wis.2d 666, 643 N.W.2d 878 (citation omitted). For the reasons discussed above, this is not such a case.

Black attempts to characterize his conviction as immediately suspect because the case against him was based largely on circumstantial evidence. He does not, however, make a sufficiency of the evidence argument. Circumstantial evidence is not necessarily weak evidence. *See, e.g., State v. Poellinger*, 153 Wis.2d 493, 501-02, 451 N.W.2d 752 (1990). It is well established that a finding of guilt may rest upon evidence that is entirely circumstantial and that circumstantial evidence is often-times stronger and more satisfactory than direct evidence. *Id.*

This Court has expressly recognized the particular need to rely extensively on circumstantial evidence in prosecutions involving child abuse that resulted in death. *State v. Hirsch*, 2002 WI App 8, ¶¶ 6-8, 249 Wis.2d 757, 640 N.W.2d 140 (citing *State v. Johnson*, 135 Wis.2d 453, 400 N.W.2d 502 (Ct. App. 1986)). Justice was done here, and there is no need to grant a new trial.

VI. If the court did err in admitting or excluding any evidence, the error(s) were harmless.

The State maintains that the circuit court did not err and will not proffer an unnecessarily lengthy harmless error argument. However, assuming arguendo that evidence

should not have been admitted or excluded, any error was harmless.

"The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction." *State v. Thoms*, 228 Wis.2d 868, 873, 599 N.W.2d 84 (Ct. App. 1999) (citation omitted). "The beneficiary of the error, here the State, has the burden to establish that the test has been met." *Id*. (citation omitted).

Here, there was no reasonable alternative explanation for the vast multitude of injuries to Bobby. He had more than 50 injuries to his body, many of which could not have been the result of an accidental fall. The only person with Bobby before he suffered these catastrophic injuries was Black. There was no weakness in the State's case that made it likely that the court's evidentiary rulings tipped the balance. The prosecution presented a strong and consistent case against Black and even if the circuit court should not have admitted or excluded some testimony, there is no reasonable possibility that the error contributed to the conviction.

CONCLUSION

This Court should affirm the judgment of conviction and order denying postconviction relief.

Dated this 18th day of September, 2017.

Respectfully submitted,

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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 10,831 words.

_____
TIFFANY M. WINTER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

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. § 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.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 18th day of September, 2017.

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TIFFANY M. WINTER
Assistant Attorney General

Appendix
State of Wisconsin v. Dakota R. Black
Case No. 2017AP837-CR

SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation, 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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TIFFANY M. WINTER
Assistant Attorney General

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I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 809.19(13). I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

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Dated this 18th day of September, 2017.

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