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DISTRICT I

February 18, 2025

To:

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Circuit Court Judge
Electronic Notice

Hon. Jean M. Kies
Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Michael C. Sanders
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You are hereby notified that the Court has entered the following opinion and order:

2022AP1469-CR State of Wisconsin v. Dan J. Popp (L.C. # 2016CF1022)

Before White, C.J., Donald, P.J., and Geenen, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Dan J. Popp appeals from a judgment of conviction and from a postconviction order.[1] Popp pled no-contest to three counts of first-degree intentional homicide and one count of

[1] The notice of appeal refers only to the order denying Popp's postconviction motion, but we construe the notice as encompassing both the judgment of conviction and the postconviction order. *See **Rhyner v. Sauk Cnty.***, 118 Wis. 2d 324, 326, 348 N.W.2d 588 (Ct. App. 1984) (holding that a notice of appeal is sufficient if we are able to determine what the appellant seeks to challenge). The Honorable Jeffrey A. Conen presided over the trial and sentencing proceedings and entered the judgment of conviction. We refer to Judge Conen as the trial court. The Honorable Jean M. Kies presided over the postconviction proceedings and entered the postconviction order. We refer to Judge Kies as the circuit court.

attempted first-degree intentional homicide. He then proceeded to a jury trial on his special pleas of not guilty by reason of mental disease or defect. The jury found against him, and the trial court therefore entered a judgment of conviction reflecting that he was guilty of the four crimes. Popp moved for postconviction relief, which the circuit court denied without a hearing. On appeal, Popp asserts that he was entitled to directed verdicts on the issue of his mental responsibility for his conduct and that he was entitled to a hearing on his postconviction claims. He alternatively seeks a new trial in the interest of justice. Based upon a review of the briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[2] We affirm.

On March 6, 2016, police responded to reports of an active shooter in a Milwaukee neighborhood. Police arrested Popp when he walked out of an apartment building on the 3000 block of South 92nd Street with a long gun slung over his shoulder. The officers determined that Popp lived in the four-unit building and that he had shot and killed three people inside.

J.M.C. told police that shortly before the shooting, he and his father, J.M.P., encountered Popp in a common area of the apartment building where they all lived. Popp offered J.M.P. a beer, which J.M.P. declined. Popp asked the pair where they were from, and when they told him, Popp responded: "Oh, that's why you don't speak English. You're Puerto Rican." Popp then went back into his apartment while J.M.P. and J.M.C. walked downstairs to the basement. When J.M.P. and J.M.C. were returning up the stairs, Popp came out of his apartment, raised a long gun, pointed it at J.M.P., and said: "you guys got to go." Popp then shot J.M.P. in the head.

[2] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Popp next pointed his gun at J.M.C., who fled. J.M.C. heard another gunshot, but was able to escape the building and call 911.

T.V. told police through a Hmong interpreter that on March 6, 2016, she was visiting her brother, P.V., his wife, M.V., and their four minor children at their apartment on South 92nd Street. Popp broke into the unit and found the family hiding in a bedroom. He pointed a rifle at P.V. and ordered him to leave the room. After P.V. left with Popp, T.V. heard several shots. Popp then returned and dragged M.V. and two of her children out of the bedroom.

Police found J.M.P.'s body on the landing of the apartment building's interior stairway and M.V.'s body in Popp's apartment. Police determined that the door of another apartment had been forced open, and inside that unit they found P.V.'s body in the bathroom. A county medical examiner performed autopsies and concluded that J.M.P., M.V., and P.V. had all died of gunshot wounds. The State charged Popp with three counts of first-degree intentional homicide based on those deaths, and the State charged Popp with attempted first-degree intentional homicide based on the shot fired at J.M.C.

Popp, by trial counsel, entered pleas of not guilty and special pleas of not guilty by reason of mental disease or defect. Two court-appointed experts, one a psychiatrist and the other a psychologist, evaluated Popp and supported his special pleas. Popp then decided to give up his right to a trial regarding his guilt but to maintain his claims that he was not mentally responsible for the crimes. He pled no-contest to the four charges and proceeded to a jury trial on the question of his mental responsibility.

At trial, Popp presented the testimony of the court-appointed psychiatrist and psychologist, who opined that Popp suffered from a mental disease or defect. The experts

testified that Popp was delusional at the time of the crimes and committed them believing that he and the children in the apartment building were in danger from robots masquerading as people. Both experts opined that at the time of the crimes, Popp lacked substantial capacity to appreciate the wrongfulness of his actions or to conform his conduct to the requirements of the law. Popp also presented testimony from several law enforcement officers who described Popp's statements during and after his arrest, and the jury saw portions of the video of Popp's custodial interview. Popp's statements included references to "terminators" and to concerns about zombies at the jail.

The State presented testimony from J.M.C., T.V., and from I.V., the oldest of M.V.'s and P.V.'s daughters. These witnesses described what they saw and heard on March 6, 2016, when Popp threatened them and killed their family members. The State also presented testimony from Popp's friend and former roommate, who described Popp as "depressed" and "paranoid" during the months before the shooting but did not recall Popp ever discussing terminators or robots infiltrating the population. The State then played recordings of Popp's telephone and video calls from jail during the weeks immediately following his arrest, and the State highlighted the absence of any discussion of robots or other delusions during these calls. Finally, the State presented testimony from a jail inmate housed in a cell block with Popp. According to the inmate, Popp said "[t]hat he was going to play his role all the way to Mendota."[3]

At the close of the evidence, Popp moved for directed verdicts. The trial court denied the motion, and the case instead went to the jury. Following deliberation, the jury found that Popp suffered from a mental disease or defect when he committed his crimes but that he did not lack

[3] The jury heard testimony that Mendota Mental Health Institute is one of two Wisconsin state mental health institutions.

the substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. Popp again unsuccessfully sought directed verdicts, and the matter thereafter proceeded to sentencing. The trial court imposed three consecutive life sentences and a concurrent, evenly bifurcated twenty-year term of imprisonment.

With the assistance of postconviction counsel, Popp moved for postconviction relief. He alleged that his trial counsel was ineffective for failing to: object to the victims' trial testimony; ensure that witnesses were not called out of order; present the entirety of certain video recordings; and ensure that the jury received correct and sufficient jury instructions. The circuit court rejected Popp's claims without a hearing.

Popp appeals. In this court, he challenges the orders that denied his allegations of ineffective assistance of counsel without granting him a hearing and that rejected his requests for directed verdicts. He additionally seeks a new trial in the interest of justice.

To prevail on a claim of ineffective assistance of counsel, a defendant must prove both that counsel's performance was deficient and that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must show that counsel's actions or omissions "fell below an objective standard of reasonableness." ***Id.*** at 688. To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. If a defendant fails to make a sufficient showing on one prong of the ***Strickland*** test, a reviewing court need not address the other. ***Id.*** at 697.

Pursuant to ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979), a defendant who alleges ineffective assistance of counsel must seek to preserve counsel's

testimony in a postconviction hearing. The defendant, however, is not automatically entitled to such a hearing. ***State v. Allen***, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433. Rather, the circuit court is required to hold an evidentiary hearing only if the defendant has alleged, within the four corners of the postconviction motion, sufficient material facts that, if true, would entitle the defendant to relief. ***Id.*** at ¶¶14, 23. Whether a postconviction motion alleges sufficient material facts to require a hearing is a question of law that we review *de novo*. ***Id.***, ¶9. A defendant's postconviction motion will normally be sufficient to warrant a hearing if the motion includes allegations that establish "the five 'w's' and one 'h'; that is, who, what, where, when, why, and how." ***Id.***, ¶23. If a postconviction motion "does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief," the circuit court, in its discretion, may deny relief without a hearing. ***Id.***, ¶¶9, 34. We review a circuit court's discretionary decisions with deference. ***Id***., ¶9. With these principles in mind, we consider Popp's claims of ineffective assistance of counsel.

Popp first argues that his trial counsel was ineffective for failing to move to exclude the testimony of J.M.C., T.V., and I.V. on the ground that their testimony was irrelevant, cumulative, and unfairly prejudicial. The circuit court correctly rejected this claim.

J.M.C., T.V., and I.V. were all eyewitnesses to Popp's crimes, and J.M.C. was also the victim of the attempted homicide. The jurors were required to determine whether Popp was responsible for those crimes or whether, due to 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* WIS. STAT. § 971.15(1). As the circuit court found, eyewitness testimony about Popp's wrongful conduct was clearly relevant to assessing his state of mind

when he engaged in such conduct, and a motion to exclude that evidence as irrelevant would therefore have been groundless because "no evidence should be excluded which reasonably tends to show the mental condition of the defendant at the time of the offense." ***State v. Carlson***, 5 Wis. 2d 595, 607, 93 N.W.2d 354 (1958). Further, the circuit court found that, while the three eyewitnesses all testified about what they heard Popp say and the things that they saw him do before and during the shootings, neither the witnesses' perspectives nor their observations were identical. Accordingly, the testimony from the eyewitnesses was not excludable as merely cumulative. *Cf.* WIS. STAT. § 904.03 (permitting a trial court to prevent the "needless presentation of cumulative evidence").

As to the allegation that the eyewitness testimony was unfairly prejudicial, Popp bases this allegation on his assertions that the testimony was irrelevant, cumulative, and emotional. As we have seen, however, the circuit court correctly determined that the evidence was not irrelevant or cumulative, so Popp's claim of unfair prejudice hinges on his assertion that the testimony was emotional. We do not doubt the accuracy of that characterization, nor do we doubt Popp's accompanying assessment that the testimony likely had a substantial impact on the jury. The question, however, is whether Popp sufficiently alleged that trial counsel performed deficiently by not pursuing a motion to exclude such testimony. We conclude that he failed to do so. The State was entitled to present relevant evidence regarding the key issue in dispute, namely, Popp's mental state at the time of the crimes. *See* ***State v. Connor***, 2009 WI App 143, ¶27, 321 Wis. 2d 449, 775 N.W.2d 105 (reflecting the general rule that the State may make its case with evidence of the prosecutor's choosing). Testimony from eyewitnesses relevant to that issue may have had an impact on the jury but the evidence was not unfair as a result.

Accordingly, a motion to exclude the testimony of J.M.C., T.V., and I.V. as irrelevant, cumulative, or unfairly prejudicial would have lacked merit. Trial counsel therefore did not perform deficiently by forgoing such a motion. ***State v. Sandoval***, 2009 WI App 61, ¶34, 318 Wis. 2d 126, 767 N.W.2d 291 (holding that counsel does not perform deficiently by failing to pursue a meritless claim). We need not reach the prejudice prong of the analysis. ***Id.***

Popp next faults his trial counsel for not objecting when the trial court permitted the State to call J.M.C., T.V., and I.V. to testify out-of-order after Popp presented his first two witnesses. Popp's allegation of deficient performance is wholly conclusory. Pursuant to WIS. STAT. § 906.11(1), a trial court has discretion to control the presentation of witnesses, and the statute confers a "broad grant of superintending authority" on the trial court. ***State v. Wright***, 2003 WI App 252, ¶50, 268 Wis. 2d 694, 673 N.W.2d 386. Popp fails to argue, let alone demonstrate, that the trial court erroneously exercised its broad discretion here.[4] Popp goes on to allege that he suffered unfair prejudice because, as a consequence of the order of witnesses, his "case [was] destroyed after it had barely begun." Popp, however, does not offer any legal authority for his theory that evidence is rendered unfairly prejudicial by the timing of its presentation. We know of no such authority. ***State v. Norwood***, 2005 WI App 218, ¶25, 287 Wis. 2d 679, 706 N.W.2d

[4] Popp asserts on appeal, as he also asserted in his postconviction motion, that the State called some of its witnesses before Popp had completed his presentation because trial counsel "was unprepared to call his own witnesses" and "did not have enough witnesses present to use the time allotted for trial." Popp has not provided a record citation that supports these contentions. Rather, as the State pointed out in postconviction proceedings, Popp's record citation leads to the trial court's explanation to the jury that it would hear some testimony "out of order so that we can accommodate people that have been waiting around here." We remind appellate counsel that unsupported statements do not assist a litigant, because we do not consider assertions of fact that are not part of the record. ***Jenkins v. Sabourin***, 104 Wis. 2d 309, 313-14, 311 N.W.2d 600 (1981).

683. We need not and will not further consider this unsupported claim. ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

We next reject Popp's claim that his trial counsel was ineffective for failing to play the entirety of a video recording of his post-arrest statements. As Popp acknowledges, the video "froze" due to a technical malfunction, and counsel therefore presented testimony from a detective about the content of the video. Popp nonetheless contends that there "was no legitimate reason for failing to demonstrate to the jury in its entirety the defendant's video recorded statements." The circuit court found, however, that malfunctioning video equipment was a legitimate reason for counsel's omission. We agree.

Popp argues, in effect, that technical malfunctions of courtroom equipment constitute deficient performance by trial counsel, but he fails to explain what trial counsel could have done to avert that malfunction, how counsel could have done so, when the error could have been corrected, or who could have corrected it. *See* ***Allen***, 274 Wis. 2d 568, ¶23. At most, Popp addresses why he views counsel's performance as deficient, *see* ***id.***, arguing that the video was "the best evidence" of his state of mind and thus would have provided a "much better understanding" of his mental state than the detective's testimony. Trial counsel's performance, however, is not judged by whether it was the best possible. Rather, the question is whether counsel's performance fell "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. Here, as the circuit court correctly explained, "counsel ensured that [Popp's] behavior was put before the jury for consideration," and trial counsel adapted to the circumstances when technical difficulties arose. Accordingly, Popp fails to demonstrate that his trial counsel performed deficiently in responding to a technical malfunction. We need not consider the question of prejudice. ***Id.*** at 697.

Next, Popp claims that his trial counsel failed to ensure that the jury received proper instructions regarding the ramifications of a not-guilty verdict. Popp's claim turns on language that is codified in WIS. STAT. § 971.165(2), and echoed in WIS JI—CRIMINAL 603:

> If the plea of not guilty by reason of mental disease or defect is tried to a jury, the court shall inform the jury that the effect of a verdict of not guilty by reason of mental disease or defect is that, in lieu of criminal sentence or probation, the defendant will be committed to the custody of the department of health services and will be placed in an appropriate institution ***unless*** the court determines that the defendant would not pose a danger to himself … or to others if released[.]

Sec. 971.165(2) (emphasis added). Popp faults his trial counsel for failing to object when "the [c]ourt indicated that Mr. Popp would remain hospitalized ***until*** found to be not a danger to himself or others," because "the suggested jury instruction indicates a person would remain hospitalized ***unless*** found to be not a danger[.]" As the circuit court and the State point out, however, the trial court used the word "until" in this context during *voir dire*, before a jury was selected, but § 971.165(2) describes information that the court must give "the jury."[5] Popp has not identified any authority reflecting that § 971.165(2) applies to the court's remarks to prospective jurors. Accordingly, Popp has not demonstrated that his trial counsel performed deficiently by failing to object to the trial court's prefatory remarks to the venire. *See* ***State v. McMahon***, 186 Wis. 2d 68, 84-85, 519 N.W.2d 621 (Ct. App. 1994) (holding that counsel does not perform deficiently by failing to argue a point of law that is unsettled or unclear).

Were we to assume, however, that a trial court must use the precise language set forth in WIS. STAT. § 971.165(2) when conducting *voir dire*—and, to be clear, we do not make that

[5] Popp describes what "the [c]ourt indicated" without explaining when or to whom the trial court gave the indication.

assumption—Popp fails to show that he suffered any prejudice as a consequence of his trial counsel's failure to object to a deviation from that language. The trial court used the language at issue once when addressing the venire and did not repeat it. After the jurors were selected, the trial court gave both a preliminary instruction and a later closing instruction that if the jury found Popp not guilty by reason of mental disease or defect, he would remain hospitalized "unless" the court found him not to be a danger.

In ***State v. Vander Linden***, 141 Wis. 2d 155, 414 N.W.2d 72 (Ct. App. 1987), where, as here, a jury decided the question of criminal responsibility after the defendant pled no-contest, we rejected the defendant's claim for relief based on the trial court's erroneous statement to the venire that the defendant had pled guilty. ***Id.*** at 160-62. We determined that the remainder of the preliminary comments to the venire and the final instructions to the impaneled jury were all correct, and that "[a]ny possible negative inferences ...were rendered harmless ... because the overall meaning communicated by the instructions was correct." ***Id.*** at 162.

Analogously here, the jurors that were ultimately selected to decide the facts received instructions that Popp would remain hospitalized "unless" the court found him not to be a danger. Thus, the impaneled jury received the instruction that Popp believes was required. Moreover, the record shows that the impaneled jurors were also told to be "guided by" the court's instructions and to answer the questions on the special verdict "according to" those instructions. We presume that the jury followed the trial court's instructions. ***State v. Pirtle***, 2011 WI App 89, ¶27, 334 Wis. 2d 211, 799 N.W.2d 492. Accordingly, we are satisfied that Popp did not suffer any prejudice when his trial counsel failed to object to an alleged misstatement during *voir dire*. No reasonable probability exists that the result of the trial would

have been different if the court had used the word "until" rather than the word "unless" when making preliminary remarks to the prospective jurors.

Popp next contends that his trial counsel's performance was prejudicially deficient because counsel failed to request an instruction that, if the jury found Popp not guilty by reason of mental disease or defect, he "would remain supervised for life ... and would never be unsupervised again regardless of the verdict." As the State correctly argues, however, the instruction that Popp describes misstates the law. Pursuant to WIS. STAT. § 971.17(4), any person who is committed for institutional care may seek conditional release from such care; pursuant to § 971.17(5), a person who has been granted conditional release "may petition the committing court to terminate the order of commitment." Popp concedes in his reply brief: "It is true that had he, at some point, been granted conditional release, then he could have petitioned for termination of his commitment." In light of Popp's concession, we reject his claim. Clearly, trial counsel had no obligation to request an instruction that would have misled the jury about the ramifications of its potential verdict. *See* ***Sandoval***, 318 Wis. 2d 126, ¶34.

Popp next asserts that he suffered cumulative prejudice from his trial counsel's errors. "[W]hen a court finds numerous deficiencies in a counsel's performance, it need not rely on the prejudicial effect of a single deficiency if, taken together, the deficiencies establish cumulative prejudice." ***State v. Thiel***, 2003 WI 111, ¶59, 264 Wis. 2d 571, 665 N.W.2d 305. Because we conclude that trial counsel did not perform deficiently and that Popp did not wrongly suffer prejudice from the actions that he challenges, we necessarily conclude that there was no prejudice to cumulate. "Zero plus zero equals zero." ***State v. Brown***, 85 Wis. 2d 341, 353, 270 N.W.2d 87 (Ct. App. 1978) (citation omitted).

In sum, Popp failed to allege sufficient material facts to support any of his claims of ineffective assistance of counsel. The circuit court properly denied his claims without a hearing.

We turn to Popp's claim that the trial court erred by denying Popp's motions for directed verdicts. We reject this claim. Popp does not demonstrate that the trial court had the legal authority to grant a directed verdict in his favor. To the contrary, controlling decisions of our supreme court show that the trial court could not grant such relief.

In ***State v. Bergenthal***, 47 Wis. 2d 668, 685-86, 178 N.W.2d 16 (1970), our supreme court held that the trial court properly denied the defendant's motion for a directed verdict on the question of mental responsibility for crimes, even though the State did not present any witnesses of its own to rebut the defendant's case. The ***Bergenthal*** court explained: "[t]he issue as to sanity remained for resolution by the trier of fact.... The question of whether the defendant had met his burden of proof was one of fact for the jury, not one of law for the court." ***Id.***

Our supreme court later clarified that, notwithstanding the language in ***Bergenthal***, a trial court may grant a directed verdict in favor of the State on a question of mental responsibility. ***State v. Leach***, 124 Wis. 2d 648, 659-60, 370 N.W.2d 240 (1985). The ***Leach*** court explained that the reasoning behind permitting the trial court to direct a verdict for the State on the issue of mental responsibility is the same as applies when a trial court considers whether to disallow other defenses to crimes: "[t]he trial court should be permitted to withhold [the] defense of not guilty by reason of mental disease or defect, like other defenses, from the consideration of the jury when there is no evidence presented or there is insufficient evidence to present a jury question on the defense." ***Id.*** at 663. Similarly, a trial court also "should be permitted to direct a verdict against the defendant if the judge finds there is no credible probative evidence toward

meeting the burden of establishing the defense of not guilty by reason of mental disease or defect[.]" ***Id.***

Our supreme court discussed ***Leach*** in ***State v. Koput***, 142 Wis. 2d 370, 418 N.W.2d 804 (1988). The ***Koput*** court made clear: "this court has held, in ***State v. Leach***, that *the judge may grant a directed verdict on the motion of the [S]tate* if the defendant has failed to produce any credible evidence tending to prove a lack of responsibility." ***Koput***, 142 Wis. 2d at 392 (emphasis added; citation omitted).

Bergenthal, ***Leach***, and ***Koput*** together teach that the trial court may not direct a verdict in favor of the defendant on the question of mental responsibility for criminal conduct. This court is not free to reach a contrary result. ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) (holding that "[t]he supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case").

For the sake of completeness, we add that, were we to conclude that the trial court has the authority to direct verdicts in the defendant's favor on the question of mental responsibility, we would readily conclude that the trial court properly declined to do so here. Popp argues that "two respected doctors" testified in his favor and that "no credible evidence" supported verdicts finding him mentally responsible for his actions. A jury, however, is entitled to reject the opinion of an expert, even when that opinion is uncontradicted, because "such testimony must pass through the screen of the fact trier's judgment of credibility." ***Pautz v. State***, 64 Wis. 2d 469, 476, 219 N.W.2d 327 (1974) (citation omitted). Further, and relatedly, credibility is for the fact-finder to decide, and a jury's credibility assessments will not be set aside unless the jury has

relied upon evidence that is "inherently or patently incredible." ***State v. Kucharski***, 2015 WI 64, ¶24, 363 Wis. 2d 658, 866 N.W.2d 697 (citation omitted).

In this case, the State cross-examined the expert witnesses who testified in Popp's favor, and even Popp acknowledged that "perhaps holes can be picked here or there in either of the doctors' conclusions." The State presented testimony from eyewitnesses who described their observations of Popp's behavior before, during, and after the crimes, and Popp concedes that the testimony of these witnesses was significantly adverse to his position, opining in his appellant's brief that their testimony "destroyed" his case. Additionally, the State presented testimony about Popp's conduct in jail, including evidence of conversations that he had with a fellow inmate. According to that inmate, Popp said that he would "play his role all the way to Mendota."

Therefore, assuming without so holding that the trial court could have directed verdicts that Popp was not guilty by reason of mental disease or defect, we conclude that doing so here would not have been proper. The evidence permitted reasonable people to reach different conclusions about Popp's mental responsibility for his criminal conduct. The question was thus one of fact for the jury. *See* ***Leach***, 124 Wis. 2d at 660.

Last, Popp asserts that he should have a new trial in the interest of justice. Pursuant to WIS. STAT. § 752.35, this court may grant a new trial in the interest of justice when the real controversy has not been fully tried or when it is probable that justice has miscarried. However, "reversals under ... § 752.35 are rare and reserved for exceptional cases." ***Kucharski***, 363 Wis. 2d 658, ¶41. Therefore, before this court exercises its discretionary power of reversal, we must conclude "that the case may be characterized as exceptional." ***State v. McKellips***, 2016 WI 51, ¶52, 369 Wis. 2d 437, 881 N.W.2d 258. Here, Popp seeks discretionary reversal without

offering an analysis of why this case satisfies "the exceptional standard." *See* ***id.*** Accordingly, we reject his claim. ***Pettit***, 171 Wis. 2d at 647. For all of the foregoing reasons, we affirm.

IT IS ORDERED that the judgment of conviction and postconviction order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals