

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

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Appeal No. 2017AP001559 CR

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

NATALIE N. MURPHY,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

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

Respectfully submitted,

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Defendant-Appellant

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**I. MR. HOWARD'S PROPOSED TESTIMONY
SATISFIED WIS. STAT. § 907.02.**

It is the State's position that Mr. Howard's proposed testimony failed to satisfy four of the requirements of Wis. Stat. § 907.02. Ms. Murphy disagrees for the following reasons.

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

As previously noted, the trial court “set aside” the issue of whether Mr. Howard was qualified as an expert fit to testify on the two issues relevant to this appeal - 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 regarding the dangerousness of the Glock 23 pistol. With the trial court failing to have reached a conclusion on this prong of § 907.02, the State is left to craft its own rationale in support of excluding Mr. Howard’s testimony. Much of what the State points to falls into what the trial court correctly described as going more towards Mr. Howard’s credibility than his qualifications. Without exhaustively restating Ms. Murphy’s previous argument, for approximately 25 years, he has been employed or occupied in some capacity involving the manufacture or maintenance of firearms, law enforcement, shooting investigations involving reconstructions and routinely has been published on these subjects. Mr. Howard is highly qualified to offer expert testimony on the matters at issue in this appeal.

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

The State asserts, as it did before the trial court, that the factual basis upon which Mr. Howard relied in his investigation was insufficient and unclear. Regarding the issue of the lack of apparent trauma to Mr. Dammen's hands, Mr. Howard plainly and explicitly made clear the factual basis for his experimentation – Ms. Murphy's account of an accidental discharge occurring while the gun was being thrust into her hand by Mr. Dammen. Neither the State, the trial court, nor the jury is obligated to accept this accounting of events as true, but that fact does not render Ms. Murphy's account an "insufficient" factual basis. Rather, the sequence of events recounted by Ms. Murphy is simply in dispute, as would be natural if not inevitable in a case of this nature. If this Court were to accept the State's position, it would put defendants in criminal cases involving factual disputes in a position in which no expert could take the defendant's recitation of factual background into account, which would be absurd.

Regarding Mr. Howard's opinion on the dangerousness of the Glock 23, the State argues that Mr. Howard's observations and conclusion are, to some degree, at odds with one another. While Ms. Murphy disagrees with this characterization, even if accurate, this

observation would only be fodder for cross-examination and argument, not a lack of qualification or insufficient facts and data.

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

Regarding this aspect of § 907.02, the State echoes the trial court's criticism of Mr. Howard's work as being "results oriented" as it focused on testing the plausibility of Ms. Murphy's account of events. The State takes issue with Ms. Murphy's argument that there would be no "reason for Mr. Howard's research and experimentation to be conducted independent of the present litigation." The State contends that "a similar point could likely be made whenever an expert is hired to perform an investigation for the purposes of specific litigation." Ms. Murphy disagrees. There are countless litigation scenarios in which a body of research and experimentation would exist that could assist an expert in reaching conclusions that would render Mr. Howard's fact-driven work unnecessary. This case is not among them. If this Court were to accept the State's position, no expert witness could review and investigate a case involving a unique factual background not lending itself to cookie-cutter application of extant pool of study. Neither the law nor logic supports such a conclusion.

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

As to this aspect of the § 907.02 requirements, Ms. Murphy restates her previous arguments and notes that *none* of the criticisms voiced by the State in its brief relate to the areas of Mr. Howard's proposed testimony that are at issue in this appeal.

II. ADMISSION OF DR. STIER'S REBUTTAL TESTIMONY.

A. The trial court erroneously exercised its discretion in admitting Dr. Stier's rebuttal testimony over Ms. Murphy's objection.

The State argues that the trial court properly exercised its discretion in admitting Dr. Stier's testimony regarding the possibility of a firearm discharging in the manner described by Ms. Murphy without leaving injury or soot. This Court applies the erroneous exercise of discretion standard to a trial court's determination of the admissibility of evidence. State v. Hunt, 2014 WI 102, 360 Wis. 2d 576, 851 N.W.2d 434. In reviewing a lower court's determination using this standard, a reviewing court will ask if the lower court (1) examined the relevant facts, (2) applied a proper standard of law, and (3) used a "demonstrated rational process to reach a conclusion that a reasonable judge could reach." Industrial Roofing v. Marquardt, 299 Wis.2d 81, 726 N.W.2d 898, 906 (2007). (internal citations omitted).

The State recites Dr. Stier's credentials and asserts that a reasonable judge could have concluded that Dr. Stier was qualified to answer the question posed by the State. As previously discussed, Dr. Stier's testimony went far beyond his credentials as a forensic pathologist. Moreover, the trial court's rationale for overruling Murphy's objection was not the rationale that the State is now advancing on appeal. Rather, the trial court overruled Murphy's objection on the grounds that "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: 128). And for reasons already stated, this was an erroneous exercise of discretion. The State was asking for, and received in abundance, Dr. Stier's opinion on matters well beyond the scope of his previous testimony – namely whether a firearm could discharge in close proximity to Mr. Dammen's hands without leaving injury or soot. That was *not* what Dr. Stier was previously asked. The trial court did not in any meaningful way address one of the explicit bases of Ms. Murphy's objection – that the State was attempting to elicit testimony beyond the scope of Dr. Stier's expertise. Instead, the trial court based its overruling on a factually incorrect view of his prior testimony and

failed to apply any recognizable standard of law. This cannot be considered a proper exercise of discretion.

B. Ms. Murphy did not forfeit her right to challenge the admissibility of Dr. Stier's rebuttal testimony by failing to object.

The State argues that Ms. Murphy's objection at trial to the rebuttal testimony of Dr. Stier at issue in this appeal was waived because Ms. Murphy did not continue to object throughout Dr. Stier's testimony. In support, the State relies on two cases, State v. Mayer, 220 Wis. 2d 419 583 N.W.2d 430 (Ct. App. 1998), and State v. Romero, 147 Wis. 2d 264 432 N.W.2d 899 (1988). Such reliance is misplaced.

In Mayer, the defendant argued that an expert witness called by the State was improperly allowed to testify about battered woman's syndrome (BWS) because there was no evidence that the victim suffered from that syndrome. The Court of Appeals rejected this argument for two reasons relevant to this appeal. First, the Court noted that Mayer's only objection to this line of testimony was that it was not relevant. The Court concluded that the evidence was relevant, and that the alternative arguments raised on appeal were waived, stating "[b]ecause Mayer raised no alternative basis for objection, we do not determine whether an alternate basis existed for

the exclusion of this evidence.” Id. at 429. Second, while arguably dicta, as the Court had already determined that the sole objection on grounds of relevance was without merit, the Court noted that Mayer’s objection was made while the witness was testifying about characteristics of abuse victims in general, and no objection was made when the topic turned to characteristics of victims of BWS.

The Court stated:

While Mayer is correct that Schnorr should not have been permitted to testify about common characteristics of women suffering from BWS without a proper foundation, it was not the duty of the trial court to *sua sponte* strike the testimony. Rather, Mayer should have called to the trial court’s attention any evidentiary concerns it had at the time. We will not review a decision to admit evidence when the evidence was admitted without an objection to the trial court.

Id. at. 430.

In Romero, the defendant was tried on one count of first degree sexual assault. The testimony at issue was that of a police officer who, during cross-examination, twice mentioned other alleged incidents of sexual assault committed by the defendant. In the first instance, trial counsel unsuccessfully moved to strike the testimony as non-responsive. No objection or motion to strike was made in the second instance.

On appeal, Romero argued that this testimony was inadmissible as improper other acts evidence. The Supreme Court of

Wisconsin concluded that Romero had failed to preserve this issue for appeal, stating:

Although he moved to strike the first statement as unresponsive, the objection was insufficient to inform the court that the remark was inadmissible evidence of other misconduct; therefore, he failed to preserve it for appeal. Two questions later, when Krimbill again referred to other allegations, defense counsel made no objection and, again, failed to preserve the issue for appeal.

Romero, 147 Wis. 2d 264, 274 (citations omitted).

Neither the Mayer nor Romero courts found that the defendants had forfeited their right to challenge the admissibility of the testimony in question by failing to repeat their objection to the same line of questioning. Nor should this court. In both cases, the finding of waiver was rooted in trial counsel's failure to alert the trial judge to the proper grounds for the objections, which would later be argued for the first time on appeal. And, in case of Mayer, failure to object to what amounted to a separate line of questioning.

This is not what occurred in Ms. Murphy's trial. In the words of the Mayer court, Ms. Murphy *did* "[call] to the trial court's attention any evidentiary concerns [she] had at the time." 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.

(169: 123-24).

Ms. Murphy's objection to the State's initial question, which fundamentally encompassed the entire subsequent line of questioning, called to the trial court's attention her evidentiary concern. The concern was that the State was asking Dr. Stier to testify to matters outside of his expert qualifications. The trial court overruled that objection. And that is the same issue that is being argued on appeal. The fundamental basis for the reviewing courts finding waiver in Mayer and Romero simply isn't present in this case.

Following the trial court's overruling of Ms. Murphy's objection, Dr. Stier went on to testify as follows:

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.

(169: 123-24).

The State further argues that by not objecting when the line of testimony narrowed to the Glock 23 pistol, Ms. Murphy's initial

objection was not preserved for appeal because this somehow amounted to a new line of questioning, and that Ms. Murphy “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. The prosecutor and Dr. Stier then shifted the conversation toward the Glock 23 pistol specifically.” (State’s Br. 23-24), (citations omitted). Clearly, the Glock 23 pistol was the “pistol” that the State was referring to in the first place when it asked whether “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?” This was the fourth day of a five-day trial during which the Glock 23 had been the only firearm mentioned, was discussed extensively and identified as the firearm which caused the fatal wound to Mr. Dammen. It is irrational to characterize the mention of the Glock 23 in this context as converting the State’s inquiries into a separate and distinct line of questioning to which Ms. Murphy failed to object.

The State’s further arguments regarding waiver fail for the

same reasons. The State's claim that Ms. Murphy should have moved to strike Stier's testimony and its suggestion that Ms. Murphy could be "sandbagging" by having hidden in the weeds, thereby depriving the State of the opportunity to establish proper foundation for Dr. Stier's testimony, essentially hinge on the assumption that Murphy is raising this issue for the first time on appeal. As discussed above, and in Ms. Murphy's initial brief, that is not the case. Ms. Murphy clearly alerted the trial court to her concern that the State's inquiry was calling for Dr. Stier to testify to matters outside of his area of expertise. Her objection was overruled. The State has cited no authority to support its implicit contention that once a proper objection has been made and ruled on, that the adverse party is required to continue voicing the same objection to the same line of questioning.

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. The State ignores this standard of review, instead

urging this Court to find any error harmless based on its recitation of the evidence adduced at trial which could support the jury's verdict. For this Court to find harmless error, 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 v. United States, 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). There is more than a "reasonable possibility" that the errors in this trial contributed to the convictions. Dr. Stier told the jury that Ms. Murphy's account of an accidental discharge was an *impossibility*.

And the State's characterization of Ms. Murphy's testimony as "equivocal" or "hypothetical," thus rendering Dr. Stier's rebuttal testimony unimportant and the errors of which Ms. Murphy now complains moot, is without merit. While the State correctly notes that Ms. Murphy could not be entirely certain of every detail of Mr. Dammen's shooting, she was unequivocal in her testimony that the

discharge was accidental, and that it occurred in the process of Mr. Dammen thrusting the weapon into her hand. And this is what Dr. Stier testified *could not have happened*. And that is precisely how the State characterized this testimony in its closing argument (170: 53-54). Allowing a forensic pathologist, cloaked in a shroud of impartiality and knowledge in the eyes of a jury, to testify outside of his area of expertise, over the defense's objection, and opine that the defendant's theory of defense could not possibly be true, cannot be characterized as a harmless error that, beyond a reasonable doubt, could not have contributed to the convictions obtained by the State.

And for the reasons previously argued by Ms. Murphy, the exclusion of Mr. Howard's testimony was also not harmless error. By barring Mr. Howard from testifying at the trial in this matter, Ms. Murphy was left with no effective means of countering Dr. Stier's sweeping conclusion that the fatal shot could not have occurred in the manner that she described. And given the contents of Mr. Howard's report filed with the trial court and his testimony at the August 9, 2016, Daubert hearing, he would have directly contradicted Dr. Stier's speculation with his own hands-on experience in recreating the conditions described by Ms. Murphy using the same model of pistol and same ammunition. The exclusion

of such testimony cannot be said, beyond a reasonable doubt, to have contributed nothing to the convictions in this case.

IV. CONCLUSION

For the reasons stated above, and those stated in Ms. Murphy's brief-in-chief, Ms. Murphy respectfully requests that this Court reverse the convictions in this matter and grant her a new trial.

Dated at Middleton, Wisconsin, February 13, 2018.

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 3000 words.

JOHN C. ORTH