STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2017AP1559-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NATALIE N. MURPHY,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE JUNEAU COUNTY CIRCUIT COURT, THE HONORABLE PAUL S. CURRAN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Did the circuit court properly use its discretion when it excluded testimony of a defense expert witness?

The circuit court implicitly answered yes by excluding the testimony.

This Court should answer "yes."

2. Did the circuit court properly use its discretion when it overruled Murphy's objection during rebuttal testimony? Alternatively, did Murphy forfeit her right to challenge the subsequent rebuttal testimony by not objecting to it?

The circuit court overruled Murphy's objection.

This Court should answer "yes."

3. Alternatively, were the rebuttal testimony and the exclusion of Murphy's proffered expert testimony harmless errors?

The circuit court did not decide this issue.

This Court should answer "yes."

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent, and because resolution of this appeal requires only the application of well-established precedent to the facts of the case.

INTRODUCTION

Murphy was convicted of reckless homicide for shooting and killing her boyfriend with whom she had a young child. Her theory of defense was that the fatal shot

was accidentally fired when her boyfriend thrust a gun into her hand. Murphy tried to introduce expert testimony to show that her version of the shooting was plausible, but the circuit court excluded it. After Murphy testified, the State recalled a witness who then testified that Murphy's version of the shooting was likely impossible because the victim's hands did not have any sign of injuries or gunshot residue. Murphy argues on appeal that the circuit court should have allowed her expert testimony and excluded the State's rebuttal testimony.

This Court should affirm. First, the circuit court properly used its discretion when it excluded Murphy's proffered expert testimony. Second, Murphy forfeited her right to challenge the State's rebuttal testimony because she did not object to the specific portions of it that she challenges on appeal. She objected only to the prosecutor's first question during rebuttal testimony, and the circuit court reasonably overruled the objection.

In any event, the alleged errors were harmless. The State introduced strong evidence of Murphy's guilt, including her spontaneous statements to first responders that she had shot and killed her boyfriend. Further, the testimony at issue was not important. That testimony concerned whether it is possible to hold the barrel of a Glock pistol when it is fired without getting any injuries or gunshot residue on one's hand. The State's rebuttal witness testified that doing so was likely impossible, while Murphy's proposed expert witness would have testified that it was possible. But that issue was purely hypothetical because the physical evidence strongly suggested that the victim was not holding the gun when he was shot. Indeed, Murphy did not unequivocally testify that the victim was holding the gun when it fired.

STATEMENT OF THE CASE

Around March 2014, about a month after Natalie Murphy's child in common with Andrew Dammen was born, Murphy learned that Dammen was dating another woman, Clara Haldeman. (R. 169:58–59.) Dammen said that he had made a "mistake" because of the stress of their baby coming. (R. 169:58.) Murphy told Dammen that she would continue to be in an exclusive relationship with him, and she kept her promise. (R. 169:58–59.) Murphy did not want their "child to grow up in a broken family." (R. 169:58.)

Murphy learned a couple of months later that Dammen had continued seeing Haldeman. (R. 169:59.) Murphy and Dammen broke up, and he moved in with Haldeman. (R. 169:59–60.) Dammen and Haldeman later broke up in November 2014, and he reconciled his relationship with Murphy. (R. 169:60–61.)

In late January or early February 2015, Murphy began hearing rumors that Haldeman might be pregnant with Dammen's child. (R. 169:61–62.) Dammen told Murphy that the rumors might be true. (R. 169:63.) The possibility that they might be true caused Murphy stress. (R. 169:64.)

A short time later, on February 11, Murphy and Dammen went out together to get drinks and play pool. (R. 169:82, 85.) Murphy and Dammen were getting along well that night. (R. 169:86–87; 168:204–06, 211–12, 220.) Dammen, however, exchanged text messages with Haldeman throughout the evening, with his final text message being sent to Haldeman at 12:34 a.m. (R. 168:43–44.)

Murphy and Dammen returned to her home after midnight. (R. 169:93, 95.) Murphy undressed, got into bed, and waited for Dammen to come into the bedroom. (R. 169:96.) Dammen entered the bedroom and said to Murphy, "Oh, so you're naked already?" (R. 169:96.) Murphy

said she could put her clothes back on, expecting Dammen to say no. (R. 169:96.) Dammen "kind of huffed" and Murphy thought she heard him leave the room. (R. 169:96.) Murphy felt "hurt" and "kind of rejected." (R. 169:97.) Dammen, who was still wearing a jacket, came back into the bedroom and said multiple times, "I can't do this anymore." (R. 169:97–98.)

Sheriff's deputies were dispatched to Murphy's home because a woman had called 9-1-1 and yelled, "Andrew is dead." (R. 166:94–97.) When deputies arrived at Murphy's house, she was standing in the doorway and yelled and motioned for them to go inside. (R. 166:97.) Murphy "was yelling and crying and saying that Andrew or Andy was dead." (R. 166:97.) Murphy sat on a chair while "crying hysterically" and "rocking back and forth." (R. 167:32.)

A deputy went into a bedroom and found Dammen's unresponsive body lying on the floor. (R. 166:98–99.) The deputy did not see any injuries at that point. (R. 166:99.) He went to another room where Murphy was and he asked her what had happened. (R. 166:100.)

Murphy said that "she had killed" Dammen. (R. 166:100.) A deputy asked Murphy what had happened, and "she said that she fucking shot him." (R. 166:101.) The deputy asked her what she had shot Dammen with, and Murphy said, "With that fucking gun right over there." (R. 166:102.) Murphy was referring to a Glock pistol that was in a dresser drawer. (R. 166:102.) Murphy said, "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." (R. 103:1–2.) A deputy returned to the bedroom where Dammen's body was lying and unsuccessfully tried to revive him with chest compressions. (R. 166:103–04.)

A deputy smelled alcohol on Murphy and asked her whether she had been drinking. (R. 105:2; 166:104.) Murphy

said, "I've had enough to kill the man that I love if that gives you any indication." (R. 105:2.) Testing later showed that Murphy's blood-alcohol concentration around the time of the shooting was .145. (R. 120:1; 167:197–98; 170:30–31.)

An autopsy revealed that Dammen had died from a gunshot wound. (R. 169:124.) The fatal bullet had gone "into the compartment where the heart is but [did] not strike the heart." (R 167:151.) The bullet struck Dammen's pulmonary and aorta arteries, "the two largest arteries in the human body." (R 167:151.) It also struck his spinal cord and would have paralyzed him had he survived. (R. 167:152.)

Experts examined the gun from this case and the jacket that Dammen was wearing when he was shot. A firearm and tool mark examiner with the State Crime Lab determined that the gun "was not shot at or near contact with" the jacket that Dammen was wearing. (R. 168:176.) His reasoning was that the jacket did not have any "classic signs of an at or near contact [shooting]—the singeing, burning, tearing of the fabric." (R. 168:175.) He also reasoned that the bullet hole on the jacket did not have a "lead halo," which generally appears on an item that is shot within one foot of a gun. (R. 168:175.)

Dr. Michael Stier, who performed an autopsy on Dammen, reached the same conclusion. Dr. Stier could not estimate how far Dammen was from the gun when it was fired, but he concluded that the gunshot wound was "not a contact wound and it's not a distant wound. It is an intermediate firearm wound." (R. 167:150.) The term "contact" wound includes "near contact" wounds. (R. 167:172.) Dr. Stier believed that Dammen's gunshot wound was "[a]bsolutely not" a contact wound. (R. 167:177.) Dr. Stier reached his conclusion based on the stipple lesions on Dammen's shirt and jacket, which were caused by unburned or partially unburned gunpowder particles that were discharged from the gun. (R. 167:148–49.) Dr. Stier

performed an average of 200 autopsies a year over 20 years, with about five to nine percent of them in homicide cases. (R. 167:135, 192.)

The State charged Murphy with the first-degree intentional homicide of Dammen and with first-degree recklessly endangering the safety of their infant child. (R. 36.)

In November 2015, Murphy's lawyer contacted Steven Howard, a self-proclaimed expert on firearms and related subjects. (R. 69:3.) Murphy's lawyer hired Howard to reenact the shooting. (R. 69:3.) In a report, Howard claimed that Dammen had been shot when he thrust the gun into Murphy's hand. (R. 69:5.) Howard tried to reenact that version of the shooting by thrusting a gun from one hand to the other and firing it toward himself. (R. 69:10.) Howard fired more than ten rounds toward himself while holding the barrel of the gun, which he acknowledged was extremely dangerous. (R. 69:10.) Howard's hand that was on the barrel did not have any injuries or gunpowder residue on it afterward. (R. 69:12.)

Howard also stated in his report that "Glocks are notorious for accidental/unintended discharges. They are, in this author's opinion, the most unsafe firearm ever invented." (R. 69:19.) For support, Howard stated that "[s]omewhere between 7 to 8 out of every 10 accidental discharges this author investigates involve a Glock." (R. 69:19.) He further reasoned that "if anything touches the trigger on a Glock handgun, the one 'external' safety, which is located on the trigger itself, becomes meaningless and the gun discharges like any other gun with the safety off." (R. 69:20.)

The State moved to exclude Howard's proffered expert testimony at trial under Wis. Stat. § 907.02(1), Wisconsin's so-called *Daubert*[1] standard. (R. 66.) The circuit court received briefs on the issue and held an evidentiary hearing where Howard testified. (R. 73; 80–82; 163.) The court granted the State's motion at a later hearing. (R. 165:8–26.)

Murphy had a five-day jury trial in September 2016. (R. 166–70.) Witnesses testified to the facts summarized above.

In addition, Dr. Stier testified briefly about Dammen's hands. He testified that Dammen's hands had some discoloration that had been caused by a needle, apparently by paramedics who were treating him. (R. 167:159–60.) He further testified that Dammen's hands did not have any injuries that would be consistent with a gun being fired near his hands. (R. 167:160.)

Murphy testified in her defense. She said that Dammen had leaned over her while she was in bed, thrust the gun into her right hand, and then fell over. (R. 169:98–99, 115–16.) When asked whether the gun was still in Dammen's hand when it fired, Murphy said, "I believe so, yes." (R. 169:115.) She testified that she did not hear the gun fire. (R. 169:98, 116.) She just assumed that the gun "had to have" fired because Dammen fell to the floor and was not saying anything. (R. 169:98, 101, 116.)

The State recalled Dr. Stier to offer rebuttal testimony. (R. 169:122–23.) The prosecutor asked, "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?" (R. 169:123.) Murphy objected and the circuit court overruled her objection.

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[1] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

(R. 169:123.) Dr. Stier said, "I think I would have to answer that question in the context of a specific model." (R. 169:124.)

The prosecutor said, "Glock 23 pistol. Glock 23, .40 caliber." (R. 169:124.) Murphy did not object to the question. Dr. Stier then said, "I'm almost to the point of being able to say that I think it's impossible based on my observations of [Dammen] 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." (R. 169:124.) Murphy did not object to the answer.

The prosecutor then asked Dr. Stier what kinds of injuries he would expect to see on a person who was shot by a Glock 23 pistol while handing it to another person. (R. 169:124.) Murphy did not object to the question. Dr. Stier then gave an answer that spanned three pages of transcript. (R. 169:124–26.) His answer discussed the mechanics of how a Glock 23 pistol fires and the ways in which it would injure a person's hand while being fired. (R. 169:124–26.) Murphy did not object to any part of the answer.

After Dr. Stier's rebuttal testimony, the circuit court explained that it overruled Murphy's objection because the court had expected Dr. Stier to give testimony similar to his testimony from the previous day. (R. 169:127–28.)

The jury acquitted Murphy of the two counts charged but convicted her of a lesser-included offense of each count charged: first-degree reckless homicide and second-degree recklessly endangering safety.

Murphy appeals her judgment of conviction. (R. 155.)

SUMMARY OF ARGUMENT

I. The circuit court properly used its discretion when it excluded Murphy's proposed expert testimony by Howard. The proffered testimony largely concerned Howard's experiment where he tried to reenact Murphy's account of

the shooting. But Murphy has failed to show that Howard is an expert in shooting reconstruction. Further, the circuit court reasonably concluded that Murphy had failed to show that (1) Howard's opinion was based on sufficient facts or data, (2) Howard's opinion was the product of reliable principles and methods, and (3) Howard had reliably applied those principles and methods to the facts here.

II.A. The circuit court properly overruled Murphy's objection to a question during Dr. Stier's rebuttal testimony. The question asked Dr. Stier whether the injuries that he observed on Dammen could have resulted from a gun discharging when Dammmen handed it to someone else. A reasonable judge could think that Dr. Stier—who had done an average of 200 autopsies a year for 20 years—was qualified to answer the question.

II.B. Murphy forfeited her right to challenge the specific portions of Dr. Stier's rebuttal testimony that she challenges on appeal. During Dr. Stier's rebuttal testimony, Murphy objected only when the State asked a question about the injuries that Dr. Stier had observed on Dammen. Murphy failed to object when the State subsequently asked Dr. Stier about the mechanics of Glock pistols. Murphy thus forfeited her right to challenge Dr. Stier's testimony about Glock pistols.

III. In any event, the circuit court's alleged errors were harmless. The State introduced strong evidence of Murphy's guilt. She told first responders that she had shot and killed Dammen. The fact that he was shot in a vital part of the body further suggests that Murphy intentionally shot him. The State also showed that Murphy had a motive to shoot Dammen: she apparently thought that Dammen was breaking up with her again and was going to leave her for his other girlfriend, whom he might have impregnated. In contrast, the expert testimony at issue was not important. It concerned a purely hypothetical question—whether

Dammen's hand would have had injuries or gunshot residue on it *if* he were holding the gun when it was fired. But physical evidence strongly suggests that Dammen was *not* holding the gun when it was fired, and Murphy did not unequivocally testify otherwise. And the only expert rebuttal question to which Murphy objected was harmless because Dr. Stier did not give a substantive answer.

STANDARDS OF REVIEW

This Court reviews a circuit court's decision admitting or excluding evidence for a misuse of discretion. *State v. (James) Hunt*, 2014 WI 102, ¶ 20, 360 Wis. 2d 576, 851 N.W.2d 434. This Court reviews de novo whether an objection to evidence adequately preserved the issue for appeal, *State v. Kutz*, 2003 WI App 205, ¶ 27, 267 Wis. 2d 531, 671 N.W.2d 660, and whether an alleged error was harmless, *State v. King*, 2005 WI App 224, ¶ 22, 287 Wis. 2d 756, 706 N.W.2d 181.

ARGUMENT

I. The circuit court properly used its discretion when it excluded Murphy's proffered expert testimony.

A reviewing court "will not disturb a circuit court's decision to admit or exclude evidence unless the circuit court erroneously exercised its discretion." *(James) Hunt*, 360 Wis. 2d 576, ¶ 20 (citation omitted). "A circuit court erroneously exercises its discretion if it applies an improper legal standard or makes a decision not reasonably supported by the facts of record." *Id.* (citation omitted). Further, "[r]egardless of the extent of the trial court's reasoning, [this Court] will uphold a discretionary decision if there are facts in the record which would support the trial court's decision had it fully exercised its discretion." *State v. (John) Hunt*,

2003 WI 81, ¶ 52, 263 Wis. 2d 1, 666 N.W.2d 771 (citation omitted).

"The test is not whether this court agrees with the ruling of the trial court, but whether appropriate discretion was in fact exercised." *State v. Wollman*, 86 Wis. 2d 459, 464, 273 N.W.2d 225 (1979). When reviewing a discretionary decision by a circuit court, this Court does not determine whether the decision was "'right' or 'wrong.'" *State v. Jeske*, 197 Wis. 2d 905, 913, 541 N.W.2d 225 (Ct. App. 1995). Rather, the decision "will stand unless it can be said that *no reasonable judge*, acting on the same facts and underlying law, could reach the same conclusion." *Id.* (emphasis added). "It is not important that one trial judge may reach one result and another trial judge a different result based upon the same facts." *State v. Ronald L.M.*, 185 Wis. 2d 452, 463, 518 N.W.2d 270 (Ct. App. 1994).

A witness may testify about his or her "scientific, technical, or other specialized knowledge" if (1) the testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue"; (2) the witness is "qualified as an expert by knowledge, skill, experience, training, or education"; (3) "the testimony is based upon sufficient facts or data"; (4) "the testimony is the product of reliable principles and methods; and (5) "the witness has applied the principles and methods reliably to the facts of the case." Wis. Stat. § 907.02(1). The Legislature adopted this so-called *Daubert* standard in 2011. *State v. Giese*, 2014 WI App 92, ¶ 17, 356 Wis. 2d 796, 854 N.W.2d 687.

"The [*Daubert*] standard is flexible but has teeth. The goal is to prevent the jury from hearing conjecture dressed up in the guise of expert opinion." *Id.* ¶ 19 (citations omitted). "The court's gate-keeper function under the *Daubert* standard is to ensure that the expert's opinion is based on a reliable foundation and is relevant to the material issues." *Id.* ¶ 18 (citation omitted). "Relevant

factors include whether the scientific approach can be objectively tested, whether it has been subject to peer review and publication, and whether it is generally accepted in the scientific community." *Id.* (citation omitted). A trial court has discretion when determining which reliability factors are relevant in a given case and when applying them. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

The proponent of evidence has the burden of showing why it is admissible. *State v. Jenkins*, 168 Wis. 2d 175, 187–88, 483 N.W.2d 262 (Ct. App. 1992). "The party seeking to introduce the expert witness testimony bears the burden of demonstrating that the expert witness testimony satisfies the [*Daubert*] standard by a preponderance of the evidence." *Krik v. Exxon Mobil Corp.*, 870 F.3d 669, 673 (7th Cir. 2017) (citation omitted); *see also Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 n.10 (1993).

Here, Murphy's proffered expert testimony by Howard failed four of the requirements under Wis. Stat. § 907.02(1). At the very least, the circuit court had a reasonable basis for thinking so.

A. Murphy failed to show that Howard is an expert in shooting reconstruction.

Murphy failed the second requirement under Wis. Stat. § 907.02(1) because she did not show that Howard was an expert in shooting reconstruction. At the *Daubert* hearing, Howard testified that he was "a part-time attorney" and "a part-time weapons expert, shooting reconstructionist, ballistics expert, basically firearms expert and specializing in shooting cases." (R. 163:72.) Howard previously had a gunsmith job at C. Sharps Arms. (R. 163:126–27.) When the prosecutor asked Howard whether his job with C. Sharps Arms had him investigate crime scenes where shootings had occurred, Howard said, "I had to go to the scene of scenes. I had to go to the gun itself . . . ." (R. 163:128.) In other words,

no. Howard also testified that he had taken "[a] number of investigative classes" dealing with crime scene investigation before 1989. (R. 163:128–29.) He could not recall the names of the classes. (R. 163:128–29.) He also made vague references to "other things that were covered at the Border Patrol Academy" and getting "into some investigative things at the Department of Defense federal police." (R. 163:129.) Howard worked at each of those agencies for less than a year. (R. 163:118, 123.) He was fired from the Department of Defense job and was forced to resign upon threat of being fired from the Border Patrol job. (R. 163:121, 124.) These facts show that the circuit court had a reasonable basis to find that Howard lacked the required expertise to give his proffered testimony about his shooting reconstruction experiment.

The circuit court further concluded that "Mr. Howard's opinions also involve things that are clearly outside of his area of expertise, if he has any." (R. 165:24.) It noted that "Mr. Howard described how hands work as they are grasping something." (R. 165:24.) But there was no evidence that Howard "has any foundation in the science of kinesiology or the mechanics of how hands work." (R. 165:24.)

The circuit court also determined that "Mr. Howard's opinions have never been published in any peer-reviewed article." (R. 165:23.) The testimony at the *Daubert* hearing "established that Mr. Howard didn't even understand what peer reviewed meant." (R. 165:24.) As noted above, a circuit court may find peer review and publication relevant in a *Daubert* analysis. *Giese*, 356 Wis. 2d 796, ¶ 18.

In arguing that Howard was qualified as an expert, Murphy heavily relies on Howard's firearms expertise. (Murphy Br. 16–18.) But being a firearms expert does not make one an expert in shooting reconstruction. *See, e.g.*, *Christian v. State*, 998 So. 2d 1019, 1023 (Miss. Ct. App. 2008). Murphy has not met her burden of showing that

Howard is an expert in shooting reconstruction. The circuit court at least had a reasonable basis to reach that conclusion.

B. Murphy failed to show that Howard's proposed testimony was based on sufficient facts and data.

Murphy also failed the third requirement under Wis. Stat. § 907.02(1) with respect to Howard's proposed testimony about his reconstruction of the shooting. The circuit court noted that an "interview of Natalie Murphy is a source of much of Mr. Howard's factual support." (R. 165:15.) The court also noted, however, that the defense did not provide any evidence about Murphy's anticipated testimony or "even a summary of this interview." (R. 165:17.) The court determined that inferences about what Murphy might have told Howard were inadequate to allow it to perform its "gatekeeper function." (R. 165:17.) The court explained that "[w]ithout knowledge of Ms. Murphy's statement to Mr. Howard, the Court simply can't perform its gatekeeper function." (R. 165:18.) It concluded that because Murphy had failed to meet her "burden of providing this information," "Mr. Howard must be excluded from testifying." (R. 165:18.)

The circuit court's decision was reasonable. For example, Howard stated in his report that Murphy's "hand was 2 feet off the bed at the time of the shooting +/- 3 inches." (R. 69:9.) How did Howard come up with that number? Did Murphy give him that estimate? Did he return to the crime scene with Murphy and take that measurement? The circuit court reasonably determined that Murphy had failed to show that Howard's shooting reconstruction was based on sufficient facts and data.

Murphy argues that presumptions in Howard's shooting reconstruction experiment were based on information from her. (Murphy Br. 19.) But that argument

ignores the circuit court's concern—Murphy and Howard did not tell the circuit court what she had said to him, so the court had no way of knowing whether Howard had relied on bald assumptions as opposed to actual information from Murphy. In other words, the court had no way of knowing whether Howard's opinion was based on sufficient facts and data.

Further, Howard's opinion about the dangerousness of Glock guns was not based on sufficient facts and data. Howard claimed in his report that "Glocks are notorious for accidental/unintended discharges. They are, in this author's opinion, the most unsafe firearm ever invented." (R. 69:19.) For support, Howard stated that "[s]omewhere between 7 to 8 out of every 10 accidental discharges this author investigates involve a Glock." (R. 69:19.) That anecdotal evidence is insufficient under *Daubert*. Howard failed to consider or rebut other possible explanations. It is entirely possible that Glocks could be involved in a majority of total accidental discharges but still have a *lower rate* of accidental discharge than other guns. In other words, a less commonly owned type of gun might have a higher rate, but lower total number, of accidental discharges than Glocks. Further, Howard failed to provide relevant statistical analysis or information, including whether his case work included a large enough sample size to be representative of all accidental discharges.

Howard's other reasoning undercuts, rather than supports, his claim that Glocks are the most unsafe gun ever made. He stated in his report that "[t]he Glock is the type of pistol that you can throw it out of a 747 jet at 37,000 feet and it can land on concrete and it still won't go off." (R. 69:20.) That fact makes Glocks sound safe. Howard further stated, "But, *if anything touches the trigger* on a Glock handgun, the one 'external' safety, which is located on the trigger itself, becomes meaningless and the gun *discharges*

like any other gun with the safety off." (R. 69:20.) What if a feather touched a Glock's trigger? Would the Glock—"like any other gun"—fire? Saying that a Glock would fire "like any other gun" does not show that Glocks are the most unsafe gun ever made. Howard's opinion on the dangerousness of Glocks was "conjecture dressed up in the guise of expert opinion." *See Giese*, 356 Wis. 2d 796, ¶ 19.

In short, sufficient facts and data did not support Howard's proposed testimony about his shooting reconstruction experiment or his opinion about the dangerousness of Glocks.

C. Murphy failed to show that Howard's proposed testimony was the product of reliable principles and methods.

Murphy failed the fourth requirement under Wis. Stat. § 907.02(1), as well. One possible reliability factor is whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." *Seifert v. Balink*, 2017 WI 2, ¶ 63, 372 Wis. 2d 525, 888 N.W.2d 816 (lead opinion) (citation omitted), *reconsideration denied*, 2017 WI 32, 374 Wis. 2d 163, 897 N.W.2d 54. Another factor is "[w]hether the expert has adequately accounted for obvious alternative explanations." *Id.* (citation omitted).

The circuit court here found Howard's proposed testimony unreliable because of those two factors. (R. 165:12–13, 18–19.) It reasoned that Howard had done "a results-oriented investigation." (R. 165:19.) "[T]he purpose of [Howard's] investigation was to support Ms. Murphy's testimony, not really to find out what happened." (R. 165:19.) Howard also failed to consider "other possible theories that would fit the evidence." (R. 165:19.) The circuit

court's conclusions were reasonable, especially in light of the mission statement in Howard's report, which stated that his "mission was simple: determine, if possible, what really happened?" (R. 69:4.) If Howard's mission really was to find out what happened, his failure to consider possibilities besides Murphy's self-serving account hurts his reliability. The circuit court properly used its discretion when it determined that Howard's proposed testimony was not based on reliable principles and methods.

Murphy disagrees with the circuit court's reasoning because there was no "reason for Mr. Howard's research and experimentation to be conducted independent of the present litigation." (Murphy Br. 22.) But a similar point could likely be made whenever an expert is hired to perform an investigation for the purposes of specific litigation. A circuit court may consider that fact when determining if the expert's opinion is reliable. *Balink*, 372 Wis. 2d 525, ¶ 63 (lead opinion). Murphy's disagreement with the circuit court's rationale does not show that the court misused its discretion.

D. Murphy failed to show that Howard reliably applied principles and methods.

Finally, Murphy failed to satisfy the fifth requirement under Wis. Stat. § 907.02(1). For example, in his experiment, "Howard did not use an exact copy of the jacket that Andrew Dammen was wearing." (R. 165:25.) The circuit court found that fact "significant"—and for good reason. (R. 165:25.) Howard testified at the *Daubert* hearing that there were "small particle burn marks on the inside of the sleeve" of Dammen's jacket. (R. 163:85.) He corrected himself, saying that because of the jacket's material, the burn marks were better characterized as melt marks. (R. 163:90.) During his shooting reenactment experiment, Howard used a jacket that was as close to Dammen's jacket as he could find.

(R. 163:88.) He determined that the melt marks on Dammen's jacket sleeve supported Murphy's theory of the shooting. (R. 163:89–90, 93–94.) But, as the circuit court noted, Howard did not explain what kind of material his test jacket was or whether it was the same kind of material as Dammen's jacket. (R. 165:25.) In light of that omission, Murphy did not show that Howard had reliably conducted his experiment with the test jacket.

Howard's improper reliance on a forensic journal article further shows that he did not reliably apply principles and methods. Howard testified that one of the bases for his opinion was an article titled, "Gunshot Residue Patterns on Skin in Angled Contact and Near Contact Gunshot Wounds." (R. 163:85.) The circuit court determined that the article was "completely irrelevant" here. (R. 165:21.) The court reasoned that the article did not involve Glocks. (R. 165:20–21.) It further reasoned that the article noted that different types of gunpowder could cause "a completely different result" in terms of gunshot residue patterns, but the article did not purport to discuss the same type of gunpowder that was used in this case. (R. 165:20–21.) The court further distinguished that article because it involved "contact" gunshots where a gun was less than an inch from its target, but here Howard thought that the gun was about 20 inches away from Dammen when it was fired. (R. 165:20.)

Murphy argues that Howard was a reliable expert because he testified at the *Daubert* hearing that his experiment used procedures that were generally accepted in the ballistics community. (Murphy Br. 23.)[2] But a circuit court is not required to accept an expert witness's *ipse dixit* ("because I said so") testimony that he or she used reliable

[2] Murphy raises this argument when discussing the fourth requirement under Wis. Stat. § 907.02(1), but the State thinks that it is instead relevant to the fifth requirement.

methods. *Giese*, 356 Wis. 2d 796, ¶¶ 19–20. The circuit court reasonably characterized Howard's bald assertion that he followed generally accepted practices as *ipse dixit* testimony. (R. 165:12.)

Murphy further argues that Howard reliably applied sound principles and methods because he reconstructed the shooting and used the same type of ammunition. (Murphy Br. 24–26.) But Murphy's argument ignores the reliability shortcomings discussed above. They gave the circuit court a reasonable basis to exclude Howard from testifying.

In sum, the circuit court properly used its discretion when it excluded Murphy's proffered expert testimony.

II. The circuit court properly overruled Murphy's objection to rebuttal testimony, and she forfeited her right to challenge the subsequent testimony by not objecting to it.

A. The circuit court properly used its discretion when it overruled Murphy's objection during rebuttal testimony.

As discussed more fully above, a reviewing court "will not disturb a circuit court's decision to admit or exclude evidence unless the circuit court erroneously exercised its discretion." *(James) Hunt*, 360 Wis. 2d 576, ¶ 20 (citation omitted). A circuit court's discretionary decision "will stand unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion." *Jeske*, 197 Wis. 2d at 913.

After Murphy testified, the State recalled Dr. Stier to offer rebuttal testimony. (R. 169:122–23.) The prosecutor asked, "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?" (R. 169:123.) Murphy objected, saying, "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." (R. 169:123.) The circuit court overruled the objection. (R. 169:123.)

The circuit court reasonably concluded that Dr. Stier was qualified to answer that question. Dr. Stier testified that he was a medical doctor, a professor at the University of Wisconsin Medical School, and a Wisconsin-licensed pathologist. (R. 167:133.) He testified that his medical practice was exclusively autopsies, almost all of which were forensic autopsies. (R. 167:133–34.) At the time of trial, he had been doing autopsies for about 20 years. (R. 167:135.) He did 150 to 300 autopsies per year, averaging about 200. (R. 167:135.) About five to nine percent of his autopsies were in homicide cases. (R. 167:192.) He did an autopsy on Dammen. (R. 167:135–37.) During his previous testimony two days earlier—to which Murphy did not object—Dr. Stier testified that he had noticed some "grayish-blue discoloration" on Dammen's hands, which Dr. Stier thought had been caused by paramedics using needles on Dammen. (R. 167:159.) Dr. Stier also said during his previous testimony, without objection, that he had not seen any other injuries to Dammen's forearms or hands, including injuries that would be consistent with a gun being fired near Dammen's forearms or hands. (R. 167:160.) A reasonable judge could think that Dr. Stier was qualified to answer the rebuttal question due to his lengthy medical career doing thousands of autopsies and his autopsy on Dammen, which included his observation of Dammen's hands.

Murphy argues that her "objection should have been sustained." (Murphy Br. 31.) She contends that "Dr. Stier's rebuttal testimony was essentially as an expert in the workings and effects of discharge of a Glock 23 pistol. . . . Clearly, the workings of a Glock 23 pistol are not within the purview of a forensic pathology or Dr. Stier's area

of professional expertise." (*Id.* at 31–32.) But, as explained in the next subsection, Murphy did not object to Dr. Stier's testimony about the mechanics of Glock 23 pistols. Murphy thus forfeited her right to challenge that testimony on appeal. Her *only* objection during Dr. Stier's rebuttal testimony occurred when the prosecutor asked, "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?" (R. 169:123.) The circuit court reasonably overruled that objection.

B. Murphy forfeited her right to challenge certain rebuttal testimony.

"It is a fundamental principle of appellate review that issues must be preserved at the circuit court." *State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727. "The party who raises an issue on appeal bears the burden of showing that the issue was raised before the circuit court." *Id.* (citation omitted).

"[A] specific, contemporaneous objection is required to preserve error." *State v. Delgado*, 2002 WI App 38, ¶ 12, 250 Wis. 2d 689, 641 N.W.2d 490 (citation omitted). "[A]n objection must be made as soon as the opponent might reasonably be aware of the objectionable nature of the testimony." *State v. Waites*, 158 Wis. 2d 376, 390, 462 N.W.2d 206 (1990) (citation omitted). "Failure to object results in a waiver of any contest to that evidence." *Id.* (citation omitted).[3]

"The waiver rule serves several important objectives. Raising issues at the trial court level allows the trial court to

[3] Although some case law uses the term "waiver" in this context, the proper term is "forfeiture." *See State v. Haywood*, 2009 WI App 178, ¶ 15 & n.5, 322 Wis. 2d 691, 777 N.W.2d 921.

correct or avoid the alleged error in the first place, eliminating the need for appeal." *Huebner*, 235 Wis. 2d 486, ¶ 12 (citation omitted). "It also gives both parties and the trial judge notice of the issue and a fair opportunity to address the objection." *Id.* (citation omitted). This rule also "prevents attorneys from 'sandbagging' errors, or failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal." *Id.* (citations omitted). Further, when a party fails to object to an alleged error, the circuit court is not given an opportunity to exercise its discretion. *State v. Seeley*, 212 Wis. 2d 75, 81, 567 N.W.2d 897 (Ct. App. 1997). When an appellant challenges the admission of unobjected-to evidence on appeal, "the appellant is in effect asking the reviewing court to exercise its discretion, when that is exclusively the role of the trier of fact." *Bunker v. LIRC*, 2002 WI App 216, ¶ 17, 257 Wis. 2d 255, 650 N.W.2d 864 (citation omitted).

A party's objection to one question does not extend to a later question. *See, e.g.*, *State v. Romero*, 147 Wis. 2d 264, 274, 432 N.W.2d 899 (1988); *State v. Mayer*, 220 Wis. 2d 419, 429–30, 583 N.W.2d 430 (Ct. App. 1998). In *Romero*, the defendant objected to a police officer's testimony about "allegations of other incidents of sexual assault." *Romero*, 147 Wis. 2d at 274. The defendant forfeited his right to challenge similar subsequent testimony because "[t]wo questions later, when [the officer] again referred to other allegations, defense counsel made no objection." *Id.* In *Mayer*, the defendant forfeited an objection to testimony about common characteristics of victims who suffered from battered woman's syndrome. *Mayer*, 220 Wis. 2d at 429–30. The defendant objected to testimony "about common characteristics of victims of domestic abuse," the circuit court overruled the objection, and then the witness's "testimony continued without objection." *Id.*

Here, Murphy similarly failed to object. The prosecutor asked, "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?" (R. 169:123 (emphasis added).) Murphy objected and the circuit court overruled her objection. (R. 169:123.) Dr. Stier then shifted the conversation from the injuries he had observed to specific firearms. He said, "I think I would have to answer that question in the context of a specific model." (R. 169:124.) The prosecutor said, "Glock 23 pistol. Glock 23, .40 caliber." (R. 169:124.) Murphy did not object to the question. Dr. Stier then said, "I'm almost to the point of being able to say that I think it's impossible based on my observations of [Dammen] 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." (R. 169:124.) Murphy did not object to the answer. The prosecutor then asked Dr. Stier what kinds of injuries he would expect to see on a person who was shot by a Glock 23 pistol while handing it to another person. (R. 169:124.) Murphy did not object to the question. Dr. Stier then gave an answer that spanned three pages of transcript. (R. 169:124–26.) His answer discussed how a Glock 23 pistol fires and the ways in which it would injure a person's hand while being fired. (R. 169:124–26.) Murphy did not object to any part of the answer.

Murphy thus forfeited her right to challenge Dr. Stier's testimony about how Glock 23 pistols function. Like the defendants in *Romero* and *Mayer*, Murphy objected to one question, was overruled, and then allowed the testimony to continue on a slightly different subject without objection. She objected only to the prosecutor's initial question about whether the *injuries that Dr. Stier observed* on Dammen's body could have resulted from a gun firing while being

handed to someone else. (R. 169:123.) The prosecutor and Dr. Stier then shifted the conversation toward the Glock 23 pistol specifically. (R. 169:124–26.) The prosecutor asked two questions about that specific gun, and Dr. Stier gave long answers to both questions, explaining how Glock 23 pistols function. (R. 169:124–26.) Murphy did not object to either question or any aspect of either answer. (R. 169:124–26.) On appeal, Murphy challenges Dr. Stier's testimony about the mechanics of Glock 23 pistols. (Murphy Br. 29–31.) She forfeited that challenge by failing to object to that specific testimony.

Murphy's two contrary arguments have no merit. First, she claims, without citing the record, that she "*did* timely object to the testimony in question." (*Id.* at 31.) She is wrong, as explained in the two preceding paragraphs.

Second, she argues that the circuit court should not have allowed Dr. Stier's testimony about Glock 23 pistols because it exceeded the scope of his testimony from the previous day. After Dr. Stier's rebuttal testimony, the circuit court explained that it overruled Murphy's objection because the court had expected Dr. Stier to give testimony similar to his testimony from the previous day. (R. 169:127–28.) Murphy argues that "Dr. Stier's previous testimony was clearly of a substantially different extent and nature than his rebuttal testimony." (Murphy Br. 30.) She reasons that Dr. Stier's rebuttal testimony "was essentially as a firearms expert," detailing the mechanics of a Glock 23 pistol. (*Id.*)

But "[i]t is not the duty of the trial court to *sua sponte* strike testimony that is inadmissible." *Delgado*, 250 Wis. 2d 689, ¶ 12 (citation omitted). If Murphy believes that Dr. Stier's rebuttal testimony about Glock 23 pistols was inadmissible, she should have objected to it at trial. At the very least, she should have moved to strike that testimony when she had reason to think that it had gone beyond what the circuit court was expecting to hear. By objecting only to

the State's initial question *about the injuries* that Dr. Stier observed on Dammen's body, Murphy did not preserve her right to challenge Dr. Stier's subsequent testimony *about Glock 23 pistols*.

This Court should apply the forfeiture rule here. Had Murphy objected to Dr. Stier's testimony about Glock pistols, or at least moved to strike that testimony when the circuit court later explained its reason for overruling Murphy's initial objection, the circuit court could have corrected the alleged error. At the very least, an objection could have given the prosecutor an opportunity to establish a foundation for Dr. Stier's testimony about Glock pistols. Murphy thus could have preserved judicial resources by eliminating the need to appeal this issue. Murphy is "in effect asking [this Court] to exercise its discretion" to determine whether Dr. Stier's testimony at issue should have been admitted, but making that determination was "exclusively" the circuit court's role. *See Bunker*, 257 Wis. 2d 255, ¶ 17. There is also a "sandbagging" concern because Murphy is seeking a new trial on a ground that she did not present to the circuit court. This concern is especially strong here because the circuit court excluded Murphy's proffered expert testimony about Glocks, so she should have thought that Dr. Stier's similar testimony about Glocks was inadmissible. Yet she said nothing when Dr. Stier's rebuttal testimony addressed the mechanics of Glock pistols. She also said nothing when she had reason to think that Dr. Stier's rebuttal testimony had gone beyond what the circuit court expected to hear.

In short, Murphy forfeited her right to challenge Dr. Stier's rebuttal testimony about Glock pistols.

III. The alleged errors were harmless.

If a circuit court erroneously excluded or admitted evidence, a defendant is not entitled to a new trial if the error was harmless. *State v. Nieves*, 2017 WI 69, ¶ 17, 376

Wis. 2d 300, 897 N.W.2d 363. "For an error to be harmless, the party who benefitted from 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. Deadwiller*, 2013 WI 75, ¶ 41, 350 Wis. 2d 138, 834 N.W.2d 362 (citation omitted). "In other words, '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.'" *Id.* (citation omitted).

A court considers "the totality of the circumstances" to determine whether an error was harmless. *(James) Hunt*, 360 Wis. 2d 576, ¶ 29. In doing so, a court may consider several non-exhaustive factors, including "the importance of the erroneously admitted or excluded evidence; the presence or absence of evidence corroborating or contradicting the erroneously admitted or excluded evidence; the nature of the defense; the nature of the State's case; and the overall strength of the State's case." *Id.* ¶ 27 (citation omitted).

If the circuit court erred by excluding Murphy's proffered expert testimony and allowing Dr. Stier's rebuttal testimony, those errors were harmless for two reasons. First, the State introduced strong evidence of Murphy's guilt. Second, the testimony at issue was not important. It concerned a hypothetical scenario that the physical evidence strongly suggested did not happen—and that Murphy's own testimony did not even unequivocally say happened. And the only rebuttal question to which Murphy objected was harmless because the answer did not hurt her defense.

One key piece of evidence of Murphy's guilt was her excited statements to first responders where she repeatedly admitted to shooting and killing Dammen. Statements given while under stress from an event are considered to be trustworthy because the person has not had time to think of a lie. *State v. Padilla*, 110 Wis. 2d 414, 418, 329 N.W.2d 263 (Ct. App. 1982). When sheriff's deputies responded to a 9-1-1

call at Murphy's house, Murphy was sitting on a chair while "crying hysterically" and "rocking back and forth." (R. 167:32.) Murphy said that "she had killed" Dammen. (R. 166:100.) A deputy asked Murphy what had happened, and "she said that she fucking shot him." (R. 166:101.) The deputy asked her what she had shot Dammen with, and Murphy said, "With that fucking gun right over there." (R. 166:102.) Murphy was referring to a Glock pistol that was in a dresser drawer. (R. 166:102.) Murphy said, "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." (R. 103:1–2.) A deputy smelled alcohol on Murphy and asked her whether she had been drinking. (R. 105:2; 166:104.) Murphy said, "I've had enough to kill the man that I love if that gives you any indication." (R. 105:2.) The jury reasonably believed Murphy's spontaneous explanation for the shooting rather than her self-serving *post hoc* story.

Murphy's intoxication also helped show that she shot Dammen. Intoxication suggests that a person is more prone to an impulsive violent act. *See State v. McGill*, 2000 WI 38, ¶ 31, 234 Wis. 2d 560, 609 N.W.2d 795 ("It is logical and completely reasonable to infer that a person under the influence may be more likely to commit an impulsive violent act against a police officer than one who is sober."). Murphy's blood-alcohol concentration around the time of the shooting was .145. (R. 120:1; 167:197–98; 170:30–31.)

The fact that Dammen was shot very close to his heart helps show that Murphy intentionally shot him. "In cases of first-degree murder, the fact that the defendant shot his [or her] victim in a vital part raises a presumption of intent." *Lofton v. State*, 83 Wis. 2d 472, 478–79, 266 N.W.2d 576 (1978) (citation omitted). Under those circumstances there is a presumption that the shooting was not "the result of accident." *See Smith v. State*, 69 Wis. 2d 297, 303, 230 N.W.2d 858 (1975) (citation omitted). Murphy shot Dammen

"very, very close to the heart." (R 167:151.) The bullet went "into the compartment where the heart is but [did] not strike the heart." (R 167:151.) The bullet struck Dammen's pulmonary and aorta arteries, "the two largest arteries in the human body." (R 167:151.) These facts show that Murphy presumably intended to kill Dammen or at least intentionally shot him.

Murphy's *own* testimony helped prove her motive, and thus intent, to shoot Dammen. A defendant's "motive to commit the crime" "permit[s] an inference of intent." *See State v. Hoffman*, 106 Wis. 2d 185, 200–01, 316 N.W.2d 143 (Ct. App. 1982). Murphy's own testimony shows that she wanted to be in an exclusive relationship with Dammen, the father of her child—but Dammen did not want the same thing and instead dated another woman, Clara Haldeman, whom he might have impregnated. (R. 169:58–62.) After Murphy and Dammen apparently reconciled, they got along together well during Dammen's final evening alive. (R. 169:60–61, 86–87.) But Murphy's night quickly deteriorated when she and Dammen returned to her home. Dammen rejected Murphy's apparent sexual invitation while she was naked in bed and told her, "I can't do this anymore." (R. 169:96–99.)

By contrast, the only rebuttal question to which Murphy objected was insignificant. The prosecutor asked during rebuttal, "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?" (R. 169:123.) Murphy objected and the circuit court overruled her objection. (R. 169:123.) Overruling that objection was harmless because the question merely called for an answer that would have been cumulative with Dr. Stier's initial testimony from two days earlier. During his initial testimony, Dr. Stier said *without objection* that

Dammen's hands did not have any injuries that would be consistent with a gun being fired near his hands. (R. 167:160.) And when the circuit court overruled Murphy's objection during Dr. Stier's rebuttal testimony, he gave an answer that was harmless to the defense. Dr. Stier's answer was, "I think I would have to answer that question in the context of a specific model." (R. 169:124.)

Moreover, the evidence that Murphy argues was erroneously admitted or excluded—whether Dammen's hand would have had residue or injuries if he had been holding the barrel of the gun when it fired—was not important because it related to a hypothetical scenario unsupported by the facts. Dr. Stier testified on rebuttal, without objection, that he was almost willing to say that it would have been impossible for Dammen to have been shot while he was holding the barrel of the gun because Dammen's hand did not have any gunpowder residue or injuries from the gun's slide moving back and forth when fired. (R. 169:124–26.) Howard would have testified that his hand did not have any injuries or gunpowder residue on it after he tried reenacting Murphy's account of the shooting by thrusting a gun from one hand into the other and firing it toward himself. (R. 69:10–12.) This disagreement was a hypothetical, moot point for two reasons.

First, Murphy did not testify unequivocally that Dammen was holding onto the gun when it fired. She testified that Dammen had leaned over her, thrust the gun into her right hand, and then fell over. (R. 169:98–99, 115–16.) When asked whether the gun was still in Dammen's hand when it fired, Murphy equivocated, saying, "I believe so, yes." (R. 169:115.) She testified that she did not hear the gun fire. (R. 169:98, 116.) She just assumed that the gun "had to have" fired because Dammen fell to the floor and was not saying anything. (R. 169:98, 116.) Thus, the

disagreement between Howard and Dr. Stier concerned a scenario that Murphy did not unequivocally say happened.

Second, the physical evidence showed that Dammen was not leaning over Murphy when the gun fired. A firearm and tool mark examiner with the State Crime Lab testified that the gun "was not shot at or near contact with" the jacket that Dammen was wearing. (R. 168:176.) His reasoning was that the jacket did not have any "classic signs of an at or near contact [shooting]—the singeing, burning, tearing of the fabric." (R. 168:175.) He also reasoned that the bullet hole on the jacket did not have a "lead halo," which generally appears on an item that is shot within one foot of a gun. (R. 168:175.)

Dr. Stier testified similarly during testimony that Murphy does not challenge on appeal. Dr. Stier could not estimate how far Dammen was from the gun when it was fired, but he concluded that the gunshot wound was "not a contact wound and it's not a distant wound. It is an intermediate firearm wound." (R. 167:150.) The term "contact" wound includes "near contact" wounds. (R. 167:172.) On cross examination, Dr. Stier confirmed that Dammen's gunshot wound was "[a]bsolutely not" a contact wound. (R. 167:177.) Dr. Stier reached his conclusion based on the stipple lesions on Dammen's shirt and jacket, which were caused by unburned or partially unburned gunpowder particles that were discharged from the gun. (R. 167:148–49.)

This physical evidence strongly suggested that Dammen was *not* leaning over Murphy with his hand on the gun when it fired. Thus, Dr. Stier's rebuttal testimony and Howard's proffered testimony about whether Dammen's hand could have been on the gun when it fired concerned a hypothetical scenario that the physical evidence strongly suggested did not happen. The jury therefore gave little or

no weight to Dr. Stier's rebuttal testimony, and it would have given little or no weight to Howard's testimony.

In sum, if the circuit court misused its discretion when making evidentiary rulings, the errors were harmless.

CONCLUSION

The State respectfully requests that this Court affirm Murphy's judgment of conviction.

Dated this 16th day of January, 2018.

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 9012 words.

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

I hereby certify that:

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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 16th day of January, 2018.

_____
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