COURT OF APPEALS
DECISION
DATED AND FILED

January 13, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1100-CR **Cir. Ct. No. 2011CF1208**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDWARD SANTIAGO KUCHINSKAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ELLEN R. BROSTROM, Judge. *Affirmed.*

Before Kessler, J., Brennan, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. A jury found Edward Santiago Kuchinskas guilty of two counts of physical abuse of a child and one count of child neglect. The victim was his nine-week-old son, O.K. Kuchinskas appeals the judgment of conviction and the postconviction order denying him a new trial. He claims that

the circuit court violated his constitutional right to present a defense by excluding evidence that Erin Sabady, O.K.'s mother, had a history of substance abuse, and by excluding evidence that O.K. was born addicted to heroin. Kuchinskas further claims that his trial counsel was ineffective in seeking admission of the excluded evidence, that he is entitled to a postconviction hearing to explore his allegations of trial counsel's ineffectiveness, and that he should receive a new trial in the interests of justice. We reject his contentions and affirm.

BACKGROUND

¶2 O.K. was born to Sabady and Kuchinskas on May 2, 2010. After a month-long hospital stay, O.K. went home with his parents to the trailer they shared with Kuchinskas's grandmother, Beverly Kehoss. Early in the morning of July 10, 2010, Sabady called 911 seeking help for O.K. At the hospital, medical personnel determined that O.K. had recent fractures to nearly all of his ribs and had sustained two liver lacerations. He also had a bruised brain, a fractured skull, subdural hemorrhages—bleeding between the brain and skull—in both the front and the back of his head, extensive retinal hemorrhages, and optic nerve damage leading to blindness in his right eye. The State ultimately charged Kuchinskas with two counts of intentional physical abuse of a child, one such count stemming from the damage to O.K.'s ribs and liver, and the other stemming from the damage to O.K.'s eyes, skull, and brain tissue. *See* WIS. STAT. § 948.03(2)(a) (2009-10).[1] The State also charged Kuchinskas with one count of child neglect based on

[1] All subsequent references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

alleged failure to seek help promptly for O.K. *See* WIS. STAT. § 948.21(1)(c). The matters proceeded to a jury trial.

¶3 Kehoss testified that, late in the evening of July 9, 2010, she went shopping with Sabady, Kuchinskas, and O.K. Kehoss testified that O.K. did not exhibit any unusual symptoms at that time. On the morning of July 10, 2010, however, Kuchinskas "came into [her] bedroom all excited" and said he had tripped over a cord and fallen with O.K. Kehoss testified that after she looked at O.K., she directed Sabady and Kuchinskas to call 911 because O.K. did not look "normal" and appeared to have difficulty breathing.

¶4 Gilbert Scherer testified that he lived in the same trailer park as Kuchinskas. Scherer said that he heard a baby screaming throughout the night of July 9, 2010, and on several occasions he looked outside and saw Kuchinskas with an infant. Scherer testified that he last saw Kuchinskas with the infant that night at approximately 3:30 a.m. At that time, Scherer found the baby's screaming so disturbing and unusual that he left his home to sleep somewhere else.

¶5 Steven Stessl testified that, in mid-May 2010, he joined Kuchinskas's household. Stessl testified that, on the night of July 9, 2010, he left the trailer at about 11:00 p.m. He returned at approximately 6:00 a.m. the following morning and encountered Sabady outside the trailer where they spoke for a few minutes. At some point after they went inside, a monitor attached to O.K. sounded an alarm. Stessl observed that O.K. looked "really bad," that "his eyes were glaring up," and that he was "gasping for air." According to Stessl, he advised calling 911 but Kuchinskas wanted to delay making the call, stating that "they are going to think we did it because we are drug addicts." When paramedics

arrived, Kuchinskas went into Kehoss's room and closed the door, explaining that he "didn't want to be around when the cops come."

¶6 Sabady testified. She described the shopping trip on the evening of July 9, 2010, and she told the jury that O.K. appeared to notice the ceiling lights in the store. When they returned home, Kuchinskas offered to assume responsibility for O.K. so that she could sleep.

¶7 Sabady testified that she awoke at about 5:00 a.m. She left her bedroom and found Kuchinskas asleep with O.K. in the living room. After she "did a couple things," she went outside to smoke a cigarette. She encountered Stessl arriving home and they chatted outside the trailer. When she and Stessl went inside, O.K.'s breathing monitor sounded and Kuchinskas soon seemed "in a panic" that something was wrong with O.K. Sabady heard O.K. grunting, he appeared to be having trouble breathing, she heard popping sounds in his chest, and his eyes were fixed. Kuchinskas then told her that he had fallen with O.K., but Kuchinskas did not want to call paramedics, stating: "[t]hey're going to say that, you know, we're drug addicts, and they're going to try and say I [Kuchinskas] was high." Sabady, however, decided to call 911, and she described Kuchinskas hiding in his grandmother's room when the paramedics arrived. Sabady accompanied O.K. to the hospital.

¶8 Dr. Angela Rabbit, a pediatric child abuse specialist who examined O.K. at the hospital, described his injuries for the jury. She said that O.K. had sustained twenty-one rib fractures within the seven-to-ten days prior to his arrival at the hospital on July 10, 2010, and that he had sustained a skull fracture within the previous two weeks. She did not pinpoint the time of his eye injuries, but she testified that symptoms of eye injury are generally exhibited immediately. She

went on to describe additional injuries, including two lacerations to the liver, and bruises to and bleeding within the brain. She said that O.K.'s injuries were life-threatening and that "the likelihood of abuse, statistically speaking is 100 percent."

¶9 Detective Steven Fabry testified about Kuchinskas's statements to police. According to Fabry, Kuchinskas said in his first statement that he agreed to watch O.K. on the night of July 9, 2010. Kuchinskas said he was awake with O.K. for several hours before he and O.K. both fell asleep on a bed in the living room. Upon awakening at approximately 6:00 a.m., Kuchinskas said, he stood up while holding O.K., became entangled with a cord attached to the child's monitor, and fell on top of O.K. Kuchinskas told Fabry that O.K. "may have struck the left side of his head on a rocking chair" during the fall. Fabry said that in Kuchinskas's second statement to police, Kuchinskas admitted to using heroin or OxyContin every day and further admitted that he had used drugs of some kind before going shopping with his family on July 9, 2010. Kuchinskas also said during the second police interview that he did not know if he caused O.K.'s injuries on July 9-10, 2010, because he was high at that time.

¶10 Kuchinskas's theory of defense at trial was that someone else injured O.K. In support of this theory, Kuchinskas offered evidence that Stessl babysat for O.K. on occasion and that Sabady was the primary caretaker who was with O.K. ninety-five percent of the time. Kuchinskas also explored with Sabady the periods of time that she had access to O.K. and Kuchinskas did not because he was away from the trailer or asleep.

¶11 Additionally, Kuchinskas tried throughout the trial to present evidence that Sabady used heroin and that O.K. was born addicted to drugs. The circuit court rejected the efforts, explaining in various ways and at various times

that, in the circuit court's view, the evidence was offered merely to show that Sabady had a propensity to do bad things and that the evidence was inadmissible for that purpose.

¶12 The trial spanned six days. At its conclusion, the jury returned guilty verdicts on all counts.

¶13 In postconviction proceedings, Kuchinskas argued that the circuit court wrongly prevented him from presenting evidence of Sabady's substance abuse and O.K.'s condition at birth because those rulings interfered with his constitutional right to present a defense. Kuchinskas further alleged that his trial counsel afforded him constitutionally ineffective assistance because, he said, the trial presented several opportunities to offer testimony about Sabady's drug use that trial counsel failed to pursue. Finally, Kuchinskas asserted that he should receive a new trial in the interests of justice. The circuit court rejected his claims in a written order entered without a hearing, and he appeals.

DISCUSSION

¶14 A circuit court has "'broad discretion to admit or exclude evidence.'" ***State v. Nelis***, 2007 WI 58, ¶26, 300 Wis. 2d 415, 733 N.W.2d 619 (citation omitted). We will uphold a circuit court's evidentiary ruling as a proper exercise of discretion if the circuit court "'examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a reasonable judge could reach.'" ***State v. Marinez***, 2011 WI 12, ¶17, 331 Wis. 2d 568, 797 N.W.2d 399 (citation omitted).

¶15 WISCONSIN STAT. § 904.04(2)(a) provides that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in

order to show that the person acted in conformity therewith." The statute, however, "does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ***Id.*** Admissibility of evidence pursuant to § 904.04(2)(a) is governed by a three-step inquiry: (1) whether the evidence is offered for a permissible purpose, as required by § 904.04(2)(a); (2) whether the evidence is relevant within the meaning of WIS. STAT. § 904.01; and (3) whether the probative value of the evidence is substantially outweighed by the concerns enumerated in WIS. STAT. § 904.03. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998).

¶16 In this case, the circuit court determined that Kuchinskas offered the evidence of Sabady's drug use and O.K.'s condition at birth to show that Sabady was "a bad person because of a drug addiction and therefore she likely caused the injury and not [Kuchinskas]. That is not a viable defense. That's a propensity defense."

¶17 On appeal, Kuchinskas first contends that the circuit court's rulings deprived him of the constitutional right to present a defense. A circuit court errs if it exercises its discretion to admit or exclude evidence in a way that denies the defendant the constitutional right to present a defense. ***State v. St. George***, 2002 WI 50, ¶49, 252 Wis. 2d 499, 643 N.W.2d 777. Whether a circuit court's evidentiary ruling abridged a defendant's right to present a defense is a question of constitutional fact for our *de novo* review. *See* ***State v. Stutesman***, 221 Wis. 2d 178, 182, 585 N.W.2d 181 (Ct. App. 1998).

¶18 "The right to present evidence is not absolute.... [A] defendant has the constitutional right to present only relevant evidence that is not substantially

outweighed by its prejudicial effects." ***Id.*** Moreover, "[t]here is no abridgement on the accused's right to present a defense, so long as the rules of evidence used to exclude the evidence offered are not arbitrary or disproportionate to the purposes for which they are designed." ***State v. Muckerheide***, 2007 WI 5, ¶41, 298 Wis. 2d 553, 725 N.W.2d 930. The ***Muckerheide*** court explained: "[w]hen evidence is irrelevant or not offered for a proper purpose, the exclusion of that evidence does not violate a defendant's constitutional right to present a defense." ***Id.***, ¶40.

¶19 Kuchinskas asserts that the circuit court erred by excluding the evidence of Sabady's drug use in this case because, he says, the proffered evidence satisfied the test for admissibility set forth in ***St. George***. There, the supreme court set forth a two-part, multi-factor test for considering whether exclusion of expert testimony violated the right to present evidence:

> The defendant must show: 1) The testimony of the expert witness met the standards of Wis. Stat. § 907.02 governing the admission of expert testimony. 2) The expert witness's testimony was clearly relevant to a material issue in this case. 3) The expert witness's testimony was necessary to the defendant's case. 4) The probative value of the testimony of the defendant's expert witness outweighed its prejudicial effect.
>
> After the defendant successfully satisfies these four factors to establish a constitutional right to present the expert testimony, a court undertakes the second part of the inquiry by determining whether the defendant's right to present the proffered evidence is nonetheless outweighed by the State's compelling interest to exclude the evidence.

St. George, 252 Wis. 2d 499, ¶¶54-55 (footnotes omitted; formatting altered).

¶20 Although Kuchinskas asserts that the evidence he wished to offer satisfies the ***St. George*** test, he does not present any argument in support of his assumption that the ***St. George*** test for admitting expert testimony also applies to

other evidence that a defendant might want to offer. For this reason alone, his argument is insufficient to sustain his claims. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we do not address matters that are inadequately briefed). Assuming without deciding that the ***St. George*** test applies to evidence of the kind at issue here, however, Kuchinskas does not show that the excluded evidence was clearly relevant to a material issue, as required by the ***St. George*** analysis. *See* ***id.***, 252 Wis. 2d 499, ¶54.

¶21 Kuchinskas asserts that evidence of Sabady's drug use was relevant to Sabady's credibility, perception, and recall. We must reject this assertion. Long-settled Wisconsin law reflects that intoxication may:

> affect the capacity to observe, to recollect, or to communicate[,] and is therefore admissible to impeach.… But a general habit of intemperance tells us nothing of the witness' testimonial incapacity except as it indicates actual intoxication at the time of the event observed or the time of testifying; and hence, since in its bearing upon moral character it does not involve the veracity trait, it will usually not be admissible.

Chapin v. State, 78 Wis. 2d 346, 355, 254 N.W.2d 286 (1977) (citations and quotation marks omitted; formatting altered). Therefore, "'the mere fact a witness upon occasion becomes drunk would not affect his [or her] credibility.'" ***Id.*** (citation omitted). These principles are applicable here, where Kuchinskas seeks to show that Sabady "used drugs" without demonstrating that she was under the influence of an intoxicating substance at any relevant period of time.[2]

[2] Kuchinskas emphasizes that Sabady admitted to police after O.K.'s hospitalization that she had "used drugs" five times since the birth of her child, and Kuchinskas asserts that this "means that Sabady was using heroin every other week.... At most, Sabady had gone a week without using heroin." Kuchinskas's analysis is based on false logic. Sabady's admission that she used drugs five times within a set period does not reveal the specific timing of each usage.

¶22 Next, we consider the assertions that evidence of Sabady's drug use and O.K.'s condition at birth shows "motive and opportunity." These claims are neither developed nor supported.

¶23 Kuchinskas asserts that Sabady's drug use was relevant "to her opportunity to hurt O[]. K." Opportunity is defined as "[t]he fact that the alleged doer of an act was present at the time and place of the act." BLACK'S LAW DICTIONARY 1267 (10th ed. 2014). Kuchinskas fails to offer a logical reason that Sabady's drug use provided an opportunity to injure O.K.

¶24 Similarly vague is Kuchinskas's claim that Sabady's drug use was relevant to her motive. Motive is "the reason which leads the mind to desire the result of an act. In other words, a defendant's motive may show the reason why a defendant desired the result of the crime charged." ***State v. Fishnick***, 127 Wis. 2d 247, 260, 378 N.W.2d 272 (1985) (internal citation omitted). Here, Kuchinskas asserts that Sabady's drug use provided a motive for Sabady to "point the finger" at Kuchinskas. Kuchinskas, however, does not specify the things that Sabady did, in his view, to "point the finger" at him, and he fails to tie those unspecified acts to alleged consumption of any drugs at or near the time when O.K. sustained the injuries that required his hospitalization on July 10, 2010.[3]

¶25 Tellingly, Kuchinskas moves from stating that Sabady's drug use is relevant to motive and opportunity to stating that "evidence that the baby was born addicted to drugs further supported the defense theory that other people, including

[3] We observe that the circuit court barred the parties from questioning any witness, including Sabady, about who the witness believed had abused O.K. On the other hand, Sabady did testify that she "never saw [Kuchinskas] do anything that could injure [O.K.]" and that she "never heard [] Kuchinskas do anything that could injure O[.K.]."

Sabady, had opportunity to commit the charged crimes and motive to blame Kuchinskas." We conclude that Kuchinskas's assertions about Sabady's opportunity and motive add up to only a conclusory propensity argument, a theory that Sabady's past drug use was evidence that she caused O.K.'s life-threatening injuries. Mere propensity evidence "'is not legally or logically relevant to the crime charged.'" *See* ***Muckerheide***, 298 Wis. 2d 553, ¶29 (citation omitted).

¶26 Finally, Kuchinskas claims that Sabady's drug use and O.K.'s condition at birth were relevant to provide "context" for the crimes against O.K. Evidence may be admissible to show context when the evidence will "'complete the story of the crime on trial by proving its immediate context of happenings near in time and place.'" ***State v. Pharr***, 115 Wis. 2d 334, 348, 340 N.W.2d 498 (1983) (citation and one set of quotation marks omitted). Thus, the supreme court determined that evidence of other bad acts was admissible in a sexual assault trial to show context where the victims claimed that the defendant smoked crack cocaine while committing the sexual assaults. *See* ***State v. Hunt***, 2003 WI 81, ¶¶4, 12, 263 Wis. 2d 1, 666 N.W.2d 771 (2003). Kuchinskas asserts that ***Hunt*** governs here, but we cannot agree. ***Hunt*** fits well within the analytical framework that permits admission of other bad acts to "'complete the story of the crime on trial.'" *See* ***Pharr***, 115 Wis. 2d at 348 (citation and one set of quotation marks omitted). Here, however, Kuchinskas failed to show that Sabady's drug use and O.K.'s condition at birth were a part of the events that caused the life-threatening injuries O.K. displayed on July 10, 2010. We add that "'Wisconsin courts permit a more liberal admission of other crimes evidence in sexual assault cases than in other cases.'" ***Hunt***, 263 Wis. 2d 1, ¶86 (citation omitted). Thus, "in a sex crime case, the admissibility of other-acts evidence must be viewed in light of the greater

latitude test." ***Id.*** The instant case, unlike ***Hunt***, does not involve a sex crime. ***Hunt*** offers no meaningful guidance here.

¶27 Moreover, were we to agree with Kuchinskas and conclude that the circuit court erroneously limited his defense, we would nonetheless deny relief because any such error was harmless. *See* ***State v. Kramer***, 2006 WI App 133, ¶26, 294 Wis. 2d 780, 720 N.W.2d 459 (violation of right to present a defense is subject to harmless error analysis). "[I]f it is clear beyond a reasonable doubt that a rational jury would have rendered the same verdict absent the error, then the error did not 'contribute to the verdict,' and is therefore harmless." ***Id.*** (citations, one set of brackets, and two sets of quotation marks omitted).

¶28 The State presented overwhelming evidence that Kuchinskas was the person who injured O.K. Kuchinskas's grandmother testified that O.K. appeared normal during a shopping trip late in the evening of July 9, 2010. Scherer saw Kuchinskas alone with O.K. on several occasions during the night of July 9, 2010, and heard the infant screaming in a terrible and unusual way. A police officer described Kuchinskas's statements about his actions on the night of July 9, 2010, which included admissions that Kuchinskas was responsible for O.K's care that night, that Kuchinskas fell on top of O.K., and that O.K. may have struck his head against a chair during the fall. Several witnesses testified that Kuchinskas did not want to call 911 because he feared that police would blame him for hurting O.K., and that he hid when paramedics arrived. *See* ***State v. Knighten***, 212 Wis. 2d 833, 839, 569 N.W.2d 770 (Ct. App. 1997) (evidence of flight or related conduct is circumstantial evidence of guilt). Dr. Rabbit testified that when O.K. arrived at the hospital on July 10, 2010, he had recently received life-threatening injuries and that eye injuries are normally noticeable immediately after they occur. In light of this evidence, we are satisfied beyond a reasonable doubt that a rational jury

would have delivered precisely the same guilty verdicts in this case had the jury also heard evidence that O.K. was born addicted to heroin and that Sabady "used drugs."

¶29 We turn to Kuchinskas's contention that his trial counsel was ineffective in seeking admission of evidence to show Sabady's drug use and O.K.'s condition at birth. Kuchinskas concedes that his trial counsel tried unsuccessfully on multiple occasions to admit the evidence. He believes, however, that his trial counsel failed to capitalize on all of the available opportunities to press the issue after the circuit court said that it would "continue to look at [the issue] as [counsel] think[s] doors are open[ed]." Kuchinskas further asserts that his trial counsel was ineffective for failing to pursue during trial the arguments about motive, opportunity, and context that he raises now. He complains that the circuit court denied his allegations of trial counsel's ineffectiveness without first affording him a postconviction hearing pursuant to ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

¶30 To show ineffective assistance of counsel, a defendant must prove both that trial counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficiency, Kuchinskas "must show that 'counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment.'" *See* ***State v. Pote***, 2003 WI App 31, ¶15, 260 Wis. 2d 426, 659 N.W.2d 82 (one set of internal quotation marks and citation omitted). To prove prejudice, Kuchinskas "must show that trial counsel's errors had an actual, adverse effect on the defense." *See* ***id.***, ¶16. Whether counsel's performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990).

¶31 Although a defendant alleging ineffective assistance of trial counsel must seek to preserve trial counsel's testimony in a postconviction hearing, *see* ***Machner***, 92 Wis. 2d at 804, the defendant is not automatically entitled to such a hearing. A circuit court must grant a hearing only if the postconviction motion contains allegations of material fact that, if true, would entitle the defendant to relief. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. This also presents a question of law for our independent review. ***Id.*** If, however, the defendant does not allege sufficient material facts that, if true, entitle him or her to relief, if the allegations are merely conclusory, or if the record conclusively shows that the petitioner is not entitled to relief, the circuit court has discretion to deny a postconviction motion without a hearing. ***Id.*** We review a circuit court's discretionary decisions with deference. ***Id.***

¶32 Kuchinskas asserts that his trial counsel was ineffective for failing to renew efforts to admit evidence of Sabady's drug use "when witnesses opened the door." The allegation fails to satisfy the deficiency prong of ***Strickland***. "The curative admissibility doctrine, commonly referred to as 'opening the door,' is applied 'when one party accidentally or purposefully takes advantage of a piece of evidence that is otherwise inadmissible.'" ***State v. Krueger***, 2008 WI App 162, ¶8 n.5, 314 Wis. 2d 605, 762 N.W.2d 114 (citation omitted). The purpose of the doctrine "is to 'cure' some prejudice resulting to a party as the result of the presentation by the opposing party of evidence which is inadmissible." ***Bertrang v. State***, 50 Wis. 2d 702, 706, 184 N.W.2d 867 (1971). Kuchinskas's discussion of incidents that allegedly "opened the door" lacks any suggestion that the State

presented inadmissible evidence.[4] Kuchinskas therefore fails to show that the curative admissibility doctrine had any applicability. *See* ***Krueger***, 314 Wis. 2d 605, ¶8 n.5. He correspondingly fails to show that trial counsel had an obligation to invoke that doctrine. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (counsel not ineffective for foregoing meritless arguments).

¶33 Moreover, the record shows that Kuchinskas was not prejudiced by any arguable deficiency in his trial counsel's failure to push harder to admit evidence of Sabady's drug use. His trial lawyer made numerous attempts to admit the evidence of Sabady's drug use, but, as he recognizes in his brief, "at every turn the court rejected Kuchinskas's efforts." On the fourth day of trial, Kuchinskas made a further attempt to admit the evidence and the circuit court ruled: "I am not going to revisit that issue. Her drug use is not admissible." Kuchinskas suffered no "actual, adverse effect" from his trial counsel's decision to forego urging the circuit court a few more times to reverse itself. *See* ***Pote***, 260 Wis. 2d 426, ¶16. To the contrary, a lawyer is not ineffective for failing to make claims that would have been denied. *See* ***State v. Berggren***, 2009 WI App 82, ¶21, 320 Wis. 2d 209, 769 N.W.2d 110.

[4] Kuchinskas points to three instances during trial that he believes "opened the door" to testimony about Sabady's drug use. First, he points to testimony about his statements that police "would think we did it because we are drug addicts," and he says these statements "opened the door to evidence that Kuchinskas wasn't the only drug user in the house." Second, he asserts that, when the State asked Sabady whether she "recalled every word she said to the detective," this "opened the door for the defense to question Sabady about the reasons, like drug use, that she could not remember everything she said." Third, Kuchinskas asserts that, when Dr. Rabbit testified that head trauma can cause developmental delays, this testimony "opened the door because the same is true for babies born addicted to drugs." As discussed in the body of the opinion, he makes no argument that the events that allegedly "opened the door" are instances where the jury heard inadmissible evidence.

¶34 Kuchinskas next argues that his trial counsel was ineffective because, although trial counsel sought admission of Sabady's drug use, counsel did not argue that the evidence was admissible to demonstrate "motive and opportunity ... and to provide context." Kuchinskas does not demonstrate any deficiency because, as we have already explained, Kuchinskas fails to show that Sabady's history of substance abuse was relevant to those issues.[5]

¶35 Last, Kuchinskas asserts that the interests of justice require a new trial. We are not persuaded. We exercise the power to grant a new trial in the interest of justice in only the most exceptional of circumstances, such as those cases where "the jury was erroneously denied the opportunity to hear important testimony bearing on an important issue." *See* ***State v. Doss***, 2008 WI 93, ¶86, 312 Wis. 2d 570, 754 N.W.2d 150. Here, Kuchinskas asserts that the jury should have heard evidence that he has not demonstrated was relevant to the key question of who committed the crimes at issue here. The interests of justice do not require a new trial under these circumstances. For all of these reasons, we affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[5] We also observe that, although Kuchinskas states his trial counsel "failed to argue that the evidence was admissible to demonstrate motive and opportunity under WIS. STAT. § 904.04," his trial counsel in fact did argue that evidence of Sabady's drug use was admissible to show both opportunity and motive to lie under ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).