STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2017AP001559 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

NATALIE N. MURPHY,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

ON APPEAL FROM THE CIRCUIT COURT FOR
JUNEAU COUNTY, BRANCH II, THE HONORABLE
PAUL S. CURRAN, PRESIDING

Respectfully submitted,

NATALIE N. MURPHY,
Defendant-Appellant

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ISSUES PRESENTED

A. Did the trial court abuse its discretion in excluding all testimony from the defendant's firearms expert witness?

Trial court. No. The trial court concluded that the defense's firearms expert failed to meet the requirements of Wis. Stat. § 907.02 and barred him from testifying at all.

B. Did the trial court abuse its discretion in overruling Ms. Murphy's objection to rebuttal testimony from the State's forensic pathologist regarding the possibility of a firearm discharging in the manner in which Ms. Murphy described it as having occurred in this case?

Trial court. No. The trial court concluded that it could not sustain Ms. Murphy's objection on the grounds that similar topics had been addressed in this witness's prior testimony during the State's case-in-chief.

C. Was the exclusion of all testimony from Ms. Murphy's firearms expert witness and admission of the State's forensic pathologist's rebuttal testimony over Ms. Murphy's objection harmless error?

Trial court. As the trial court ruled the defense's proposed testimony in question inadmissible, and overruled Ms. Murphy's objection to the rebuttal testimony in question, the trial court presumed that these rulings were not error at all, and this issue was not addressed by the trial court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The defendant-appellant does not request that the opinion in this appeal be published, nor does he request oral argument of the issues presented in this case, but stands ready to so provide if this Court believes that oral argument would be useful in the exposition of the legal arguments

presented herein.

STATEMENT OF THE CASE

By a criminal complaint filed in the Juneau County Circuit Court on February 13, 2015, the defendant-appellant, Natalie N. Murphy (hereinafter the Ms. Murphy), was charged in case number 15CF24 with first degree intentional homicide , contrary to Wis. Stat. § 940.01(1)(a). On May 22, 2015, an information was filed charging the defendant with the above offense, as well as one count of first degree recklessly endangering safety, contrary to Wis. Stat. § 941.30(1).

On April 22, 2016, the Plaintiff-Respondent (hereinafter State) filed a motion *in limine* seeking, among other things, the exclusion of testimony of the defense's proposed firearms expert, Steven C. Howard (hereinafter Mr. Howard). On August 9, 2016, the Court held an evidentiary hearing on the State's motion at which testimony from Mr. Howard was taken. On August 31, 2016, the court issued an oral ruling granting the State's motion *in limine* and ordering that Mr. Howard would not be permitted to testify at all.

On September 30, 2016, following a five-day jury trial commencing on September 26, 2016, Ms. Murphy was found guilty of one count of first degree reckless homicide , contrary to Wis. Stat. § 940.02(1), and one count of second degree recklessly endangering

safety, contrary to Wis. Stat. § 941.30(2) .

On December 16, 2016, Ms. Murphy was sentenced to 22 years and six months in the Wisconsin State Prison System consisting of 18 years initial confinement followed by four years and six months of extended supervision on the first degree reckless homicide charge and four years in the Wisconsin State Prison System consisting of two years initial confinement followed by two years of extended supervision on the charge of second degree recklessly endangering safety, to be served consecutively.

By Notice of Appeal filed June 6, 2017, the Appellant appeals the convictions in this matter.

FACTS

In the early hours of February 12, 2015, Juneau County Sheriff's Office Deputies Jay Greeno and Cody Simons were dispatched to 200 Sheridan St. in the Village of Necedah, Juneau County, Wisconsin, in reference to a 911 call in which a frantic woman had stated words to the effect that "Andrew is dead" (166: 94-97, 115). After finding the correct address and unit, the deputies made contact with Natalie Murphy, who was crying and repeating that Andrew or Andy was dead (166: 96-97). Deputy Greeno detected an odor of intoxicants coming from Ms. Murphy (166: 104). She directed the Deputies to a back

bedroom within the residence where they found an unresponsive white male, later identified as Andrew Dammen (hereinafter Mr. Dammen), but with no apparent signs of trauma other than a small amount of blood coming from his mouth and nose area (166-98-99). Deputy Greeno returned to Ms. Murphy, along with her father who also lives at the residence, James Murphy, who was holding her infant child, and found her sobbing and saying that she had "killed Andrew" (166: 100).

Ms. Murphy then more specifically informed Deputy Greeno that she had shot Andrew (166: 101). Due to the lack of obvious signs of trauma, and believing that Mr. Dammen may have suffered an overdose, Deputy Greeno asked what she shot him with, to which Ms. Murphy responded that she had shot him with "that fucking gun right there," pointing to an open dresser drawer (166: 102). Deputy Greeno observed what appeared to be a Glock pistol in the dresser drawer, and placed Ms. Murphy in handcuffs (166: 102). Deputy Greeno attempted to render first aid to Mr. Dammen, to no apparent avail, until he was relieved by EMS responders (166: 103-104). Mr. Dammen was later pronounced dead by Dr. Eric Ness at Mile Bluff Medical Center in Mauston, WI (167: 24, 27).

Ms. Murphy, crying "hysterically" and rocking back and forth continued to make voluntary statements in the presence of the Deputies,

including "Oh my god I killed him. He's dead. He's fucking dead…I want to die. Just fucking shoot me" and "Please save him. Please god help them fucking save him because I could go to jail for fucking ever. He just kept telling me to fucking shoot him" (167: 32, 103: 1-2) and "I took it from him. I, I said it's my fucking gun. Give me my fucking gun" (133: 2). Ms. Murphy further repeated several times that Mr. Dammen told her to shoot him, and that she could "admit to anything and everything I've done" (104: 1-2). When Deputy Simons inquired of Ms. Murphy how much she had to drink that night, she responded "I've had enough to kill the man I love if that gives you any indication" (105: 2).

At trial, Ms. Murphy testified to the events leading up to Mr. Dammen's death. As of February 11, 2015, Ms. Murphy and Mr. Dammen were in a relationship both of an intimate nature and as co-parents of their daughter, Cadence Dammen, born January 15, 2014 (169: 55). They had been dating and living together intermittently for over two years, and had occasionally considered marrying, but never did (169: 51-57). A little over a month after the birth of Cadence, in approximately March of 2014, Ms. Murphy learned that Mr. Dammen was seeing another woman, Clara Haldeman, but the two reconciled and continued their relationship (169: 58-59).

Ms. Murphy learned within the coming months that Mr. Dammen had continued his involvement with Ms. Haldeman, and he and Ms. Murphy separated, with him moving to Ms. Haldeman's residence (169: 59-60). In November of 2014, Mr. Dammen informed Ms. Murphy that he had ended his relationship with Ms. Haldeman and moved back in with his mother, which Ms. Murphy took as an encouraging sign that she and Mr. Dammen may be able to resume their life as a family with Cadence (169: 60-61). The two continued to see each other frequently, usually daily, and did resume their romantic relationship (169:61).

In late January or early February of 2015, Ms. Murphy began to hear rumors that Mr. Dammen was still seeing Ms. Haldeman, and that Ms. Haldeman might be expecting a child with Mr. Dammen being the presumed father (169: 61-62). Mr. Dammen told Ms. Murphy that he was unsure whether this was true, but Ms. Murphy acknowledged that the possibility that it *might* be true caused stress to both her and Mr. Dammen (169: 63-64). Ms. Murphy informed Mr. Dammen that if Ms. Haldeman was pregnant with his child, their relationship would end (169:64-65). She asked Mr. Dammen to find out one way or the other, but he avoided the subject and became angry when she brought it up (169: 64). She was unaware of whether he did find out, and believed that Ms. Haldeman was ignoring Mr. Dammen's inquiries (169: 64-65).

Despite this difficulty, the two continued their relationship, both as co-parents and romantically, with Mr. Dammen spending nearly every night with Ms. Murphy (169: 65-66).

On the evening of Wednesday, February 11, 2015, Mr. Dammen and Ms. Murphy had dinner at her residence (169: 75). While preparing dinner, Ms. Murphy asked Mr. Dammen to go to the nearby Kwik Trip convenience store to get milk (169: 76-77). Mr. Dammen did so, but first informed Ms. Murphy that he had forgotten to carry with him his gun that day, and asked if he could borrow hers, which she kept in her nightstand. (169: 73, 77). Ms. Murphy agreed, noting in her testimony that she trusted Mr. Dammen with her gun, and that it was typical for him to go armed (*Id*).

After dinner, Mr. Dammen and Ms. Murphy took Cadence to stay with Ms. Murphy's mother while they went to the Vets Hall to meet Ms. Murphy's father for a drink, then to the Poorhouse Bar for her pool league, and again back to the Vets Hall (169: 82, 85). While they were out, Mr. Dammen left Natalie's gun in the glove compartment of the car (169: 78). By several accounts, Mr. Dammen and Ms. Murphy appeared to be having an enjoyable evening and getting along well (169: 86-87, 169: 174, 204-06, 211-12, 220). Shortly after midnight on February 12, 2015, Ms. Murphy and Mr. Dammen left the Vets Hall to pick up

Cadence at Ms. Murphy's mother's home, and then proceeded to Ms. Murphy's residence (169: 93, 95).

After arriving home, Ms. Murphy undressed and got into bed, expecting Mr. Dammen to join her (169: 96). When Mr. Dammen did enter the bedroom, he said to Ms. Murphy "Oh, so you're naked already," to which she responded "Well, I can put my clothes back on if you want" (*Id*). She heard him "huff" and walk out of the room (*Id*). Feeling "rejected" and "hurt" Ms. Murphy believe that she probably made some "snappy" remark (169: 97). At trial, Ms. Murphy described what then occurred:

> I was still laying facing towards the wall. And Andy came back into the room, and he says to me, "I can't do this anymore." And he's really -- he's like, "I can't do this anymore." I'm not facing him, so I'm like, "You can't do what anymore, Andy? What can't you do?"
>
> So I'm sitting up, and I rolled back towards the center of the bed and I sit up, and I -- I had actually put on a tank top before when he left the first time to leave the room. I rolled over. I grabbed a tank top. I'm like, fine, I will put my clothes on. If he doesn't want me to be naked, I won't be naked.
>
> So I'm wearing my tank top and a pair of underwear, and I sit up and I realize that he's holding my gun. I'm like, "What do you mean? What can't you do anymore, Andy?" And he just says, "I can't fucking do this anymore." I'm like, "Andy, why don't you give me the gun? Just give me" -- and he's really angry and he's really hostile. And he, you know, says, "What the fuck are you going to do? Are you going to fucking shoot me?" And I'm like, "No, you just need to give me the gun, because we don't need to have a gun in this situation. I don't understand what's going on. Andy, please give me the gun."
>
> And he keeps taunting me and he keeps yelling at me, "What are you going to do? Are you going to fucking shoot me? Go ahead and fucking shoot me." And I keep telling him, "I'm not going to

> shoot you. Andy, why would I shoot you? Just give me the gun." And he keeps getting closer with every time he says, "What are you going to do, fucking shoot me?" And then he's at the corner of my bed and he's leaned over and he's in my face, "You want the gun? Go ahead and fucking shoot me." And he grabs my hand, and again says, "You want the gun? Go ahead, fucking shoot me." And he -- he slams it into my hand. And it happened so fast that I didn't even hear the gun go off. And the next thing I know he's just on the ground and he's not saying anything.

(169: 97-98).

In her testimony, Ms. Murphy acknowledged that much of the details to which she testified were not relayed to law enforcement on the night of her arrest, stating that for a "very, very long time" she had no recollection of the moments immediately preceding Mr. Dammen's death (169:102). This information came back to her only after engaging in eye movement and desensitization and reprocessing (EMDR) therapy with Dr. David Ogren to alleviate dissociative amnesia, a symptom of her diagnosed condition of post-traumatic stress disorder, which was explained at trial in great detail by Dr. Ogren (169: 106, 24-33).

Regarding her spontaneous statements to law enforcement, Ms. Murphy stated, among other things:

> I remembered that, you know, he was yelling at me about, you know, shooting him, go ahead and shoot me. And everything after that I just -- it was just gone. And I thought I shot him. I had to. I had no other explanation as to why he was dead. I had no other -- I had no other reasoning that suggested anything other than the fact that I killed him. I had to have shot him.

(169: 104).

At trial, the State called forensic pathologist Dr. Michael Stier,

who had previously testified in its case-in-chief, as its sole substantial rebuttal witness. Testimony was elicited from Dr. Stier for the purpose of rebutting Ms. Murphy's testimony that the gun that killed Mr. Dammen accidentally discharged during the act of Mr. Dammen thrusting it into Ms. Murphy's hand. Dr. Stier was asked whether he "believe[d] that the injuries [he] observed on Andrew Dammen's body could have resulted from a pistol being handed from Andrew Dammen to another person and during that hand-off the pistol discharging?" (169: 123). Dr. Stier replied at some length (see: infra, 25-26), ultimately concluding "I can't imagine that scenario" (169: 126).

This same issue of the lack of visible soot or trauma to Mr. Dammen's hand was addressed by a firearms expert retained by Ms. Murphy, Mr. Howard, among other topics addressed by Mr. Howard. In his report submitted to the Court, Mr. Howard detailed his own hands-on testing of whether or not the discharge of the firearm as Ms. Murphy described it would have left soot or signs of injury on Mr. Dammen's right hand. Mr. Howard recreated the scenario over 10 times himself by gripping a pistol identical to the one causing Mr. Dammen's death by its barrel with his right hand and thrusting it into his left hand and causing discharge of a live round each time. Mr. Howard examined his own hand and found no soot, bruising or other signs of injury (69: 8-10).

By a motion filed April 22, 2016, the State moved to exclude Mr. Howard's testimony. That motion was heard in an evidentiary hearing on August 9, 2016. The Court issued an oral ruling on August 31, 2016, granting the State's motion.

ARGUMENT

I. THE TRIAL COURT ERRED IN BARRING THE DEFENSE'S FIREARMS EXPERT FROM TESTIFYING ENTIRELY

A. STANDARD OF REVIEW

Evidentiary decisions are left to the circuit court's sound discretion, although a court erroneously exercises its discretion when it applies an incorrect standard of law. State v. Hunt, 2003 WI 81, ¶ 34, 263 Wis.2d 1, 666 N.W.2d 771. "The admissibility of expert testimony is governed by Wis. Stat. § 907.02." State v. Giese, 2014 WI App 92, ¶17, 356 Wis. 2d 796, 854 N.W.2d 687. This statute was amended in 2011 to adopt the Daubert standard. See: State v. Kandutsch, 2011 WI 78, ¶26 n.7, 336 Wis. 2d 478, 799 N.W.2d 865. Under the Daubert standard, a circuit court is to perform a "gate-keeper" role "to ensure that the expert's opinion is based on a reliable foundation and is relevant to the material issues." Giese, 356 Wis. 2d 796, ¶18 (citing Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589 n.7 (1993)).

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

B. MR. HOWARD'S PROPOSED TESTIMONY MET THE REQUIREMENTS OF WIS. STAT. § 907.02.

Wis. Stat. §907.02 sets out a number factors that must be met for expert testimony to be admissible: first, it must assist the trier of fact; second, the witness must be qualified; third, the testimony is based upon sufficient facts or data; fourth, the testimony is the product of reliable principles and methods; and fifth, the witness has applied the principles and methods reliably to the facts of the case.

It should be noted that several aspects of Mr. Howard's investigation, report, and proposed testimony did not ultimately emerge at trial as material issues. While Ms. Murphy does not concede that any aspects of Mr. Howard's proposed testimony should have been excluded, Ms. Murphy's arguments will be limited to those aspects of Mr. Howard's proposed testimony which were critical to her trial defense, and the exclusion of which could not

reasonably be characterized as harmless error. Namely, whether the absence of soot, powder burn or other injury to Mr. Dammen's right hand contradicts Ms. Murphy's account of the gun discharging when Mr. Dammen thrust it into her hand with his right hand over the barrel, and Mr. Howard's opinion as to the dangerousness of the Glock 23 pistol.

In his report summarizing his anticipated testimony, Mr. Howard stated the following:

> This author reviewed a photograph of the deceased's right hand and wrist in the materials provided to him along with the autopsy report. This naturally led to the question: "If the deceased was holding the Glock pistol by the barrel in his right hand when he thrust the grip of the pistol into Natalie's hand wouldn't there be soot and/or powder stippling, and/or bruising on the deceased hand, wrist or arm?" To determine the answer to this question, this author obtained a Glock model 23 in 40 caliber Smith & Wesson, along with a supply of "Z-Max" ammunition and went to the test range. While holding the pistol by the barrel, with the barrel pointing slightly to the right of the author's torso, this author thrust the Glock into his own left hand, with his finger in the trigger, and discharged the Glock pistol over 10 times. Each time, the Glock pistol was held by the barrel in a different way to ensure that all possible scenarios were covered.
>
> After each test discharge, this author carefully examined his right hand for any signs of soot, dirt (discharge related), bruising, or any other discoloration upon his own skin. After more than 10 shots, there was no discoloration, whatsoever, on the author's skin located on his hand, fingers, wrist or the inside of his forearm.
>
> While many times bruises do not appear on the human body until hours or even days after injury is sustained, this author had no discoloration on the above stated areas even a week after the test. It is important to note that this author's palm was struck by the ejecting shell casing multiple times. These impacts on the author's skin were painful, but caused no bruising or discoloration even after a full week after the testing.

(69: 8-10).

Mr. Howard also offered his opinion on the inherent dangerousness of the Glock pistol's trigger "safety" mechanism:

> Somewhere between 7 to 8 out of every 10 accidental discharges this author investigates involve a Glock. Glock always touts its products as "perfection" while the reality is far from the truth. Standard trigger weight, that is the amount of pressure needed to be put on a trigger in order to get the firearm to discharge, is between 5 and 7 pounds. This is for firearms such as the colt 45 1911, Browning high power 9 mm, the Walther P 38, the Lugar 9 mm, the Smith & Wesson 39 and 59 series once the hammers cocked, and a long list ofothers. The problem with Glocks is that while they have a 4.5 to 7 pound trigger pull they have no other real safety. Glock claims they have three internal safeties, and they do. The Glock is the type of pistol that you can throw it out ofa 747 jet at 37,000 feet and it can land on concrete and it still won't go off. But, ifanything touches the trigger on a Glock handgun, the one "external" safety, which is located on the trigger itself (See Fig. 13), becomes meaningless and the gun discharges like any other gun with the safety off.

(69: 19-20)

i. Mr. Howard's Testimony Would Have Assisted the Trier of Fact.

The circuit court correctly held that Mr. Howard's testimony would have assisted the trier of fact in this case, stating "I don't think there's really any dispute about that. That factor requires the Court to allow the testimony if the specialized knowledge will assist the trier of fact, and I don't think that's really been disputed" (165: 14). A critical question for the jury to consider in evaluating Ms. Murphy's version of events, particularly in light of Dr. Stier's nearly unequivocal testimony that a Glock 23 would almost certainly have

caused trauma to Mr. Dammen's hand, was whether the absence of any visible injuries to Mr. Dammen's hand suggested, or perhaps even established, that the gun could not have discharged in the manner described by Ms. Murphy.

Of course, the fact that the defense's firearms expert replicated exactly this scenario under controlled conditions, and did so repeatedly with no injuries to his own hand, would have been probative and aided the jury in assessing the significance of this fact, as well as the weight that should be afforded to Dr. Stier's testimony on this subject.

The ease with which accidental discharge can occur with Glock's trigger safety mechanism would be highly relevant to the question of whether the gun did, in fact, discharge while being thrust into Ms. Murphy's hand. As such, Mr. Howard's expert opinion on the dangerousness of Glock pistols would also have assisted the jury in evaluating the likelihood that an accidental discharge did occur.

ii. Mr. Howard Was Qualified to Render an Expert Opinion on the Matters at Issue.

In its oral ruling, the trial court did not address Howard's qualifications with any specificity. Rather, the Court remarked unflatteringly upon Howard's testimony at the August 9, 2016, motion hearing, but noted that its comments were directed more

towards Mr. Howard's credibility than his qualifications. The Court "set aside" the issue of qualification, but ultimately never revisited it after rooting its exclusion of Mr. Howard's testimony in other grounds.

There is no question that Mr. Howard possesses more than adequate training and experience to be qualified as an expert on the subject of firearm safety and shooting reconstruction. During the Daubert hearing, the State focused largely on Mr. Howard's employment experience and characterized his *curriculum vitae* (CV) as being "puffed up." The fact remains that his CV is, in fact, accurate and nothing that the State elicited or offered during the hearing showed it to be inaccurate, beyond Mr. Howard's premature inclusion of the present case in his CV.

While his tenure in two law enforcement positions was brief, Mr. Howard *did* hold those positions as stated on his CV, and *did* complete law enforcement training *twice*. He *is* a gunsmith holding an associate degree in gunsmithing with extensive experience in private practice and industry employment. He *does* hold a Bachelor of Science degree in criminal justice. He *is* an NRA certified firearms safety instructor. He *has* been published numerous times on firearms topics. He *has* been recognized by courts as a firearms

expert in 28 cases, and acted as a consultant in over 100 other cases.

Prior to the trial court's ruling, the State pointed out that some of the basis of Mr. Howard's knowledge and continuing education has been self-study, and opined that "[t]he State knows of no authority that would allow independent reading alone to form the basis of expertise." "[I]ndependent reading alone" is not remotely the sole basis for Mr. Howard's expertise. Again, the uncontroverted evidence demonstrated that he has extensive training in gunsmithing, law enforcement, and hold an associate's degree, bachelor degree and doctorate, all of which are related to firearms, criminal justice and law. According to Mr. Howard's sworn testimony, for approximately 25 years, he has been employed or occupied in some capacity involving the manufacture or maintenance of firearms, law enforcement, shooting investigations frequently involving reconstructions and routinely has been published on these subjects. Mr. Howard is clearly qualified to offer expert testimony in this case.

iii. Mr. Howard's Proposed Testimony Was Based on Sufficient Facts and Data.

The trial court most heavily focused on the question of whether Mr. Howard's conclusions were based on sufficient facts and data in reaching its decision to exclude Mr. Howard as an expert witness. In its August 31, 2016, oral ruling, the trial court expressed

its belief that it had insufficient information on which to evaluate the facts and data relied upon by Mr. Howard (165: 16-18). The Court acknowledged that it was clear that Mr. Howard's presumptions in conducting his investigation, and reconstruction, were supplied by Ms. Murphy (165: 15-17). And in both the report submitted to the Court, and in Mr. Howard's testimony in the August 9, 2016, motion hearing, with regards to the issue of lack of soot or injuries on Mr. Dammen's hands, there are numerous references to the presumption that the fatal shot was fired with Mr. Dammen's hand over the barrel, information supplied by Ms. Murphy. Indeed, in his report Mr. Howard succinctly distils the factual basis for his experiment - "If the deceased was holding the Glock pistol by the barrel in his right hand when he thrust the grip of the pistol into Natalie's hand wouldn't there be soot and/or powder stippling, and/or bruising on the deceased hand, wrist or arm?" (69: 8)

Further facts not in dispute relied upon by Mr. Howard are the make and model of the gun, Glock 23, and the ammunition used, Hornaday Z-Max (69: 7). While the trial court partially questioned this factual basis as well, at least with regards to the ammunition used, if the court did indeed conclude, as a factual matter, that the defense failed to establish that Mr. Howard's experimentation was

conducted using the same ammunition involved in Mr. Dammen's death, that finding would be clearly erroneous and should not be relied upon by this court. State v. Jenkins, 303 Wis.2d 157, 736 N.W.2d 24, 34 (2007). In its ruling, the court rhetorically asked "Were these the same type of ammunition?" and then stated "I don't know the ammunition." (165: 10) In both his report, and his testimony, Mr. Howard was clear that he did, in fact, use both the same gun and same ammunition as was involved in Mr. Dammen's death:

> Q And then you obtained the exact model, the exact firearm?
>
> A Yes . And the exact ammunition.

(164: 18). The State challenged neither of these assertions. Positive, uncontradicted testimony as to the existence of a fact cannot be disregarded by the court unless the testimony or evidence is somehow discredited. Duffy v. Duffy, 132 Wis. 2d 340, 346, 392 N.W. 2d 115, 118 (Ct. App. 1986).

With regards to Mr. Howard's opinion on the dangerousness of the Glock 23, the fact that a Glock 23 was the firearm used in this case is the only fact of consequence upon which he could rely.

iv. Mr. Howard's Proposed Testimony Was the Product of Reliable Principles and Methods.

The trial court did not address with any specificity the aspects

of Mr. Howard's report and testimony at issue in this appeal. Rather, after somewhat circuitous discussion of unrelated matters, the trial court concluded "It is unclear to me, based on the record in this case, what reliable principles Mr. Howard relied upon or what reliable methods he used. As a result of this analysis, both the third and the fourth requirement of 907.02 are not met. Mr. Howard must be excluded" (165: 25-26).

Given the unique factual background being addressed by Mr. Howard, it would be hard to formulate a more concise, practical or effective method for determining whether the discharge of the weapon as described by Ms. Murphy would have left injuries on Mr. Dammen's hand than a live reenactment of her description of events. Obviously, there would be no body of research or data to mine on such a limited question. As such, Daubert's illustrative list of considerations, mandatory neither in whole nor in part, and not a "test," is of limited applicability in the present case. The Daubert standard must be flexible and that the factors outlined in that case may not be applicable to all types of expert testimony. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 150 (1999). For example, there could be no known error rate for testing, as there would be no reason for such a test to be conducted outside the confines of this particular

case. Nor could such a singular reenactment reasonably be subject to peer review. Reliance on peer reviewed publications is just one factor that courts may consider when determining the reliability of expert testimony. A court may instead rely on personal experience and knowledge of the witness. Seifert ex rel. Scoptur v. Balink, 2015 WI App 59, ¶ 31, 364 Wis. 2d 692, 709, 869 N.W.2d 493, 500. Nor would there be any reason for Mr. Howard's research and experimentation to be conducted independent of the present litigation. As stated above, the Daubert standard must be flexible to permit testimony outside the realm of pure science. And as the trial court recognized, for purposes of § 907.02 analysis, Mr. Howard's work did not fall under the category of scientific, but rather specialized knowledge (165: 9-10).

Another consideration under Daubert is whether the expert's theory can, or has been tested. This is precisely what Mr. Howard did. One might theorize (as Dr. Stier did) that discharge of a Glock 23 as described by Ms. Murphy would leave soot or injury on a hand. However, as discussed above, given the unique factual circumstances of this case, there would be no reason for resources outside of hands-on experimentation to readily be available to address such a question. So experimentation was conducted to test this theory.

Mr. Howard further testified that the methods he used in conducting his experiments utilized procedures generally accepted in the firearms and ballistics community, thus satisfying the fourth optional Daubert consideration (164: 17). The State offered no evidence to rebut this testimony.

As to Mr. Howard's opinion regarding the dangerousness of Glock firearms, this plainly falls into the realm of personal experience and knowledge of the witness discussed in Seifert, rather than experimentation or other activity lending itself to in-depth analysis of methodology. Given Mr. Howard's lengthy experience in gunsmithing and firearms manufacture, as well as consulting as a shooting reconstructionist, he has handled and examined firearms extensively, and has examined the Glock 23 involved in Mr. Dammen's death as well as an identical exemplar to use for further testing (164: 17, 37). Certainly, his utilization and evaluation of firearms relevant to this case in light of his experience would be the appropriate method for developing an opinion regarding the dangerousness of these weapons.

v. Mr. Howard Has Applied These Principles and Methods Reliably to the Facts of This Case.

In addressing this aspect of § 907.02, the trial court repeated

its assertion that it was unaware of any facts to which principles and methods could reliably be applied. For the reasons stated in section iii, this belief was unwarranted, and its application to this portion of its § 907.02 analysis was abuse of discretion as it applies the law to an erroneous view of the facts in the record.

In his report, Mr. Howard described his experiment (69: 8-10, *supra*, 13-14). He further elaborated during the August 9, 2016, motion hearing:

> A Okay. The yes part. It occurred to me, and since the police had photographed the deceased's hand, saw that there were no bruises, and there was no soot marks.
>
> THE COURT: No what marks?
>
> THE WITNESS: Soot.
>
> THE COURT: Oh, okay.
>
> THE WITNESS: And there was no powder stippling. The skin being basically tattooed by the burning or unburned pieces of gunpowder leaves very distinct marks. And my thought then was should there have been some? So I got an exemplar firearm with the same trigger pull, with the exact same ammunition the exact same brand model, everything.
>
> EXAMINATION BY MR. MAYS:
>
> Q Just for clarification, where did you get that exact same ammunition? It's been discontinued, correct?
>
> A That's correct.
>
> Q Where did you get it?
>
> A I don't remember the company we got it from but it was a hell of a task.
>
> Q Tennessee or Kentucky or Alabama?

A I do not remember, but it was a terrible task to find it.

Q But did you use the exact – you went and shot this exact weapon at the police range by the way correct ?

A Yes .

Q And then you obtained the exact model, the exact firearm?

A Yes . And the exact ammunition.

Q Okay. Go ahead, please.

A And I put a sleeve on as close as I could find. We were not able to find the exact exemplar jacket. It's been discontinued. And we could not find one despite massive efforts to find one. So put on one similar.

Grasped the firearm by the barrel in several many different manners, and literally thrust it in my own hand. Now, you've heard the old saying, I'm an expert, don't try this at home. I lit -- this was insanely dangerous, in light of the fact that I could have blown my elbow off.

And I tried this experiment again and again and again, and I found two things that were really very interesting. My own hand, for which in my report I enclose a photograph, had no soot, I had no stippling or tattooing, if you prefer the term, and had no burns, no bruises, nothing even though I was repeatedly struck by the shell casing.

And I got to admit it's got a pretty good wang to it. When we tested the original firearm I don't have my notes in front of me, but the shell casing was thrown something like twenty feet, an exceptional distance. The weapon in question had a tremendous power house ejector system.

And luckily, my exemplar did, too, throw it virtually the same exact distance. And yet, despite all of that, I had no bruises. And not only did I not have any bruises at the time, I had no bruises in the following days. Because bruises can occur and then not show up for days, but they didn't show up for days.

(164: 17-19).

Both in terms of evaluating the dangerousness of Glock's trigger safety system, and determining whether discharge of a firearm with one's hand over the barrel would leave soot or injury on one's hand, it would be hard to devise a more effective way in which to apply the principles and methods discussed above than directly recreating the circumstances described by Ms. Murphy.

II. THE TRIAL COURT ERRED IN PERMITTING THE STATE TO ELICIT TESTIMONY FROM ITS FORENSIC PATHOLOGIST ABOUT THE LIKELIHOOD OF A FIREARM DISCHARGING WITH MR. DAMMEN'S HAND OVER THE BARREL NOT LEAVING AN INJURY OR SOOT.

At trial, the State called Dr. Stier as its sole substantial rebuttal witness (the other witness being called only for authentication of a partial video recording which the State was precluded from presenting in its case-in-chief as it had been ruled the product of unlawful interrogation, but was admissible following Ms. Murphy's testimony).

Dr. Stier testified as follows:

> Q Dr. Stier, do you believe that the injuries you observed on Andrew Dammen's body could have resulted from a pistol being handed from Andrew Dammen to another person and during that hand-off the pistol discharging?
>
> MR. MAYS: I'm going to object. Relevance of this outside of the scope of his job description for purposes of what he did here, and it's -- it's an expert, I think, opinion that is not qualified by this Court to give.

THE COURT: Overruled. Go ahead, Doctor.

A So to restate the question, you're asking me if the lethal wound on Andrew Dammen could have been sustained from him handing the pistol to someone else. Well, there are a lot of different pistols. I think I would have to answer that question in the context of a specific model.

Q Glock 23 pistol. Glock 23, .40 caliber.

A Okay. So to answer that question, I will think openly that I rarely say never and rarely say always and rarely say impossible. But I'm almost to the point of being able to say that I think it's impossible based on my observations of Andrew at the time of autopsy, because of the nature of what happens at the discharge of a cartridge from a Glock 23, which we know occurred because he died from a gunshot injury. That implies that a discharge of the weapon had to occur.

Q So if -- if a Glock 23 was being handed from one person to another and it -- it was discharged in some way, what injuries would you expect to see that you didn't see?

A Well, so the Glock 23 is a cycling semi-automatic pistol. At the time of discharge of the cartridge, the slide moves to eject the spent casing and feed in an unspent one, if there is one in the magazine.

At the time of discharge of the cartridge, it's an explosion -- a controlled explosion. That's what propels the bullet and causes expulsion of other material which we've already talked about, like burned powder in the form of soot, unburned powder, and partially burned powder.

In a Glock 23, that port where the cartridge that's spent, the casing is ejected and the next one that's fed in is directly above the trigger. So if we are implying that a Glock 23 can go off that way, which it can, I've tried that. It can, but only if the hand is right over that ejection port.

And I would -- can't imagine that occurring without some -- a lot of visible soot on the hand of the person holding that Glock or additional injuries. The front of a Glock 23 has a sight ramp on it which is squared off. And it's not sharp like a knife, but it has sharp edges. When that slide goes back, it's with a lot of force.

> The Glock 23 in the .40 caliber or .40 Smith & Wesson is an FBI firearm. That is a law enforcement firearm. When that slide goes back, there's a lot of force. If you're holding on to that and that slide fires or slides, the gun fires and the slide moves, not only are you going to have soot on the hand, possibly injury from the casing going out, you probably are going to have injury from the sight ramp that's on the tip of it going across the hand.
>
> And Andrew's hands other than possible injections from therapy are pristine. So I can't -- I can't imagine that scenario.

(169: 123-26).

Outside of the jury's presence, the trial court further addressed the defense's objection, stating:

> I just want to make a little bit of a record on the objection that was made when Dr. Stier was on there -- on the stand. I anticipated what actually happened, which was essentially Dr. Stier gave the same testimony he had given before about, you know, all the gas and the propellants that are burned or half burned or partially burned, and the lead, and now he did talk about the slide going back and forth. But, you know, I -- having had him testify to most all of that the day before, it seemed to me that I could not sustain an objection that it was irrelevant or that it was something that he did not have the expertise to opine about.

(169: 127-28). The previous testimony, to which the trial court was presumably referring, during the State's direct examination, was as follows:

> Q Doctor, did you observe any traumatic injuries to the hands or arms of Andrew Dammen?
>
> A Well, sort of. I mean, a trauma can be defined as any physiological -- any physical defect. I did observe some grayish-blue discoloration under the skin on the top of, I think, one hand for sure. Hold on. Yeah. So I identified, I think -- it appears to be three zones of grayish-blue discoloration under the skin on the top of the hands of

Andrew from an application of a needle of some sort.

Q And that needle could have easily been from the critical care he was receiving before he -- while paramedics were trying to work on him and treating him in the hospital?

A That's what I believe they to be.

Q Did you notice any other injuries to Andrew Dammen's arms or forearms or hands?

A No.

Q Nothing consistent with a firearm being fired near his forearms or hands?

A No.

(167: 159-60).

This was the sole exchange regarding the condition of Mr. Dammen's hands. To the extent that Dr. Stier discussed powder or propellants during his previous testimony, it was in the context of Mr. Dammen's clothing and neck, and in reaching his conclusion that the shot was fired from "intermediate" range, meaning "it's not contact or any variant of contact and it's not far enough away for the powder to have lost velocity enough to not create wounds" (167: 149). Furthermore, Dr. Stier testified that he did not have any specific knowledge regarding the type of powder used in the ammunition involved in Mr. Dammen's death (167: 175-76). And he acknowledged that his familiarity with firearms was as a hobbyist and collector (*Id*).

Dr. Stier's previous testimony was clearly of a substantially different extent and nature than his rebuttal testimony. In his prior testimony, he was simply describing his observations in the course of his autopsy of Mr. Dammen. He offered no extrapolations from those observations with regard to the significance of the absence of injury to his hands. And with regard to the issue of powder burn on Mr. Dammen's clothing and neck, he only offered a deliberately, even carefully, indefinite conclusion about the distance from which Mr. Dammen was shot, somewhere between inches and feet, but could say nothing more precise (167: 149).

Dr. Stier's rebuttal testimony offered by the State was an obvious and radical departure from the limited previous testimony to which the defense did not object (167: 159-60). Dr. Stier's testimony, ironically, was essentially as a firearms expert. He detailed the firing cycle of a Glock 23, describing it as an "explosion." He discussed the movement of the gun's slide, describing the motion of the sight mechanism during firing. He opined about the force of cartridge ejection. He bluntly stated that there would not only be soot on the hands, but also injury. And even more bizarrely, he seemed to suggest that his opinion was based on the fact that he himself had somehow discharged a Glock 23 in the

very manner described by Ms. Murphy – "So if we are implying that a Glock 23 can go off in that way, which it can, I've tried that" (169: 125). And then he claimed that such a discharge could occur "only if the hand is right over the ejection port," which is a claim that is not only utterly outside his area of expertise, but also factually dubious. And finally, offered the opinion that he "can't imagine" that the gun could not have discharged in the manner described by Ms. Murphy. Again, the State was permitted to use a forsenic pathologist who likes guns as a firearms expert witness.

Clearly, the defense's non-objection to Dr. Stier's comparatively clinical and limited observations during the State's case-in-chief could not reasonably be construed as a waiver of any objection to his wildly speculative, vastly more detailed and wide-ranging rebuttal testimony. Ms. Murphy *did* timely object to the testimony in question.

And Ms. Murphy's objection should have been sustained. As stated above, Dr. Stier's rebuttal testimony was essentially as an expert in the workings and effects of discharge of a Glock 23 pistol. Ms. Murphy's counsel objected to such testimony on the grounds that it was outside the scope of his expertise and not a topic on which he was qualified to give an opinion. Clearly, the workings of a

Glock 23 pistol are not within the purview of forensic pathology or Dr. Stier's area of professional expertise. And Dr. Stier admitted as much, noting that his familiarity with firearms was coincidental, and that he happened to have a "hobby in firearming" and was a "collector" (167: 175-76).

To admit such testimony without requiring the State to establish any qualification on the matter addressed was plainly error. How did Dr. Stier arrive at this conclusion? What were his training or education that render him qualified to make such conclusions regarding firearm discharges? Has he or anyone else tested his theory that discharge of a Glock 23 during hand-off would leave soot and injury on the hands? Has this testing been replicated? Repeated? Using the same make and model of gun? Using the same ammunition? In other words, the very considerations relied on by the trial court in *excluding* Mr. Howard's testimony on this point were not even *applied* to Dr. Stier before permitting this testimony over Ms. Murphy's objection.

The admissibility of evidence is discretionary with the trial court. State v. Peters, 192 Wis.2d 674, 685, 534 N.W.2d 867, 871 (Ct.App.1995). Discretionary decisions will be upheld as long as the trial court examined the relevant facts, applied the proper standard of

law and reached a conclusion a reasonable judge could reach. Id. The trial court's failure to apply any analysis or standard of law to Dr. Stier's qualifications before allowing this line of testimony render its admission an abuse of discretion. Moreover, for the above stated reasons, it is clear that even if the proper analysis and standards had been applied, the scope of Dr. Stier's rebuttal testimony plainly exceeded his qualifications.

III. NEITHER THE EXCLUSION OF MR. HOWARD'S TESTIMONY NOR THE ADMISSION OF DR. STIER'S REBUTTAL TESTIMONY WAS HARMLESS ERROR.

In order for an error to be deemed harmless, the party who benefited from the error must show that "it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." State v. Harvey, 254 Wis.2d 442, ¶ 49, 647 N.W.2d 189. (quoting Neder v. United States, 527 U.S. at 18, 119 S.Ct. 1827) As the party benefitted by the error, the State bears the burden of showing the error was harmless. State v. LaCount, 2008 WI 59, ¶ 85, 310 Wis.2d 85, 750 N.W.2d 780. Framed a different way, an "error is harmless if the beneficiary of the error proves 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " State v. Mayo, 2007 WI 78, ¶

47, 301 Wis.2d 642, 734 N.W.2d 115 (quoting State v. Anderson, 2006 WI 77, ¶ 114, 291 Wis.2d 673, 717 N.W.2d 74) (internal quotation marks omitted); State v. Stuart, 2005 WI 47, ¶ 40, 279 Wis.2d 659, 695 N.W.2d 259. Therefore, the State must establish, beyond a reasonable doubt, not that the jury *could* have convicted the defendant (i.e., sufficient evidence existed to convict the defendant), State v. Weed, 2003 WI 85, ¶ 28, 263 Wis.2d 434, 666 N.W.2d 485, but rather that the jury *would* have arrived at the same verdict had the error not occurred. *See* Harvey, 254 Wis.2d 442, ¶ 46, 647 N.W.2d 189 (quoting Neder, 527 U.S. at 18, 119 S.Ct. 1827).

Where there is a reasonable possibility that the error contributed to a conviction, reversal and a new trial must result. State v. Dyess, 124 Wis.2d 525, 547, 370 N.W.2d 222 (1985)

The crux of Ms. Murphy's defense was that the firearm discharged when it was being thrust into her hand by Mr. Dammen. In other words, it was an accidental discharge. Indeed, the defense requested, and was granted, Wisconsin's pattern jury instruction for accident – Wis. J. I. Crim. No. 772. The trial court's errors gravely impacted her defense.

A. DR. STIER'S TESTIMONY.

Ms. Murphy could put no finer a point on the importance of

Dr. Stier's testimony regarding the condition of Mr. Dammen's hands than the State did in its closing argument:

> And this thrusting of the gun into Natalie Murphy's hand where it mysteriously fired, this did not happen. And it is difficult in any criminal case to be able to say something just simply didn't happen, but we know that that didn't happen. It isn't just unlikely. It's impossible.
>
> Dr. Stier, a man who does 200 autopsies a year and has done them for years; a man who has no interest in this case whatsoever other than to do his job and do the autopsy and tell in court if he needs to about what he found; a very careful expert who says he doesn't like to say always, doesn't like to say never, doesn't like to say impossible.
>
> And you saw, actually, when he was talking about the abrasion collar around the wound. He said it can suggest the direction that the bullet traveled before it hit the body. But he will just not rely on it because he's seen cases where it doesn't suggest what it should suggest, or it doesn't exist when it should exist. He's too careful to say anything about the abrasion collar. It's just not reliable enough for his standards.
>
> But he is willing in this case to say there's no way this thrust into the hand happened. He's willing to say it's pretty much impossible. He can't imagine a scenario where that could have happened, because Andrew Dammen would have had some evidence of muzzle blast on his hands. Something -- powder, soot, injury, something on his hands. But how did Dr. Stier describe his hands? Pristine. No injury at all. Pristine.

(170: 53-54).

After arguing to the jury that Dr. Stier's rebuttal testimony rendered Ms. Murphy's innocent account of the firearm's discharge an *impossibility*, it certainly cannot now claim that its admission, if in error, was harmless.

If the jury believed that the discharge *could* have been accidental – i.e that the State had not established beyond a

reasonable doubt that it was intentional and not accidental – then it would have been obligated, as instructed, to find Ms. Murphy not guilty to both charges and their lesser included offenses. See: Wis. J. I. Crim. No. 772. The State was permitted to have its ostensibly credible and impartial expert witness seemingly debunk the entire theory of defense. Certainly the State can, and will, point to other evidence relied on in making its case, but given the obvious significance of Dr. Stier's rebuttal testimony, and the State's highlighting of the importance of that testimony before the jury, it cannot credibly claim that the jury not only could have, but *would have* reached the same result beyond a reasonable doubt in the absence of this testimony.

B. THE EXCLUSION OF MR. HOWARD'S TESTIMONY

And due to the exclusion of all testimony by Mr. Howard, the defense was left unable to effectively rebut Dr, Stier's contention. In speculation couched in the guise of scientific certainty, Dr. Stier claimed that it was nigh impossible for the gun to have discharged while being thrust into Ms. Murphy's hand by Mr. Dammen. However, relying on more than speculation, Mr. Howard actually recreated the conditions of discharge as described by Ms. Murphy and learned precisely the opposite. Not only was it possible for a

Glock 23 to discharge with a hand over the barrel without leaving soot or injury on that hand, but it was repeatable – over 10 times.

Moreover, Mr. Howard would have testified to the ineffectiveness of the trigger safety found on Glock firearms and the frequency of accidental discharges occurring with these weapons. Certainly this could have made the jury more likely to believe that the discharge in this case was, in fact, accidental.

Again, given the significance of Dr. Stier's rebuttal testimony as acknowledged by and highlighted by the State, it was not harmless error to bar Ms. Murphy from presenting testimony from Mr. Howard on this point, as well as the ease of accidentally firing a Glock pistol. Had the jury heard and accepted Mr. Howard's testimony on these issues, it certainly could have called into question what the State contended was practically the most damning evidence it was to consider.

IV. CONCLUSION

Ms. Murphy is entitled to a fair trial. She did not receive one. She was erroneously prevented from presenting highly relevant, highly probative, and highly exculpatory expert testimony that went to the heart of her defense. And the State was erroneously permitted to introduce testimony which on its face gave the appearance of

fundamentally debunking Ms. Murphy's entire defense. For these reasons, I would respectfully request that this Court reverse the convictions in this matter and grant Ms. Murphy a new trial.

Dated at Middleton, Wisconsin, November 21, 2017.

Respectfully submitted,

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CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 100 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and 60 characters per line. I further certify that the text of the electronic copy of this brief is identical to the text of the paper copy of this brief. The length of the brief is 9070 words.

_____

JOHN C. ORTH