COURT OF APPEALS
DECISION
DATED AND FILED

December 16, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2008AP886 **Cir. Ct. No. 1999CV6411**

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

STEVEN THOMAS, A MINOR, BY HIS GUARDIAN AD LITEM, SUSAN M. GRAMLING,

PLAINTIFF-APPELLANT,

V.

CLINTON L. MALLETT,

DEFENDANT,

ATLANTIC RICHFIELD CO., E.I. DUPONT DE NEMOURS AND CO., NL INDUSTRIES, INC., MILLENNIUM HOLDINGS, INC. AND SHERWIN-WILLIAMS CO.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed.*

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 LUNDSTEN, J. Steven Thomas sued various paint manufacturers, alleging that childhood exposure to white lead carbonate found in their products caused injury to his brain. A jury returned a verdict in favor of the Manufacturers. Thomas contends he is entitled to a new trial because of flaws in the verdict form, the improper use of peremptory strikes to remove two potential jurors, and the improper admission of evidence. We disagree and affirm.

Background

¶2 In 1991, when fourteen months old, Thomas was found to have elevated levels of lead in his blood. Subsequent blood testing showed varying elevated lead levels over a period of approximately four and one-half years. At one point, when Thomas was three years old, his blood lead levels were sufficiently elevated that Thomas underwent an intravenous blood treatment to reduce the lead levels.

¶3 In 1999, Thomas filed suit. He alleged that his elevated blood lead levels were caused by exposure to white lead carbonate in paint that was on surfaces in older homes that, in turn, caused injury to his brain with ongoing effects.

¶4 The Manufacturers argued that, because Thomas could not identify the specific manufacturer that produced the particular paint products that allegedly caused him harm, they could not be sued. The circuit court agreed and granted summary judgment in favor of the Manufacturers, dismissing the suit.[1] Thomas appealed. The supreme court affirmed in part, reversed in part, and remanded the

[1] Summary judgment was granted by Judge Timothy G. Dugan.

case for further proceedings. ***Thomas v. Mallett***, 2005 WI 129, 285 Wis. 2d 236, 701 N.W.2d 523.

¶5 On remand, after a lengthy trial, a jury returned a verdict in favor of the Manufacturers. The jury found that Thomas ingested white lead carbonate, but that his brain was not injured and he was not injured by the medical treatment for his elevated blood lead levels.

Discussion

¶6 Thomas raises three issues on appeal. We address and reject each.

A. Verdict Form

¶7 Thomas argues that the circuit court erred when it declined to include a broad injury question on the verdict form. Specifically, Thomas contends that the injury questions improperly limited the jury's possible findings to just two injuries: (1) brain injury and (2) injury resulting from medical treatment relating to Thomas's ingestion of lead. Thomas argues that a verdict question should have asked the open-ended question: "Was [Thomas] injured by his ingestion of white lead carbonate?" This question, according to Thomas, would have permitted the jury to find that he suffered the injury of "lead poisoning," which, he contends, "itself is a cognizable injury."

¶8 As discussed in more detail below, the problem with Thomas's argument is that he does not tie "lead poisoning," *standing alone*, with conditions such as pain and suffering or loss of earning capacity that would, in turn, have permitted the jury to award him damages. Our analysis begins with a description of the pertinent verdict questions and the jury's answers.

¶9 The first verdict question asked: "Did Steven Thomas ingest white lead carbonate?" The jury answered "Yes."

¶10 Two subsequent questions identified specific injuries that, under the evidence presented at trial, arguably caused compensable damages. The first of these asked: "Has Steven Thomas's brain been damaged?"[2] The other asked: "Was Steven Thomas injured as a result of being admitted to the hospital for [blood treatment] or as a result of having his blood lead level sampled while he was a young child?" The jury answered both of these injury questions "No."

¶11 The verdict form instructed that, if the jury found that Thomas suffered neither brain injury nor treatment-related injury, the jury should not answer any more questions. But, if the jury answered "yes" to one or both of the injury questions, it would have continued on to a series of questions culminating in a final damages question. The damages question asked: "What sum of money, if any, will fairly and reasonably compensate Steven Thomas for any injury you found in response to Question Nos. 3 [brain injury] or 5 [treatment-related injury]?" The damages question then provided three blanks for sums of money corresponding to three categories of damages: "Past pain, suffering and disability"; "Future loss of earning capacity"; and "Future pain, suffering and disability."

¶12 With the overall structure of the verdict form in mind, we return to Thomas's argument. Thomas asserts that he was entitled to an open-ended injury question asking: "Was [Thomas] injured by his ingestion of white lead

[2] At trial, the terms brain damage and brain injury were used interchangeably. An expert witness explained that "[b]rain *injury* and brain *damage* mean the same thing" (emphasis added).

carbonate?" Thomas contends that it was improper to limit the jury's consideration of potential injuries to brain injury and treatment-related injury because this left out the stand-alone injury of "lead poisoning." Thomas, however, does not explain how he would have benefited from the broader injury question.

¶13 Thomas's theory at trial was that his ingestion of white lead carbonate caused "lead poisoning" that, in turn, caused brain and treatment-related injuries, and that these two injuries were the basis for awarding him compensation for pain, suffering, and the other categories specified in the damages question. Thomas does not, however, point to any evidence that being "lead poisoned," by itself, caused him pain, suffering, disability, or a loss of earning capacity.

¶14 Our analysis does not hinge on a fine-line distinction. The injury questions fashioned by the circuit court permitted Thomas to fully pursue his theory that he was harmed because of injury to his brain and injuries relating to the treatment of lead in his blood. Without evidence of resulting compensable harm, nothing would have come of asking the jury to resolve whether, in some technical sense, Thomas had "lead poisoning."[3]

¶15 We stress that we do not address whether, as a general proposition, being "lead poisoned" fits some recognized definition of a tort injury. Our holding here is limited to the evidence, arguments, and particular verdict form in this case. We simply agree with the circuit court that Thomas was not entitled to a broader

[3] Notably, at trial, the parties differed on the meaning of "lead poisoning." Thomas's experts suggested that certain levels of lead in blood define whether a person has "lead poisoning." The Manufacturers' expert testified that the existence of "lead poisoning" is not defined by the concentration of lead in a person's blood, but rather by whether a person suffers "acute episodic symptomatic illness" because of the lead.

injury question in this case because the injury questions posed covered all of Thomas's theories as to why he was entitled to damages.

B. ***Batson*** *Challenges*

¶16 Thomas contends that the Manufacturers ran afoul of ***Batson v. Kentucky***, 476 U.S. 79 (1986), when exercising two of their peremptory strikes during jury selection. The circuit court, applying a ***Batson*** analysis, determined that the Manufacturers' proffered reasons were race neutral and credible.[4] Thomas argues that neither peremptory strike was race neutral and that the court's findings of fact were clearly erroneous. We are not persuaded.

¶17 ***Batson*** requires a three-step analysis. The first inquiry is whether the objecting party has established "a prima facie case of discriminatory intent." *See* ***State v. Lamon***, 2003 WI 78, ¶28, 262 Wis. 2d 747, 664 N.W.2d 607. Under the second inquiry, "'the burden shifts to the [striking party] to come forward with a neutral explanation'" for the strike. ***Id.***, ¶29 (citation omitted). This explanation "must be clear, reasonably specific, and related to the case at hand." ***Id.*** A "'neutral explanation'" means "an explanation based on something other than the race of the juror" and, "[u]nless discriminatory intent is inherent in the [striking party's] explanation, 'the reason offered will be deemed race neutral.'" ***Id.***, ¶30 (citation omitted). In the third step of a ***Batson*** analysis,

[4] For cases addressing the application of ***Batson v. Kentucky***, 476 U.S. 79 (1986), in the civil context, *see* ***Edmonson v. Leesville Concrete Co.***, 500 U.S. 614, 630 (1991) (stating that "courts must entertain a challenge to a private litigant's racially discriminatory use of peremptory challenges in a civil trial"), and ***State v. Joe C.***, 186 Wis. 2d 580, 585, 522 N.W.2d 222 (Ct. App. 1994) (recognizing that "[t]he ***Batson*** rule" applies to "peremptory challenges in a civil proceeding," citing ***Edmonson***, 500 U.S. at 630).

> the circuit court has the duty to weigh the credibility of the testimony and determine whether purposeful discrimination has been established. As part of this third step, [the party challenging the strike] may show that the reasons proffered by the [striking party] are pretexts for racial discrimination. The [challenging party] then has the ultimate burden of persuading the court that the [striking party] purposefully discriminated or that the … explanations were a pretext for intentional discrimination. Therefore, it is at this step that the issue of persuasiveness and plausibility of the [striking party's] reasons for the strike become relevant, and "implausible or fantastic justifications may [] be found to be pretexts for purposeful discrimination."

Lamon, 262 Wis. 2d 747, ¶32 (citations omitted). The circuit court's determination that a race-neutral reason for the strike is credible "will be given great deference, and will not be overturned unless it was clearly erroneous." ***Id.***, ¶37.

1. Prospective Juror M.M.

¶18 Thomas argues that the Manufacturers' peremptory strike of prospective black juror M.M. was racially motivated. Thomas contends that the Manufacturers' proffered reasons for using a peremptory strike to remove this juror fail under both the second and third steps of ***Batson***. We disagree.

¶19 We begin with a summary of the germane exchanges during voir dire and the court's related findings. We then address Thomas's specific arguments.

¶20 During questioning by one of Thomas's attorneys, prospective juror M.M. was asked if she would have a problem finding against Thomas and in favor of the Manufacturers:

> [Thomas's attorney]: And if [the Manufacturers] prove their case, would you feel comfortable turning

> Steven down and rendering a judgment in favor of the defendants?
>
> [M.M]: No.
>
> [Thomas's attorney]: You wouldn't feel comfortable?
>
> [M.M]: I wouldn't feel comfortable—I mean, I—
>
> [Thomas's attorney]: Well, go ahead.
>
> [M.M.]: If the corporations proved their case, I wouldn't feel sorry for Steven.
>
> [Thomas's attorney]: Okay. That's what I meant. Make sure we're on the same page there. I don't have any further questions for you.

¶21 A separate line of questioning addressed M.M.'s contacts with a Milwaukee alderman who was facing criminal charges. M.M.'s connection with the alderman was first broached by one of Thomas's attorneys when he asked M.M. about her involvement in political campaigns. M.M. responded that she had served as Michael McGee's treasurer and that she had known McGee since high school. An attorney for the Manufacturers later asked M.M. if she had heard that allegations against the alderman were "because of racial motivations" and asked whether this possibility was "a view that you hold." M.M. responded, "I really don't know. I haven't spoken with [the alderman]." She also said: "The only thing I know is really what's in the paper."

¶22 The Manufacturers used a peremptory strike to remove M.M., and Thomas challenged the strike. When asked to provide a reason for the strike, one of the Manufacturers' attorneys said he was concerned with M.M.'s initial "No" response to the question whether she would feel comfortable "rendering a judgment in favor of the [Manufacturers]." The attorney pointed out that, when Thomas's counsel attempted to "rehabilitate" M.M., she started to repeat that she

would not feel comfortable and then, only after a "long pause," stated she would not feel sorry for Thomas. The attorney explained, in essence, that he doubted the sincerity of M.M.'s subsequent clarification.

¶23 A different defense attorney, the one who asked the follow-up questions regarding Alderman McGee, added a second reason for the strike. This attorney said he thought his exchange with M.M. "left with [M.M.] a negative impression, certainly as to me and perhaps as to the other defendants."

¶24 Regarding the first reason, relating to M.M.'s clarification of how she would feel making a finding against Thomas, the circuit court did not initially address the relevant question, namely, whether this proffered justification was a pretext. Instead, the court said, in effect, that it disagreed with the defense attorney's assessment of M.M.'s candor. The court stated: "I think [the defense attorney] was pretty far off the target in his reading of [M.M.'s] answers. As I remember her answers, and as I read the transcript, she was confused by [Thomas's attorney's] questions."

¶25 We disagree with Thomas's assertion on appeal that the court's comments suggest that it rejected the first proffered reason as "factually false." Neither in these comments nor otherwise did the circuit court suggest that this justification was a pretext. Rather, the court merely indicated its belief that the defense concern was unwarranted. Regarding the relevant question of pretext, all we have is the circuit court's general finding that the Manufacturers' attorneys were credible when offering their justifications. Accordingly, we reject the assertion that the circuit court found this justification to be a "false" reason.

¶26 Regarding the second reason—that M.M. had a negative reaction to the defense attorney who questioned her about Alderman McGee—the circuit

court found: "I think [the justification] is not only plausible, I think it's reasonable." The court noted that M.M. had an observable negative reaction to the line of questioning. More specifically, the court found that M.M. was "recoiling ever so slightly when the subject of [the alderman] came up," and "[s]he stiffened a bit in her seat like somebody who had been put on the spot." The court stated: "I cannot conclude that [the defense attorney's] concern for the [impression] he created is off-base or a contrivance … to disguise a race-based strike," and "I do not perceive [the defense attorney's] questions to have been concocted to give him grounds to say that he offended [M.M.]."

¶27 Thomas contends that this second proffered reason fails under the second ***Batson*** inquiry because it was neither racially neutral nor "related to the case at hand." *See* ***Lamon***, 262 Wis. 2d 747, ¶29 (stating that the racially neutral explanation for a strike must be "related to the case at hand"). We disagree. Although the voir dire questions may not have related to the case, the reason offered for the peremptory strike—that a defense attorney inadvertently offended M.M.—was related and is racially neutral on its face because it is "based on something other than the race of the juror." *See* ***id.***, ¶30 ("Facial validity of the [striking party's] explanation is the issue."). We turn to the third ***Batson*** inquiry to address the remainder of Thomas's challenges to this "negative reaction" justification.

¶28 Thomas argues that it is readily apparent that the questions put to M.M. about the alderman and his legal troubles were a ploy motivated by the attorney's desire to strike M.M. based on her race. Thomas contends that the questions must have been part of a racially motivated strategy because they sought M.M.'s views on a topic that had nothing to do with this personal injury case. Thomas's reasoning seems to be that, if there was no good reason to ask the

questions, then the questions must have been a gambit to provoke M.M., thereby providing a pretextual reason to remove her because of her race. Thomas contends that this is the correct interpretation of the record because there was nothing in M.M.'s "demeanor or tone of voice" supporting a finding that she had a hostile reaction to the alderman questions.

¶29 As to M.M.'s reaction, the circuit court made the detailed findings we recount above, and Thomas does not explain why we may or should reject these findings. Under the third ***Batson*** step, a circuit court's finding that a race-neutral justification is credible is accorded "great deference." ***Lamon***, 262 Wis. 2d 747, ¶37. To overturn the circuit court's finding that an attorney did not act with discriminatory intent, the challenging party must persuade us that the court's finding is "clearly erroneous." *See* ***id.***, ¶45. Thomas has not met that burden.

¶30 Thomas asserts in his appellate brief that the circuit court "obviously felt, at the time of the question[s] …, that [M.M.] was not being put on the spot or the [circuit] court would not have directed Plaintiff's counsel to 'let the juror finish' her answer to the question." This assertion is meritless. First, the court expressly stated that M.M. acted "like somebody who had been put on the spot." Second, the exchange Thomas points to involves nothing more than Thomas's attorney interrupting M.M. during one of her answers and the court directing that M.M. have a chance to finish her answer.[5]

[5] The pertinent exchange reads:

> [Manufacturers' attorney]: Is that a view that you hold?
>
> [Thomas's attorney]: Your Honor—

(continued)

¶31 What remains is whether it is so obvious that the questions were a ploy to provoke M.M. that we should conclude, as a matter of law, that the circuit court clearly erred in finding to the contrary. The circuit court found that the attorney's questions were not "concocted to give him grounds to say that he offended [M.M.]." We are not persuaded that this finding is clearly erroneous.

¶32 We acknowledge that the line of questioning is suspect for the reason Thomas states—that M.M.'s views on the motivations behind the prosecution of the alderman are so far afield from the issues in this case that one wonders whether some other agenda was afoot. However, this amounts to mere suspicion based on a cold record. In contrast, the circuit court was present to observe demeanor, both during questioning and when the attorney explained himself. And, there is an alternative plausible view that supports the circuit court's finding of fact—that the attorney's line of questioning was a poorly conceived fishing-expedition-gone-wrong. In sum, we defer to the circuit court's superior position to make this factual call.

¶33 Before moving on, we note that Thomas argues that the voir dire questions here are similar to questions found to be improper in a Florida case. We disagree. The questions in that case were much more clearly a calculated ploy. In

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> [M.M.]: I really don't know. I haven't spoken with Mr. McGee.
>
> [Thomas's attorney]: Your Honor—
>
> [The court]: Let's let the juror finish. The juror has the floor right now. I'll let her finish. But then it will be time to move on with a new subject.
>
> [M.M.]: I really haven't spoken with Mr. McGee. The only thing I know is really what's in the paper.

Turnbull v. State, 959 So. 2d 275 (Fla. Dist. Ct. App. 2006), the court reviewed an "unlawful driving" trial where a prosecutor asked a racially mixed panel of potential jurors: "Do you think the police profile people when they drive down the street?" and "Do you think that the police racially profile people?" ***Id.*** at 276. Five prospective black jurors answered affirmatively, and the prosecutor exercised peremptory strikes against four of them. ***Id.*** The Florida court of appeals concluded that the prosecutor had employed a strategy of asking racially charged questions and then using the answers of black jurors against them. ***Id.*** at 278. In effect, the Florida court concluded that the calculated *purpose* of asking about racial profiling in a case that did not appear to involve an allegation of racial profiling was to provoke a response from black jurors and then use that response to strike them based on their race. However apparent that motive was in the Florida case, it is not so apparent here that we will overturn the circuit court's finding to the contrary. In contrast with the generic question asked in the Florida case, a tactic that could be used repeatedly in such cases, the question here seemingly sprung from an issue currently in the local news and a juror-specific relationship.

¶34 Therefore, we defer to the circuit court's finding that the use of a peremptory strike to remove M.M. did not involve intentional discrimination.

2. Potential Juror P.K.

¶35 Thomas also argues that the peremptory strike of prospective black juror P.K. violated ***Batson***. Thomas asserts that the Manufacturers' reasons for striking P.K. were "not grounded in fact" and, thus, the circuit court erred when crediting them. We are not persuaded.

¶36 As Thomas implicitly concedes, the Manufacturers' reasons for striking P.K. were racially neutral on their face. The Manufacturers noted that P.K. had "direct experience and knowledge regarding the effects of lead on children." More specifically, an attorney for the Manufacturers highlighted that P.K., who had worked in a children's learning center, was involved with a process in which children were tested for lead levels, and P.K. believed that at least one of these children might have been adversely affected by high lead levels. The Manufacturers also cited P.K.'s statement that her career focus was "helping assure the safety of children." The circuit court credited these neutral reasons for the strike, finding that they were not pretexts for intentional discrimination.

¶37 The pertinent inquiry, then, is whether this finding was clearly erroneous under ***Batson***'s third step. *See* ***Lamon***, 262 Wis. 2d 747, ¶¶32, 37. In this regard, Thomas's argument primarily turns on comparing P.K. with a "non-African American" juror whom the Manufacturers did not strike. Thomas contends that this juror "demonstrated substantially more independent expertise and potential for bias in favor of [Thomas's] position." This, Thomas suggests, reveals that the true reason for the P.K. strike was purposeful discrimination. *See* ***Miller-El v. Dretke***, 545 U.S. 231, 241 (2005) ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at ***Batson***'s third step.").

¶38 Thomas's argument fails because P.K. and the other juror had relevant differences. For example, the other juror, who worked with children as a nurse, stated that she did not have experience with lead-related injuries in children. She also stated that she had no firsthand experience with children with disabilities and no specific knowledge about the health hazards of lead. On the other hand,

P.K. stated that she worked directly with dozens of children with special needs and learning disabilities, had partnered with a commission to test children for lead levels, and had worked with children with high lead levels.

¶39 Thus, the record does not support a conclusion that the circuit court's findings of fact regarding the Manufacturers' motives in striking prospective juror P.K. were clearly erroneous.

C. Family And Bad Acts Evidence

¶40 Thomas argues that he is entitled to a new trial because the circuit court erred in admitting evidence regarding the education and abilities of Thomas's family and evidence of Thomas's own bad behavior. We reject Thomas's arguments.

1. Evidence Related To Thomas's Family

¶41 Thomas challenges evidence "concerning the educational attainment and performance and work history of [his] family members." He provides a list of record citations to this "objectionable" family-related evidence and argues that the evidence is not relevant or, if relevant, that it is unduly prejudicial. Addressing this evidence, we apply the following principles:

> When reviewing the circuit court's evidentiary rulings, the applicable standard is whether the court appropriately exercised its discretion. We will sustain an evidentiary ruling if the record shows that the circuit court examined relevant facts, applied a proper legal standard, and reached a reasonable conclusion. Generally, all relevant evidence is admissible. However, relevant evidence may be excluded if its probative value is outweighed by the potential for unfair prejudice, confusion of the issues, waste of time, needless repetition, or other specified concerns under WIS. STAT. § 904.03.

Reuben v. Koppen, 2010 WI App 63, ¶30, 324 Wis. 2d 758, 784 N.W.2d 703 (citations omitted).

¶42 We begin by noting that, unlike many common injuries, the evidence here was that brain injury caused by ingesting lead is not physically observable. For example, there were no "brain scans" that showed visible injury to Thomas's brain. Thomas's neuropsychology expert, Dr. Theodore Lidsky, testified, in effect, that brain imaging is not used to diagnose lead-caused brain injury because it is not discernible by such means. Consequently, Thomas's case relied heavily on indirect evidence of injury, such as ability testing, to support his theory of injury. In turn, a substantial portion of the testimony presented by both parties was directed at *why* Thomas performed poorly.

¶43 The Manufacturers' neuropsychology expert was Dr. Nancy Hebben. In her view, part of the explanation for Thomas's poor performance was heredity and environment. Hebben stated that, in the field of neuropsychology, it is accepted practice to establish a baseline using information about the child's family when determining whether a child has been injured.[6] Much of Hebben's testimony related to the notion that Thomas's family's abilities and performance in school and work were relevant as "risk factors" in Thomas's development. Hebben found it significant that Thomas's eight siblings performed poorly in school, that two of his half-siblings had "mild mental retardation," and that various siblings had learning disabilities and required special education. This testimony

[6] Dr. Hebben criticized the baseline IQ used by Thomas's expert, Dr. Theodore Lidsky. Hebben stated that Lidsky's baseline was improperly high because it did not correctly take "family history data" into account. She suggested that this incorrect baseline used by Lidsky led to his incorrect conclusion that Thomas's poor performance was caused by his ingestion of lead.

included a detailed analysis of parallel developmental problems between Thomas and his older half-sister, Billye. Hebben noted, for instance, that Billye's IQ was in the "mentally retarded range" and that she had disciplinary problems as shown by fifty-five "school incident referrals."[7]

¶44 Dr. Hebben then drew connections between Thomas and members of his family. Her opinion was that Thomas did not have a brain injury, but rather was "very much like his family members" and that his abilities appeared to be the product of "the home, the environment, [and] the genetics that he came from." For example, Hebben noted that Thomas's IQ test scores fluctuated over time and that Thomas's mother's and father's IQ results were in the "borderline range." It was Dr. Hebben's opinion that, when he was giving his "best performance" during testing, Thomas's IQ "subtest scores" were within the range of his parents' scores.

¶45 As is apparent, then, Thomas is incorrect when he contends that this family information was not relevant. Although he disagreed with Dr. Hebben's ultimate opinion, Thomas's primary expert on this topic, Dr. Theodore Lidsky, recognized the potential relevancy of much of this family-related data. For example, Lidsky agreed that both "poor home environment" and education can affect performance on neuropsychological tests. Further, Lidsky testified that home environment could affect IQ through, for example, lack of verbal interaction with a mother or siblings, or that IQ could be lowered by other "severe" departures from a normal upbringing. Lidsky also testified that "role models" and, in

[7] An obvious question relating to this evidence is whether the performance or behavior of other family members was also affected by the ingestion of white lead carbonate. Thomas does not discuss this topic, however, and it may be that Thomas's attorneys lacked evidence that other family members were similarly exposed to lead. In any event, it is enough to note here that the issue was not pursued in any meaningful manner during the trial.

particular, siblings may have impacts on an individual's motivation, affecting "both IQ and school performance."

¶46 Thomas suggests that the lack of relevance of the family history evidence is demonstrated by testimony of Dr. Hebben indicating that, regardless of Thomas's family history, she would have concluded that lead did not damage Thomas's brain. Thomas is referring to Hebben's testimony that, in her opinion, Thomas's lead levels were too low to cause his poor performance. Thomas does not, however, explain why Hebben's testimony about Thomas's lead levels renders the family history evidence irrelevant. Plainly it does not. In essence, Hebben told the jury that there were two ways she could tell that lead was not the cause of Thomas's poor performance. First, that the lead levels were too low and, second, that his poor performance was consistent with his family history and his bad behavior. One does not render the other irrelevant.

¶47 Moving on to other evidence, Thomas complains about evidence of his brothers' unemployment. For example, Thomas cites an instance where the Manufacturers' attorney asked whether Thomas spent a lot of time with two of his older brothers starting at age eight. The attorney then asked if part of the reason they spent so much time together was because the brothers never had full-time jobs, to which Thomas answered "Yes."

¶48 In his discussion of family evidence, Thomas cites as "objectionable" a variety of school and medical records. Thomas does not, however, specify which particular documents he finds "objectionable," and in fact most of these documents concern Thomas, not his family members. We do observe that one document, an "infant assessment" for Thomas, relates to his mother and his home environment, stating: "9th child of mother with poor diet,

reluctant to take prenatal vitamins. Chaotic household. Mom has history of alcohol abuse." Another document is a counselor's report that suggests that Thomas participated in his brothers' marijuana use.[8] Thomas, however, does not explain why this was irrelevant.

¶49 More generally, Thomas does not demonstrate a flaw in the proposition that familial evidence provides part of an alternative explanation for Thomas's poor performance. We agree with the circuit court that the issue, if any, with this evidence was not relevancy, but weight, which was a question for the jury. Lacking a developed argument from Thomas about relevancy, we move on.

¶50 Next, Thomas argues that, even if the familial evidence was relevant, its relevance was outweighed by the danger of unfair prejudice. He asserts that the familial evidence improperly suggested that he "should be barred from recovery because of the type of family he was born into." Thomas does not, however, come to grips with the fact that the family evidence is highly probative under the Manufacturers' theory of the case—that specific factors other than lead caused Thomas's poor performance.

¶51 A complex factual question for the jury was the cause of Thomas's poor performance. Under the Manufacturers' theory, it was highly relevant that Thomas was from a family with a pattern of poor academic and cognitive performance. *See* ***State v. Johnson***, 184 Wis. 2d 324, 340, 516 N.W.2d 463 (Ct. App. 1994) ("[T]he standard for unfair prejudice is not whether the evidence

[8] To the extent that this document also presents Thomas's marijuana use, it relates to Thomas's own behavior, which we address in Part C.2., below.

harms the opposing party's case, but rather whether the evidence tends to influence the outcome of the case by 'improper means.'").

¶52 It is not enough for Thomas to complain that there was a danger of unfair prejudice; he must also persuasively argue that the evidence lacks serious probative value. He has failed to do so. *See* ***id.*** ("In most instances, as the probative value of relevant evidence increases, so will the *fairness* of its prejudicial effect."). Accordingly, we reject Thomas's unfair prejudice argument.

¶53 Finally, Thomas contends that it was error to admit evidence of an arrest of Thomas's mother's boyfriend. Thomas points to questions on cross-examination where the Manufacturers' attorney questioned him about the incident. In an apparent attempt to highlight Thomas's poor home environment, the attorney asked whether the boyfriend had, on one occasion, come "barrel[ing] in[to] the house, police chasing him." Thomas denied being home during this incident, and the questioning moved on.

¶54 Thomas does not, however, develop an argument specifically directed at this cross-examination. We note that, in the midst of this questioning, the court instructed the jury that "questions are not evidence" and "you can't draw any inferences from the question." Thomas does not explain why—given this instruction, the brevity of the questioning, and Thomas's response—unfair prejudice resulted. And he does not, for that matter, explain why these questions should be treated as "evidence." Lacking these or any other developed arguments, we do not address this further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we may decline to address issues that are inadequately briefed).

¶55 In sum, Thomas does not demonstrate that the circuit court erred with regard to familial evidence.

2. Evidence Related To Thomas's Behavior

¶56 The second category of evidence Thomas complains about relates to his own past behavior. Thomas's focus here is on evidence of his marijuana use, his bad behavior at school, and allegations that he engaged in various criminal activities, such as robbery. As explained below, Thomas's primary argument, his "other acts" argument, is off the mark. Moreover, Thomas fails to rebut the circuit court's determination that he forfeited his objections to most of this evidence.[9] As to any remaining evidence, we conclude that its admission, if error, was harmless.

a. Thomas's Other Acts Challenge

¶57 Thomas's primary argument regarding the admission of evidence of his bad behavior is that it was improper other acts evidence under WIS. STAT. § 904.04(2).[10] Thomas criticizes the circuit court for failing to properly apply the ***Sullivan*** other acts test.[11] His argument, however, does not square with other acts jurisprudence.

[9] We use the term "forfeited," rather than "waived," in keeping with ***State v. Ndina***, 2009 WI 21, ¶¶28-30, 315 Wis. 2d 653, 761 N.W.2d 612 ("forfeiture" describes the failure to make the timely assertion of a right, whereas "waiver" describes the intentional relinquishment or abandonment of a known right).

[10] All references to the Wisconsin Statutes are to the 2007-08 version, unless otherwise noted.

[11] *See* ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 781-85, 576 N.W.2d 30 (1998).

¶58 The prohibition on other acts evidence, codified in WIS. STAT. § 904.04, is based on the danger that a jury will find that a person engaged in alleged conduct, not based on specific evidence of such conduct, but rather on evidence showing that he or she has a propensity to commit the type of act alleged. *See* ***La Crosse Cnty. Dep't of Human Servs. v. Tara P.***, 2002 WI App 84, ¶18, 252 Wis. 2d 179, 643 N.W.2d 194. This concern is not implicated here. The question for the jury was not whether Thomas committed some particular alleged act, but rather whether his brain was injured as a result of ingesting white lead carbonate.

¶59 Moreover, there can be no serious doubt that, as a general proposition, the "bad acts" evidence was relevant for a proper purpose, namely, to buttress the Manufacturers' theory that Thomas's poor performance in cognitive testing was largely a result of his failure to cooperate with testing and his failure to take advantage of educational opportunities. The defense theory was that Thomas performed so poorly not just because he was a poor student who often skipped school, but because he was an exceptionally poor student and an aggressive antagonist to those around him in the educational system.[12]

¶60 In addition, the Manufacturers reasonably maintained that Thomas's past behavior was relevant to damages relating to his future earning potential. For example, Thomas's vocational expert calculated Thomas's lost future earning

[12] Thomas also contends, without providing an adequate timeline of events, that evidence of his bad behavior is not relevant because it occurred after his brain was injured. In addition to being undeveloped, this aspect of Thomas's argument ignores the fact that part of the Manufacturers' theory was that there was an ongoing relationship between Thomas's behavior and his poor performance. Because Thomas's time-based relevancy assertion is not developed, we do not address it further.

capacity based on "what he should have been reasonably capable of doing as an adult." This expert opined that, if Thomas did not have "lead-poisoning issues," "there's no reason why he would not have finished high school, graduated with a diploma, been fully capable of working at that point in time." The witness calculated earning capacity based on what a "typical high school graduate" would earn from the time of graduation to age 67. We note that Thomas does not argue that exposure to lead caused his bad behavior, and it is apparent that evidence of Thomas's pattern of behavior tends to rebut the proposition that he would have been a "typical" high school graduate but for his exposure to white lead carbonate.

¶61 Accordingly, we reject Thomas's assertion that the circuit court failed to engage in a proper other acts analysis. No such analysis was required. And, as the above discussion suggests, even if the court had engaged in such an analysis, it is not apparent what the outcome should have been because the evidence had significant probative value.

b. Inadequate Briefing And Forfeiture

¶62 In addition to his other acts argument, Thomas argues, albeit often indirectly, that the probative value of the bad behavior evidence was substantially outweighed by the danger of unfair prejudice. With respect to this argument, Thomas fails to address the circuit court's primary reason for rejecting his post-trial complaint regarding bad behavior evidence, namely, that Thomas failed to make an objection to the evidence at the appropriate time at trial.

¶63 Post-trial, the circuit court primarily relied on forfeiture to reject Thomas's objection to the admission of bad behavior evidence. More specifically, the court pointed to Thomas's failure to raise his objections via a pretrial "protocol." As explained below, the court used the protocol to deal systematically

with objections to a portion of the enormous volume of trial evidence. On appeal, even though the Manufacturers raise this forfeiture issue in their responsive brief, Thomas does not address the topic. Thus, Thomas has not explained why we should not affirm the circuit court based on forfeiture. In the paragraphs that follow, we first describe the protocol, and then return to the topic of forfeiture.

¶64 In keeping with an agreement reached by the parties at a pretrial status conference, the circuit court issued a written order providing a time frame for the parties to both "identify any exhibits which the party intend[ed] to display to the jury during opening statements" and for objections to such exhibits. The order stated: "Portions of exhibits that are displayed or otherwise published to the jury will be deemed admitted." This procedure came to be shorthanded as the "protocol."

¶65 Much of the evidence that Thomas now complains about was contained in exhibits identified by the Manufacturers using the protocol. Although Thomas used the protocol to lodge objections to some proffered evidence, he did not object to bad behavior evidence found in the exhibits that he now complains about on appeal. Thomas's broad-brush approach to his discussion leaves some room for doubt, but he seems to focus his attention on the following facts and allegations:

- "[Thomas] reports he began using marijuana at age 8 or 9. He began using it daily in the last 6 months to year."
- Thomas, at school, engaged in "fighting, lying, [and] stealing."
- Thomas was "noncompliant, disruptive, verbally and physically aggressive."
- Thomas told a school bus driver that he "would blow [the driver's] F__ing head off tomorrow."

- After a school librarian asked Thomas to return to class when she found him hiding under the stairs, Thomas later followed the librarian to the staff parking lot, stating "now you're scared aren't you Bitch" and "I know your car now."

- After being told to follow certain school policies about throwing away his food, Thomas told a teacher he was going to shoot the teacher and was "going to shoot up the school."

- Thomas "grabb[ed] a student by the throat in a school restroom following other 'horseplay'" and, when confronted, he "became very belligerent and very disrespectful to [the principal] and he used offensive language."

Thomas was alerted, through the protocol process, to the Manufacturers' intent to introduce these items into evidence, but he failed to object to them through the protocol process or before or during opening statements.[13] Thus, the Manufacturers, consistent with the protocol, presented or made reference to the contents of these records during opening statements and later during the presentation of evidence.

¶66 Prior to opening statements, the court spoke with the attorneys about the protocol's effect. The court stated: "So we're perfectly clear on that, you show it in opening statement, I consider it admitted." Later in this discussion, the court again reiterated that "automatically that part that's shown comes in; no dispute, dispute's over." Thomas's attorney simply responded, "Okay," and did not otherwise indicate that the protocol was unclear or improper. Indeed, as noted above, Thomas did object to certain other proposed exhibits from the Manufacturers. It is not surprising then that, post-trial, the circuit court was satisfied that the protocol and its effect on the admission of evidence was clear.

[13] We note that Thomas does not point us to a place in the record where he attempted to make relevant and timely objections during the opening statements, and we have not located any such objections.

¶67 Although Thomas does not directly address the protocol or his corresponding forfeiture, he does seemingly suggest that he has preserved his objection because of a pretrial motion he filed. This motion led to the exclusion of some bad behavior evidence—gang membership and sexual history—but the motion did not lead to a blanket prohibition on bad behavior evidence.[14] Thomas does not say so clearly, but he may be suggesting that he was misled by the court's ruling on this motion into believing that it was pointless to object to bad behavior via the protocol procedure because the court had already ruled that all bad behavior evidence was admissible. If Thomas means to make this argument, it is too little too late. First, it is too little because Thomas does not present a developed argument along this line. Second, it is too late because Thomas did not make the argument when the circuit court had a timely opportunity to address and remedy any misunderstanding.

¶68 So far as the record discloses, the circuit court and the Manufacturers are correct that Thomas passed up his opportunity to make a timely objection during the trial. *See* ***State v. Damon***, 140 Wis. 2d 297, 300, 409 N.W.2d 444 (Ct. App. 1987) ("Failure to make a timely objection to the admissibility of evidence waives that objection."). Moreover, Thomas has not responded to the Manufacturers' assertion in their responsive appellate brief that Thomas forfeited the issue by his failure to object using the protocol. *See* ***Fischer v. Wisconsin Patients Comp. Fund***, 2002 WI App 192, ¶1 n.1, 256 Wis. 2d 848, 650 N.W.2d 75 ("An argument asserted by a respondent on appeal and not disputed by the

[14] Following Thomas's pretrial motion, the Manufacturers abandoned their pretrial effort to present gang membership evidence. The Manufacturers later renewed their effort at trial, at which point the court ruled that "the gang references" could not come in.

appellant in the reply brief is taken as admitted."). For these reasons, we deem Thomas's challenge to the bad behavior evidence we summarize above forfeited.

c. Non-Forfeited Bad Behavior References

¶69 Thomas also highlights the Manufacturers' reference, during opening statements, to two other instances of Thomas's bad behavior, suggesting that these references resulted in unfair prejudice. Specifically, the Manufacturers referred to a car theft and a check-cashing store robbery. We will assume for purposes of this discussion that, even though Thomas does not direct us to contemporaneous objections during trial, his pretrial objection to evidence relating to criminal behavior means that Thomas has not forfeited the objection for purposes of appeal. Nonetheless, we decline to require a new trial because any error in this respect was harmless.

¶70 Error is harmless when there is no "reasonable possibility that the error contributed to the outcome of the action or proceeding at issue." ***Martindale v. Ripp***, 2001 WI 113, ¶32, 246 Wis. 2d 67, 629 N.W.2d 698. "A reasonable possibility of a different outcome is a possibility sufficient to 'undermine confidence in the outcome.'" ***Id.*** Here, the reference to Thomas committing a theft and a robbery added little to the overall portrait of Thomas's bad behavior.

¶71 Our attention here is on a reference to a car theft and Thomas telling some people that "he had robbed somebody at a check cashing store" with a "pistol." Thomas draws our attention to opening statements where a Manufacturers' attorney made reference to the theft and robbery while listing Thomas's bad behaviors, much of which was school-related misconduct. Notably, the Manufacturers' attorney asserted that, collectively, all of this bad behavior evidence would support the theory that Thomas's poor performance was not

caused by the ingestion of lead, but rather was caused by other factors, including behaviors tending to "interfere with a child's learning." The contrary narrative—that Thomas's "conduct does not and it cannot explain the cognitive deficits that [Thomas] has suffered"—appears in the opening statement of Thomas's attorney.

¶72 We conclude that, although such references might be potent in many contexts, they plainly would not have stood out during this trial.[15] As we have already summarized, the jury heard evidence that Thomas engaged in "fighting, lying, [and] stealing" at school, that he grabbed another student by the throat, that he threatened to shoot a school bus driver, threatened a teacher in a school parking lot, and threatened to "shoot up" a school. In addition, the jury heard about Thomas's early and, at some point, daily use of marijuana,[16] and that he was often truant and had been suspended from school many times.

¶73 In light of the volume of evidence indicating that Thomas had severe behavioral problems, we can say with confidence that the references to a theft and a robbery did not affect the outcome of the trial. Moreover, the constant focus of testimony and argument was on cause and effect. In essence, Thomas's poor

[15] When Thomas complains in his appellate brief-in-chief about the admission of the theft and robbery, he also provides a string citation to the record without further explanation. We have examined these citations and note that some are arguably additional examples of non-forfeited error. We choose not to address these because Thomas has done nothing more than provide record cites. And, even a brief review of the citations shows that several of them are problematic from Thomas's perspective. For example, one involves cross-examination of Thomas in which he denies a specific instance of bad behavior. Obviously, a question is not evidence, and the jury was left with Thomas's denial.

[16] Referring to Thomas's marijuana use, Dr. Hebben stated that drugs affect both brain development and "performance on neuropsychological tests" and that there are "lingering effects" from chronic use. She further stated that these lingering effects include "decrements in learning and memory and things like processing speed and other areas that we assess in neuropsychological functioning." Dr. Lidsky, for his part, noted that marijuana use can impact testing "for probably a few months" after its use.

performance and behavior were not contested. Rather, the question for the jury was whether Thomas performed poorly because his brain had been injured or whether, instead, his poor performance could be explained by family history and his bad behavior.

¶74 For the preceding reasons, we conclude that any error relating to preserved objections to bad behavior evidence was harmless because there is no reasonable probability that an error contributed to the outcome of the case. *See* ***Martindale***, 246 Wis. 2d 67, ¶32.

Conclusion

¶75 For the reasons stated above, we affirm the circuit court.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.