COURT OF APPEALS
DECISION
DATED AND FILED

July 14, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2370-CR **Cir. Ct. No. 2012CF227**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AARON SCHAFFHAUSEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for St. Croix County: HOWARD W. CAMERON, JR., Judge. *Affirmed*.

Before Stark and Hruz, JJ., and Thomas Cane, Reserve Judge.

¶1 STARK, J. Aaron Schaffhausen entered pleas of guilty and not guilty by reason of mental disease or defect (NGI) to three counts of first-degree intentional homicide and one count of attempted arson of a building. Following a

trial on Schaffhausen's mental responsibility for the crimes, a unanimous jury rejected his NGI defense.

¶2 Schaffhausen now appeals, arguing the circuit court erred by: (1) erroneously telling jurors they would decide whether a defense psychiatrist and psychologist were qualified as expert witnesses and promising to give the jury an instruction on expert qualifications, but failing to do so; and (2) denying the jury's request during deliberations to provide it with three expert witness reports. Schaffhausen also seeks a new trial in the interest of justice. We reject these arguments and affirm.

BACKGROUND

¶3 According to the criminal complaint, on July 10, 2012, Schaffhausen went to the home of his ex-wife, J.S., where his three daughters—aged five, eight, and eleven—were being cared for by a babysitter. The sitter left shortly after Schaffhausen arrived. About two hours later, Schaffhausen called J.S. and told her, "You can come home now because I killed the kids." J.S. immediately called the police, and officers responding to the residence found the three girls deceased in their beds. In the basement of the home, officers found a gasoline container that had been tipped forward allowing gas to pour out. Subsequent autopsies confirmed that two of Schaffhausen's daughters died as a result of sharp force trauma to the neck, and the third died due to strangulation and sharp force trauma to the neck.

¶4 Schaffhausen was charged with three counts of first-degree intentional homicide and one count of attempted arson of a building. He entered

pleas of not guilty and NGI to all four counts.[1] However, four days before his scheduled trial, Schaffhausen changed his not guilty pleas to guilty pleas. The case therefore proceeded to a trial on Schaffhausen's mental responsibility for the crimes.

¶5 At trial, Schaffhausen had the burden to establish his NGI defense "to a reasonable certainty by the greater weight of the credible evidence." *See* WIS. STAT. § 971.15(3).[2] This required him to prove that: (1) he had a "mental disease or defect" at the time the offenses were committed; and (2) "as a result of [the] mental disease or defect[,]" he "lacked substantial capacity either to appreciate the wrongfulness of [his] conduct or conform [his] conduct to the requirements of law." *See* § 971.15(1); *see also* WIS JI—CRIMINAL 605 (2011).

¶6 The jury heard testimony from over fifty witnesses during Schaffhausen's trial, including three expert witnesses who testified regarding Schaffhausen's mental state at the time of the offenses and offered opinions regarding whether he met the legal standard for NGI. Schaffhausen called two of these experts: psychiatrist Ralph Baker, a court-appointed expert, and psychologist John Reid Meloy, who was retained by the defense.

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[1] A defendant may enter an NGI plea in conjunction with a plea of not guilty or in conjunction with a plea of guilty or no contest. 9 CHRISTINE M. WISEMAN & MICHAEL TOBIN, WISCONSIN PRACTICE SERIES: CRIMINAL PRACTICE & PROCEDURE § 17:33 (2d ed. 2008). "Wisconsin law requires a bifurcated trial procedure in which the issue of guilt or innocence is kept separate from, and tried before, the issue of the defendant's mental-responsibility." ***Id.***, § 17.36.

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶7 Baker testified first. Defense counsel began by questioning Baker about his qualifications and asking Baker to identify his report, marked as Exhibit 5. The following exchange then occurred:

> [DEFENSE COUNSEL]: Your Honor, I'd ask that you qualify him as an expert, and I'd offer Exhibit 5.
>
> [PROSECUTOR]: I agree that he's an expert, and I agree to the admission of Exhibit 5.
>
> THE COURT: All right. I'll receive Exhibit 5. I'll let the jury decide whether he qualifies as an expert.

Baker proceeded to testify that Schaffhausen had a major depressive disorder at the time of the offenses, but he did not lack substantial capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law.

¶8 Defense counsel's questioning of Meloy proceeded in a similar fashion. Counsel first questioned Meloy about his qualifications and then stated, "Judge, I'd ask that he be allowed to testify as an expert in this case." The court responded, "Members of the jury, I'll let you decide if he's an expert. I'll give you a jury instruction on it, and you make that determination." Meloy subsequently testified that Schaffhausen had "a major depression" at the time of the offenses, as a result of which he lacked substantial capacity to conform his conduct to the requirements of law.

¶9 More specifically, Meloy characterized the killings of Schaffhausen's daughters as "catathymic" homicides. He explained:

> Catathymia means in accordance with emotion. That's what the word itself means, but it's not superficial emotion. It's not anger at the moment. It's not retaliation for something that's happened to you. It goes—It's much deeper, and it's typically the person that has those deep feelings, they don't know why they are feeling that way;

> but they know internally they feel like they are coming apart.

Meloy further explained that there are three stages in a catathymic homicide: (1) an "incubation period[;]" (2) an "explosively violent act that is out of character for the person because there hasn't been a history of habitual violence[;]" and (3) "relief, the person feels relieved." Meloy testified there was evidence of all three of these phases in Schaffhausen's case.

¶10 Psychiatrist Erik Knudson testified for the State. The prosecutor questioned Knudson regarding his qualifications but did not specifically ask the circuit court to qualify him as an expert. Knudson testified that Schaffhausen suffered from a major depressive disorder, alcohol dependence, and antisocial personality disorder at the time of the crimes, but he did not lack substantial capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law.

¶11 Following the close of evidence, the court gave the jury the standard instruction on expert opinion testimony, WIS JI—CRIMINAL 200 (2012), stating:

> Generally or ordinarily a witness may testify only about facts. However, a witness with experience in a particular field may give an opinion in that field. In determining the weight to give to this opinion, you should consider the qualifications and the credibility of the expert, the facts upon which the opinion is based, and the reasons given for the opinion. Opinion evidence is received to help you reach a conclusion; however, you are not bound by an expert's opinion. In resolving conflicts in expert testimony, weigh the different expert opinions against each other. Also consider the qualifications and credibility of the experts and the facts supporting their opinions.

The court further instructed the jury, "The Court has appointed Dr. Baker to examine the defendant and to testify at trial. The same tests that apply to all other

experts apply to Dr. Baker. Each party has had the opportunity to have their—to have other experts testify."

¶12 In his closing argument, Schaffhausen's attorney urged the jury to examine the expert witnesses' reports, stating:

> And the reports are in evidence. Hopefully you'll get to see the reports. And if you do, read them. If you want to understand this puzzle and you want to understand what happened to three innocent little girls, you are going to have to take your time and think and look at what these experts say and why they say it.

¶13 During deliberations, the jury requested "[t]hree medical expert reports" and a "definition of catathymia[.]" After considering the arguments of counsel, the circuit court denied both requests and instead instructed the jury to "rely on [its] collective memory."

¶14 Thereafter, the jury unanimously concluded that Schaffhausen was suffering from a mental disease or defect when he committed each of the charged crimes, but he did not lack substantial capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law. The circuit court granted the State's request for judgment on the verdict. The court ultimately imposed consecutive sentences of life imprisonment without eligibility for extended supervision on each of the homicide counts and twenty years' imprisonment on the attempted arson count. This appeal follows.

DISCUSSION

I. Qualification of witnesses as experts

¶15 Schaffhausen correctly observes that "the qualification of an expert witness to testify on an issue is a preliminary question of fact for the circuit court

to decide under WIS. STAT. § 901.04(1)." *See* ***Martindale v. Ripp***, 2001 WI 113, ¶45, 246 Wis. 2d 67, 629 N.W.2d 698. Schaffhausen therefore contends it was "clear error" for the circuit court to "defer the issue of expert qualifications to the jury" by telling jurors they would determine whether Baker and Meloy were qualified as experts. Schaffhausen further asserts the court erred by promising to provide a jury instruction on the qualification of witnesses as experts, but then failing to do so. Schaffhausen concedes no such instruction exists in the standard jury instructions because "the jury is not supposed to be making that determination[,]" and he further concedes he "cannot argue it was error for the court to fail to give an instruction which does not exist[.]" However, he argues that promising to give an instruction on the issue and then failing to do so was tantamount to telling the jury to "go in there and do whatever you think is right."

¶16 In response, the State argues Schaffhausen forfeited this argument by failing to raise it in the circuit court. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 ("Issues that are not preserved at the circuit court … generally will not be considered on appeal."); *see also* ***State v. Cockrell***, 2007 WI App 217, ¶36, 306 Wis. 2d 52, 741 N.W.2d 267 ("Under WIS. STAT. § 805.13(3) the failure to object to a jury instruction the court proposes to give constitutes a waiver of any error in the proposed instruction."). In his reply brief, Schaffhausen does not dispute the State's claim that he forfeited his argument regarding the qualification of witnesses as experts. Instead, Schaffhausen asserts that, under the circumstances, we should decline to apply the forfeiture rule. He also asserts the issue is reviewable under the plain error rule. *See* WIS. STAT. § 901.03 (court may "tak[e] notice of plain errors affecting substantial rights although they were not brought to the attention of the judge").

¶17 We agree with the State that Schaffhausen forfeited his right to appellate review of his argument regarding the qualification of witnesses as experts. However, the forfeiture rule "is one of judicial administration and does not limit the power of an appellate court in a proper case to address issues not raised in the circuit court." ***State v. Caban***, 210 Wis. 2d 597, 609, 563 N.W.2d 501 (1997). We may decline to apply the forfeiture rule where "all new issues raised are legal questions, the parties have thoroughly briefed the issues and there are no disputed issues of fact." ***Wirth v. Ehly***, 93 Wis. 2d 433, 444, 287 N.W.2d 140 (1980), *superseded on other grounds by statute as recognized in* ***Wilson v. Waukesha Cnty.***, 157 Wis. 2d 790, 797, 460 N.W.2d 830 (Ct. App. 1990). These conditions are present in the instant case, and we therefore choose to address the merits of Schaffhausen's argument.

¶18 Before addressing the merits, we pause to note that the circuit court's statements about the jury determining whether Baker and Meloy qualified as experts were prompted by defense counsel's improper requests, in the jury's presence, that the court find them to be qualified as experts in their respective fields. As Professor Daniel Blinka explains:

> There is no set procedure for qualifying an expert witness. Traditionally, the proponent elicits the witness's education, training, and experience at the start of the direct examination. Under common law practice, the proponent then asked the court to make a "finding" that the witness was an expert in an identified field. If the witness's credentials were dubious, the court might allow the opponent to voir dire the witness regarding qualifications. Before any questions were put to the witness regarding the facts of the case, the trial judge had to find that he or she was an "expert."
>
> The common-law procedure is inappropriate and unnecessary under WIS. STAT. § 907.02 for two reasons. First, a formal finding of expertise may be misinterpreted by the jury as the judge's approbation of the witness's

> testimony. Although the judge must decide the witness's qualifications under WIS. STAT. § 901.04(1)(a), the finding need not be disclosed to the jury. Second, the thrust of the present rules has interwoven questions about the testimony's relevancy and helpfulness with that of the witness's qualifications. The issue will seldom be whether the witness is an expert in the field of medicine or economics; rather, the focus will turn on the witness's qualifications to answer the precise question put by counsel. In a sense, the witness must be qualified for each and every question. No expert has carte blanche.

7 DANIEL BLINKA, WISCONSIN PRACTICE: WISCONSIN EVIDENCE § 702.601 (3d ed. 2011) (footnotes omitted). We agree with Professor Blinka's assessment that, under the current rules of evidence, asking the circuit court to make a finding in the jury's presence that a witness is qualified as an expert in his or her field is inappropriate and unnecessary.

¶19 Turning to the merits, and regardless of defense counsel's improper requests, we agree with Schaffhausen that the circuit court erred when it told the jurors they would determine whether Baker and Meloy were qualified as expert witnesses. That was clearly a determination for the court, not the jury, to make. *See* ***Martindale***, 246 Wis. 2d 67, ¶45. However, despite the court's misstatements, we reject Schaffhausen's argument that the court, in fact, ceded its responsibility to determine whether Baker and Meloy were qualified as experts. Rather, we agree with the State that the circuit court implicitly determined these witnesses were qualified as experts, by virtue of the fact that it admitted their testimony. *See* ***State v. Pharr***, 115 Wis. 2d 334, 347, 340 N.W.2d 498 (1983) ("[A]lthough the trial court did not explicitly rule that the probative value of the evidence was not substantially outweighed by its prejudicial effect, such a ruling was implicit in the trial court's decision to admit [the] evidence[.]").

¶20 Moreover, we conclude the circuit court's error in telling the jurors they would determine whether Baker and Meloy were qualified as experts was harmless. An error is harmless when there is no reasonable probability that it contributed to the jury's verdict. ***State v. Dyess***, 124 Wis. 2d 525, 542-43, 370 N.W.2d 222 (1985). A reasonable probability is a probability sufficient to undermine our confidence in the outcome of the proceeding. ***Id.*** at 544-45.

¶21 The crux of Schaffhausen's argument is that, by telling the jurors they would determine whether Baker and Meloy were qualified as experts, promising to provide a jury instruction on that topic, and then failing to do so, the court implicitly told the jury to "go in there and do whatever you think is right." As a result, Schaffhausen argues the jury was free not only to reject these experts' opinions—which he acknowledges would be proper[3]—but also to "refuse to consider [them] at all." He asserts, "If one or more jurors never even considered [Meloy's] testimony, [Schaffhausen] did not get a fair trial of his [NGI] defense."

¶22 However, in light of the instructions the court *did* provide on expert opinion testimony, no reasonable juror could have believed he or she could refuse to consider any of the experts' opinions. The court specifically told the jurors that, in determining how much weight to give an expert opinion, they should consider the expert's qualifications and credibility, the facts on which the opinion was based, and the reasons given for the opinion. The court further stated that, although expert testimony was received to help the jury reach a conclusion, the jury was not "bound by" any expert's opinion. The court instructed the jury to

[3] *See* ***Geise v. American Transmission Co.***, 2014 WI App 72, ¶13, 355 Wis. 2d 454, 853 N.W.2d 564 ("The jury is not bound by expert opinions; rather, it can accept or reject an expert's opinion.").

"weigh the different expert opinions against each other." The court also told the jury that the same standards applied to Baker, the court-appointed expert, as to the other expert witnesses. In light of these instructions, no reasonable juror could have believed he or she could simply reject out of hand the testimony given by any of the three expert witnesses. Jurors are presumed to follow the instructions given to them, ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989), and Schaffhausen provides no basis for us to conclude the jury in this case did not follow the court's instructions on expert opinion testimony. We therefore conclude the circuit court's error in stating the jury would determine whether Baker and Meloy were qualified as expert witnesses was harmless, in that it is not reasonably probable the error contributed to the jury's verdict. *See* ***Dyess***, 124 Wis. 2d at 542-43.

¶23 Schaffhausen argues the State cannot meet its burden to establish harmless error because "a key part of its case was precisely that the defense expert should be ignored." In support of this argument, Schaffhausen asserts that, during the State's closing argument, the prosecutor stated the jury could find Schaffhausen's crimes were not the result of mental illness "[e]ven without the opinions of doctors[.]" Schaffhausen also claims the prosecutor stated the jury could find Schaffhausen legally sane "no matter what any doctor said. They could bring ten doctors in[.]"

¶24 Schaffhausen takes these quotations out of context. The prosecutor's statement about the jury being able to conclude his crimes were not the result of mental illness "without the opinions of any doctors" appears in the following portion of the State's closing argument:

> On the evidence in this case, I—there just can't really be any doubt that revenge and anger motivated him to commit

> these crimes, not mental illness. And we—it's clear, he told you himself, he told—he told other people, through witnesses he told you, the doctors and these witnesses, that it was to punish [J.S.] for rejecting him, to make her suffer for the rest of her life. Well, mission accomplished. And notice that the form of revenge that he chose hurt all the other people that he thought about killing. It hurt people she cared about, … her family. They've all lost something as a result of this. He chose his revenge well. He accomplished all of his goals.
>
> *Even without the opinions of doctors or any other evidence in the case, that alone would allow you to conclude that it was revenge and not mental illness or defect that explains why he chose to do what he did,* because a person who acts for a reason to, in his words, solve a problem, whatever that problem might be, is not a person who is out of control. It's a person who is in control of their conduct, because the conduct is the product of his thought process. The conduct is exactly what he's thinking about doing and for the reason he's thinking about doing it. The person acted—in this case, the defendant acted to achieve a goal; and that is pretty much the definition of capacity to conform your conduct to the requirements of law. And on that basis alone, you'd be justified in answering those verdict questions no.

(Emphasis added.)

¶25 When the language quoted by Schaffhausen is read in context, it is clear the prosecutor was not urging the jury to ignore Meloy's testimony. Rather, the prosecutor was arguing that, even without the opinions of any experts, including those whose testimony supported the State's position, the jury could conclude based on other evidence that Schaffhausen acted out of anger and a desire for revenge, not because he was mentally ill. Moreover, while Schaffhausen implies that the prosecutor misstated the law by telling the jury it could conclude he was not mentally ill without any expert testimony, we disagree. Expert testimony is not legally required in all NGI cases. *See* ***State v. Magett***, 2014 WI 67, ¶43, 355 Wis. 2d 617, 850 N.W.2d 42 (stating, in an NGI case, that

"where the issue is within the common understanding of a jury, as opposed to technical or esoteric, and when lay testimony speaks to the mental illness, expert testimony, though probative, may not be required").

¶26 The prosecutor's statement about the jury finding Schaffhausen sane "no matter what any doctor said" comes from the following portion of the State's closing argument:

> Please don't be fooled into thinking these were all just random acts. This was controlled, purposeful conduct. And, again, at this stage, before we even hear from the doctors, knowing what you know about his stated intentions to harm the children, and knowing what you know about the full—the full spectrum of the evidence, that would be enough *no matter what any doctor said. They could bring ten doctors in, and you would be within your rights to say on the rest of the evidence, no, not legally insane.* He knew what he was doing just based upon what we know about what he did.
>
> But, of course, there is more evidence of his sanity. Now, the only evidence that they've brought in here really is the testimony of Dr. Meloy. But his opinions are not credible, and I'll tell you why, there are three basic reasons. One is his theory makes no sense, and I'll develop this for you in just a moment. Second, even if it made sense, his theory does not fit the evidence in this case; and, third, Dr. Meloy is not credible because he attempted to mislead you.

(Emphasis added.) The prosecutor then discussed Meloy's opinions at length and explained why he believed the jury should not credit them. Again, when read in context, the prosecutor's comment about the jury finding Schaffhausen sane "no matter what any doctor said" cannot reasonably be viewed as a suggestion that the jury simply ignore Meloy's opinions. If that were the case, the prosecutor would not have spent more than twenty pages of transcript attempting to persuade the jury that Meloy's opinions were not credible.

¶27 In a related argument, Schaffhausen argues the circuit court's handling of the expert qualification issue violated his constitutional right to present a defense. He contends the right to present a defense "includes the right to jury consideration of relevant expert testimony." Yet, as the State points out, Schaffhausen does not assert the circuit court improperly excluded any expert testimony relevant to his NGI defense. Rather, he argues the court's failure to give the promised jury instruction on the qualification of expert witnesses "gave the jury the power to completely ignore the defense expert's testimony[.]" However, as explained above, the instructions the court *did* give would not have permitted a reasonable juror to conclude he or she could ignore any expert's testimony. We therefore reject Schaffhausen's argument that the court's handling of the expert qualification issue violated his constitutional right to present a defense.

II. Refusal to send expert witness reports to the jury

¶28 Schaffhausen next argues the circuit court erred by refusing to provide the three expert witnesses' reports to the deliberating jury. Whether an exhibit should be sent to the jury during deliberations is a discretionary decision for the circuit court. ***State v. Hines***, 173 Wis. 2d 850, 858, 496 N.W.2d 720 (Ct. App. 1993). "'A court properly exercises its discretion when, in making a decision, it employs a process of reasoning which depends on facts that are in the record or are reasonably derived by inference from the record, and yields a conclusion based on logic and founded on proper legal standards.'" ***Id.*** (quoted source omitted).

¶29 A court's decision whether to send an exhibit to the jury during deliberations is guided by three factors: (1) whether the exhibit will aid the jury in

proper consideration of the case; (2) whether a party will be unduly prejudiced by submission of the exhibit; and (3) whether the exhibit could be subjected to improper use by the jury. ***Id.*** at 860. Failure to consider these factors when deciding whether to send an exhibit to the jury constitutes an erroneous exercise of discretion. ***Id.*** However, we will nevertheless affirm if our independent review of the record demonstrates the existence of facts supporting the court's decision. ***Id.***

¶30 The record in this case demonstrates that the circuit court properly exercised its discretion by declining the jury's request for the expert reports. When the jury asked for the reports, the State opposed the request, citing the ***Hines*** factors. The prosecutor noted that "[a]ll of the doctors testified at great length, much more extensively that [what] is just contained in their reports." He therefore argued the reports would not aid the jury in its consideration of the case, would unduly prejudice the State, and would be subject to improper use because the jury would likely "give undue emphasis to the portions of [the] reports which are presented to them in writing as opposed to remembering the testimony as a whole[,]" particularly matters testified to on cross-examination. The prosecutor also noted the reports contained information that was not the subject of any testimony, as well as information that had been excluded or was otherwise inadmissible. Consequently, the prosecutor asserted the reports, if sent to the jury, would have to be redacted.

¶31 In response, defense counsel noted that Baker's and Meloy's reports had been received without objection, and the court had reserved ruling on Schaffhausen's objection to portions of Knudson's report. Counsel first contended the reports should go to the jury with some redactions. Alternatively, counsel argued that, even though "a lot of [Knudson's report] is prejudicial because it wasn't testified to," the "probative value of those reports would outweigh the

prejudicial effect; so we're willing to waive that and let all the reports go in as is in lieu of the first suggestion we made." Addressing the ***Hines*** factors, counsel argued that the reports would help the jury in its consideration of the case due to the complexity of the issues; that sending the reports to the jury would not prejudice either party because the jury would receive reports from each party's expert, as well as the court-appointed expert; and that the reports would not be subject to improper use because they "deal with the exact testimony and the exact issues [i]n this case." Counsel further argued the reports could go to the jury in their entirety, pursuant to WIS. STAT. § 907.07.[4]

¶32 The court rejected defense counsel's arguments. It explained:

> First of all, [WIS. STAT. §] 907.07 does not apply. There was no reading [of the reports] by the experts, so it's a nonissue. When I read the jury instructions, I said—exhibits, even if it's received, does not mean it goes back. It's still received even though it doesn't go back to the jury room. I would note that I have observed the jury. I noticed extensive note taking. Except when sometimes things got a little long and they heard the same question three or four times, I noticed they put their pens down. Additionally, you—I don't think you can waive any error, because I agree with [the prosecutor], they are going to come back and do an ineffective [assistance of counsel claim] quicker than you know.
>
> ….

[4] WISCONSIN STAT. § 907.07 provides:

> An expert witness may at the trial read in evidence any report which the witness made or joined in making except matter therein which would not be admissible if offered as oral testimony by the witness. Before its use, a copy of the report shall be provided to the opponent.

> It will be a ***Machner***[5] hearing, and you are going to be back here. And you are going to say you waived it, and they are going to say you shouldn't have waived it.
>
> ….
>
> I'm just telling you, I don't want to take time for a ***Machner*** hearing when I could avoid it I figure. Additionally, there's lots of cross-examination here that affects the reports of these doctors. I think that if the reports go in, it's overemphasized.
>
> Additionally, I did see—when [Dr. Knudson's] report came in, it was subject to the—[defense] motion, but I never ruled on that motion; so now we have a motion, and I've got to go back and rule on it to keep it out. So I'm put in an impossible position. And I can't—I can't redact it. I can't redact enough of anything. Even if I say your motion is right, as to Dr. Knudson, there [were] certain things testified to, so you have to go through his 80 pages and you have to take out certain things that they were testified to by certain people; and I find that—it impossible to redact the reports to be accurate. I don't find anybody to be prejudiced, because they took extensive notes, as not to send the reports back, okay? And I think it could be unduly prejudic[ial] if they go back, overemphasize these written reports compared to the testimony of the doctors. There was extensive testimony by both Drs. Meloy and Dr. Knudson, little on Dr. Baker.

¶33 The court's explanation demonstrates that it properly exercised its discretion by denying the jury's request for the expert reports. Although the court did not cite ***Hines***, it applied the reasoning required by that case.

¶34 With respect to the first ***Hines*** factor, the court determined the reports were unnecessary—that is, they would not aid the jury in its consideration of the case—because the jurors took extensive notes during the experts' testimony.

[5] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Schaffhausen does not point to any evidence suggesting that the circuit court's conclusion in this regard was erroneous.

¶35 With respect to the second ***Hines*** factor, the court concluded that sending the reports to the jury would unduly prejudice the State because it would overemphasize the written materials, as opposed to the witnesses' extensive testimony, including their cross-examination. The record supports this conclusion. For example, Meloy's report is seventeen pages long, but his trial testimony covers 220 pages of transcript, including over 100 pages of cross-examination. During cross-examination, the prosecutor elicited Meloy's acknowledgment that certain statements Schaffhausen made to Meloy, which Meloy included in his report, were contradicted by information from other sources. The prosecutor also emphasized on cross-examination that Schaffhausen had made a statement to Meloy indicating revenge may have been one of the reasons he committed the murders, but Meloy failed to include that statement in his report. That fact sharply undercut Meloy's opinion, as stated in his report, that there was "a striking absence of any other explanations for the killing(s)" other than that they were "psychogenic killings" that "arose from within the mental disorder and personality disorder of Aaron Schaffhausen[.]"

¶36 Regarding the third ***Hines*** factor, the court determined it would have been too difficult to redact inadmissible information from the reports. *See* ***Wilder v. Classified Risk Ins. Co.***, 47 Wis. 2d 286, 292, 177 N.W.2d 109 (1970) (exhibits sent to the jury should not contain inadmissible evidence). Schaffhausen argues redaction was unnecessary because he was willing to waive his earlier objection to Knudson's report. However, the court was understandably concerned that such a waiver would give rise to an ineffective assistance of counsel claim, particularly given defense counsel's acknowledgment that "a lot" of Knudson's report was

prejudicial. Schaffhausen does not address this aspect of the circuit court's reasoning. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (Failure to address the grounds on which the circuit court ruled constitutes a concession of the ruling's validity.).

¶37 Our review of the record therefore shows that the circuit court applied the proper legal standards to the facts of record in order to reach a logical conclusion when determining whether to send the expert reports to the jury. *See* ***Hines***, 173 Wis. 2d at 858. Accordingly, the court did not erroneously exercise its discretion by declining the jury's request for the reports.

¶38 In addition to arguing the circuit court erroneously exercised its discretion, Schaffhausen argues the court's failure to send the expert reports to the jury violated his constitutional right to present a defense.[6] In support of this argument, Schaffhausen notes that defense counsel "specifically directed the jury's attention to the reports" in his closing argument. Schaffhausen seems to suggest that, based on counsel's argument, the jury would have expected to be able to review the reports. However, indicating to a jury that it would be able to review a particular exhibit would be foolish, given that the decision whether to send an exhibit to the jury during deliberations rests within the circuit court's discretion. *See* ***id.*** Moreover, although Schaffhausen selectively quotes from defense counsel's closing argument to suggest that counsel promised the reports would be sent back, the record reveals that counsel actually stated, "And the reports are in

[6] The State argues Schaffhausen forfeited this issue by failing to raise it in the circuit court. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. We agree, but we nevertheless exercise our discretion to consider the merits of the argument, for the same reasons discussed above in ¶17.

evidence. Hopefully you'll get to see the reports. And if you do, read them." Thus, contrary to Schaffhausen's suggestion, counsel clearly acknowledged it was not certain the reports would be sent to the jury.

¶39 Schaffhausen also cites ***Ellis v. Mullin***, 326 F.3d 1122 (10th Cir. 2002), for the proposition that "[t]he right to present a complete defense includes the right to present the jury a report of a psychiatrist to support an insanity defense." However, Schaffhausen reads ***Ellis*** too broadly. In ***Ellis***, the defendant, who was charged with capital murder, was ordered to undergo a competency evaluation. ***Id.*** at 1125. In addition to addressing the defendant's competency to stand trial, the examining psychiatrist was also directed to address whether the defendant was competent at the time the offenses were committed. ***Id.*** The psychiatrist concluded the defendant was competent to stand trial, noting that his chronic, paranoid schizophrenia was in remission. ***Id.*** at 1125-26. However, the psychiatrist's report also stated the defendant "had a severe dissociative disorder in the past" and "may have been completely depersonalized at the time of the incident." ***Id.*** at 1125.

¶40 The case proceeded to trial, at which the defendant's "sole strategy" was to argue he was insane when he committed the murders. ***Id.*** at 1126. The psychiatrist who authored the competency report had died prior to trial and was therefore unable to testify. ***Id.*** The defense attempted to introduce the psychiatrist's report, but the trial court excluded it, concluding it went only to the defendant's competency to stand trial, not to his sanity at the time of the murders. ***Id.*** In its closing argument, the prosecution argued the defendant had failed to establish his insanity, emphasizing the lack of evidence from medical professionals. ***Id.***

¶41 The Tenth Circuit concluded exclusion of the psychiatrist's report deprived the defendant of his constitutional right to present a defense. ***Id.*** at 1128-30. The court noted that, "[w]ith [the psychiatrist's] diagnosis and observations excluded …, [the defendant's] case for insanity was highly vulnerable to the argument, seized upon by the prosecution in its closing argument …, that [the defendant] only began faking mental illness around the time of the killings." ***Id.*** at 1129. Under these circumstances, the court held the psychiatrist's report "would have provided the jury with objective, professional validation of [the defendant's] longstanding mental illness," and it was reasonably probable the report "would have put [the defendant's] other evidence of mental illness in an altogether different light to the jury." ***Id.***

¶42 Contrary to Schaffhausen's assertion, ***Ellis*** does not stand for the proposition that a defendant asserting an NGI defense has an absolute constitutional right to present psychiatric reports to the jury. The critical factor in ***Ellis*** was that the examining psychiatrist had died before trial and was therefore unavailable to testify. Consequently, exclusion of the psychiatrist's report deprived the jury of information relevant to the defendant's insanity defense. Conversely, in this case, the jury heard extensive testimony from three experts regarding Schaffhausen's mental state at the time of the offenses. Schaffhausen does not identify anything in the experts' reports that was important to his NGI defense but was not presented to the jury through their in-court testimony. We therefore reject Schaffhausen's claim that the circuit court's decision not to send the expert reports to the jury violated his constitutional right to present a defense.

III. New trial in the interest of justice

¶43 Finally, Schaffhausen asserts he is entitled to a new trial in the interest of justice. "Our discretionary reversal power is formidable, and should be exercised sparingly and with great caution[,]" ***State v. Williams***, 2006 WI App 212, ¶36, 296 Wis. 2d 834, 723 N.W.2d 719, and only in "'exceptional cases[,]'" ***State v. Armstrong***, 2005 WI 119, ¶114, 283 Wis. 2d 639, 700 N.W.2d 98 (quoted source omitted). We may grant a new trial in the interest of justice "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried[.]" WIS. STAT. § 752.35.

¶44 Schaffhausen argues the real controversy was not fully tried. To obtain a new trial on this ground, he must convince us that "the jury was precluded from considering 'important testimony that bore on an important issue' or that certain evidence which was improperly received 'clouded a crucial issue' in the case." ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (quoting ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996)).

¶45 Schaffhausen complains that the circuit court denied his motion to exclude: "(1) threats to [J.S.] or the children, (2) autopsy or medical examiner data and (3) crime scene data[.]" However, Schaffhausen does not identify with any greater specificity the evidence he believes should have been excluded. He also fails to present a developed argument explaining why the court erred by admitting the evidence. He merely asserts, without elaboration, that the evidence was "more relevant to guilt than to sanity[.]" This falls far short of a developed argument that the evidence was inadmissible because it was irrelevant. To the contrary, it is actually a tacit concession that the evidence was, to some extent, relevant to his mental responsibility for the charged crimes. "We will not decide

issues that are not, or inadequately, briefed." ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994).

¶46 Schaffhausen also argues the real controversy was not fully tried because "the State's case was focused in large part on convincing the jury it did not need the opinion of any expert doctor to decide legal sanity[,]" and the court "sent a not so subtle message the State's argument was correct" when it told jurors they could decide whether Baker and Meloy were experts. We reject this argument for two reasons. First, as discussed above, although the circuit court improperly told the jurors they would decide whether Baker and Meloy were qualified as experts, the court properly instructed the jury regarding expert opinion testimony, and, in light of the court's instructions, no reasonable juror could have believed he or she was free to simply ignore the experts' testimony. Second, as we have already explained, the prosecutor accurately stated the jury could conclude Schaffhausen was legally sane at the time of the crimes without any expert testimony. *See* ***Magett***, 355 Wis. 2d 617, ¶¶41-48.

¶47 In addition to these arguments, Schaffhausen notes in passing that the circuit court denied the jury's request to provide a definition of "catathymia." However, Schaffhausen does not provide any argument in support of his implicit contention that the court erroneously exercised its discretion in this regard. Thus, to the extent Schaffhausen argues he is entitled to a new trial in the interest of justice based on the court's failure to provide the jury with a definition of "catathymia," his argument is undeveloped, and we decline to address it. *See* ***Flynn***, 190 Wis. 2d at 39 n.2.

¶48 For the foregoing reasons, Schaffhausen has failed to establish that this is the sort of exceptional case warranting discretionary reversal. *See*

Armstrong, 283 Wis. 2d 639, ¶114. We therefore decline his request for a new trial in the interest of justice.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.