COURT OF APPEALS
DECISION
DATED AND FILED

March 4, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP3124-CR **Cir. Ct. No. 2002CF99**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES ROZENSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marathon County: PATRICK M. BRADY, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. James Rozenski, pro se, appeals a judgment of conviction and an order denying his motion for postconviction relief. Rozenski was convicted following a jury trial of two counts of second-degree sexual assault, one count of false imprisonment, and one count of battery. He presents numerous

issues on appeal related to ineffective assistance of counsel and prosecutorial misconduct.[1] We reject Rozenski's arguments and affirm.

BACKGROUND

¶2 Rozenski was charged with sexually assaulting Rochelle Drehmel in Wausau on February 22, 2002. Drehmel told police that she and Rozenski had been dating for about a year but their relationship ended several weeks prior to the assault. Drehmel stated they had a fight the night before New Year's Eve, and she went out on New Year's Eve with other friends, including Jeremy Zilisch, whom she eventually began dating.

¶3 At trial, Drehmel testified that she had agreed to take care of Rozenski's parents' cats in Wausau while they were on vacation. At this time, Rozenski was attending Marquette University in Milwaukee but drove up to Wausau the night before the assault, looking for Drehmel. Rozenski knocked on the door of Drehmel's parents' house at 1:17 a.m., inquiring as to Drehmel's whereabouts. Drehmel's mother testified that Rozenski stated, "Rochelle and I, we are having some difficulties in our relationship, and I thought I would try to come up and work some things out with her." Rozenski also went to Drehmel's

[1] Rozenski presents twenty issues to this court with numerous sub-issues. However, he has not presented argument on issues ten through twenty, "due to word count restrictions of § 809.19(8)(c)." Rozenski attempts to incorporate by reference arguments contained in a memorandum filed in the circuit court. Rozenski violates the rules of appellate procedure and we will not consider those issues. We consider such "for-reasons-stated-elsewhere" arguments to be inadequate and decline to consider them. *See* ***Calaway v. Brown County***, 202 Wis. 2d 736, 750-51, 553 N.W.2d 809 (Ct. App. 1996); *see also* ***DeSilva v. DiLeonardi***, 181 F.3d 865, 867 (7th Cir. 1999) ("A brief must make all arguments accessible to the judges, rather than ask them to play archeologist with the record."). Moreover, in his reply brief Rozenski states that "[s]pace considerations will not allow a response to all of the State's arguments." Arguments not refuted are deemed admitted. ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981).

workplace in the early morning hours looking for her. Scott DeBroux testified that he was in the break room when Rozenski came up to the window and knocked. Rozenski indicated he was looking for Drehmel. Rozenski then drove to Antigo searching for Drehmel, returning back to Wausau at 4:45 a.m. During this period, Rozenski telephoned Drehmel on several occasions and left messages. Drehmel stayed at Zilisch's that night.

¶4 On the morning of the assault, Drehmel fed the cats and then went to a hair appointment. Rozenski telephoned her when she was at the hair appointment and asked her to return to his parents' house. Drehmel agreed, and when she arrived, Rozenski wanted to know where she had been the night before. Rozenski also talked about working out their relationship but Drehmel told him the relationship was over and he needed to move on.

¶5 Drehmel and Rozenski sat on the couch and Rozenski leaned over and grabbed her by the coat, pulling her over to him. Rozenski started to hug and kiss her. She pushed away and told him that his actions were not going to help their relationship. Rozenski released her and she moved back to the other end of the couch. Rozenski then grabbed her again, preventing her from moving away from him. She again told him his actions were not going to help their relationship, and he released her. Rozenski pulled her over a third time onto his lap, and tried to pull her jacket off.

¶6 Rozenski then pinned her down by forcefully holding her wrists while she attempted to push away. Rozenski took one hand and put it down her workout pants and inserted his finger into her vagina. He then picked her up and carried her into the bedroom where he used his hands to cross her wrists and pin her hands above her head while pulling down her pants. He then put his penis

inside her, while she pushed and screamed at him to stop. Rozenski pulled her hair and became more aggressive until he ejaculated. Rozenski then started crying and saying, "I love you, I love you," while hugging her. Rozenski also said, "You wouldn't let me walk away from you once, and I'm not going to let you walk away from me…." Rozenski then let Drehmel up but held onto her to prevent her from getting off the bed while continuing to say that he loved her.

¶7 Rozenski finally allowed Drehmel to get up and get dressed. He said, "Just stop, I want to talk to you, you know, I love you. Let's just talk about this. We can work things out." While Rozenski was talking, Drehmel's cellular phone rang, and Rozenski demanded to know who was calling. A fight ensued over the phone and Rozenski eventually got the phone out of her pocket, trying to determine from the caller identification feature who telephoned. Rozenski kept asking, "Who's calling? How do I find out who called?" They continued to struggle and the phone rang a second time. Rozenski grabbed it, and ran into another room, and said, "Oh, Jeremy." Drehmel then got up and screamed, "Jeremy, help me." Rozenski turned to her and said, "You bitch," then grabbed Drehmel and took her into the bedroom a second time. While straddling her on the floor, he demanded to know who "Jeremy" was and took both hands and began to squeeze her neck. Rozenski said, "We're going to be together forever." He then stated, "You know how? I'm gonna kill you and I'm gonna kill myself because we're going to be together forever." Rozenski then stated that he was going to "bash your skull in." Drehmel then said to him, "In the name of the Lord, Jesus Christ, get off of me." Rozenski replied, "Your God can't save you now."

¶8 Rozenski then sat up a little bit and he just kept staring at Drehmel. Rozenski talked about taking her back to Milwaukee with him when Drehmel's father knocked on the front door of the residence. Drehmel was crying and when

she opened the door her father asked her if she was all right. Drehmel responded, "Yes. I am all right." Drehmel's father drove her car home and Drehmel rode with her mother in her parents' car. On the way home, Drehmel told her mother that she was raped by Rozenski and that he tried to kill her. Her mother informed her Zilisch had called them and that Zilisch said he heard Drehmel on the phone. After arriving at their home, Drehmel's father called the police. During the call, Rozenski pulled in their driveway. Shortly thereafter, the police arrived and apprehended Rozenski.

¶9 The defense theory at trial was essentially that Drehmel was crying rape to hide the fact that she was simultaneously pursuing two relationships. The jury found Rozenski guilty of all counts. Rozenski subsequently filed a pro se postconviction motion, raising numerous claims of ineffective assistance of defense counsel, Bridget Boyle. Rozenski also alleged prosecutorial impropriety, among other things. After a ***Machner***[2] hearing, the court concluded trial counsel's performance was not deficient and Rozenski was not prejudiced. It also rejected Rozenski's claims of prosecutorial misconduct. The court denied Rozenski's motion for a new trial and Rozenski now appeals.

DISCUSSION

I. Ineffective Assistance of Counsel

¶10 We apply a two-part test to ineffective assistance of counsel claims. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433. The defendant bears the burden of

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

establishing both deficient performance by the attorney and prejudice from the deficient performance. ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441. If the defendant fails on one prong, the court need not address the other. *See* ***State v. Evans***, 187 Wis. 2d 66, 93-94, 522 N.W.2d 554 (Ct. App. 1994).

¶11 To establish deficient performance, the defendant must demonstrate specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. Reasoned choices of trial strategy, made after consideration of the applicable law and known facts, are virtually unassailable. *See* ***id.*** at 690-91. With regard to the prejudice component, the test is whether "counsel's errors were so serious as to deprive the [client] of a fair trial, a trial whose result is reliable." ***Id.*** at 687. The client must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

¶12 The questions of performance and prejudice are mixed questions of law and fact. ***Wheat***, 256 Wis. 2d 270, ¶14. The trial court's findings of what counsel did and the basis for the challenged conduct are factual and will be affirmed unless clearly erroneous. ***Id.*** Whether counsel was actually deficient and whether the defendant suffered prejudice are questions of law. ***Id.***

¶13 Rozenski first argues Boyle was ineffective for failing to use exculpatory evidence. In his brief to this court, Rozenski catalogues evidence that he considers exculpatory and supportive of his theory that he did not sexually assault Drehmel, but rather, engaged in consensual sex as part of their ongoing romantic relationship. Rozenski fails to provide record citations concerning much of this alleged evidence. Assertions of fact not demonstrated to be part of the

record will not be considered. *See* ***State ex rel. Wolf v. Town of Lisbon***, 75 Wis. 2d 152, 155-56, 248 N.W.2d 450 (1977). Moreover, a party cannot use the brief's appendix to supplement the record. ***Reznichek v. Grall***, 150 Wis. 2d 752, 754 n.1, 442 N.W.2d 545 (Ct. App. 1989).

¶14 Even considering this evidence, Rozenski's argument fails. Most of this evidence consists of either correspondence or gifts sent by Drehmel to Rozenski prior to February 2002. Because Drehmel testified at trial the couple did not definitively break up until the first week of February, evidence that she sent him correspondence and gifts prior to that date is irrelevant. Two other items concern a planned trip to California. The status of the trip was a matter of continuing discussion in light of their breakup. These items are also irrelevant.

¶15 Another item involves a Valentine's Day card purportedly sent by Drehmel to Rozenski shortly before Valentine's Day 2002. The card is signed "Rochelle," but there was no testimony verifying the handwriting was Drehmel's, the signature was authentic, or that the card and envelope actually went together. The place to ascertain the authenticity and provenance of evidence is in the trial court, not the court of appeals. *See* ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980). Rozenski squandered his opportunity to develop this issue at the ***Machner*** hearing and therefore effectively waived the issue for appellate review. *See* ***State v. Byrge***, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999).

¶16 Moreover, Boyle testified at the ***Machner*** hearing that she did not think a Valentine's Day card sent on February 11 would be inconsistent with Drehmel's testimony that the couple broke up ten or fifteen days before the assault. Rozenski never questioned Boyle any further about it. Rozenski has not

raised a reasonable probability that the result of the trial would have been different had trial counsel used the Valentine Day's card.

¶17 Rozenski next discusses telephone calls allegedly made between him and Drehmel during this period, but Rozenski again fails to provide citations to the record on appeal and this evidence will therefore not be considered. *See* ***Wolf***, 75 Wis. 2d at 155-56.

¶18 Rozenski next presents four areas in which he asserts Boyle was ineffective for failing to obtain additional exculpatory evidence. First, Rozenski claims counsel did not "research, obtain and present … telephone records." This portion of Rozenski's argument is underdeveloped. Rozenski fails to explain how the evidence would have helped his defense or how it was exculpatory. We will not consider underdeveloped arguments. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988). Rozenski's point may be, as previously stated, that frequent calls between him and Drehmel would have undermined her testimony that the couple had broken up. But Drehmel testified that she and Rozenski continued to speak on the phone frequently.

¶19 Rozenski's second area is that Boyle failed to subpoena someone from Drehmel's place of employment. A defendant claiming that trial counsel was ineffective for not calling certain witnesses must identify them; must show, with specificity, what their testimony would have been; and must demonstrate that their absence prejudiced the defense. *See* ***State v. Leighton***, 2000 WI App 156, ¶42, 237 Wis. 2d 709, 616 N.W.2d 126. Rozenski has done none of these things. His argument thus fails in this regard and will not be considered further.

¶20 The third area is that Boyle failed to impeach Drehmel. This argument is also underdeveloped and will not be considered. In lieu of argument,

Rozenski cites two pages of his appendix. Rozenski does not explain what these pages represent nor does he explain which of the many sentences on these pages represent avenues of impeachment that Boyle failed to exploit. Rozenski further fails to explain how Boyle's assistance in this regard was ineffective within the meaning of ***Strickland***. It is not this court's job to unearth relevant issues and resolve them.[3]

¶21 Rozenski's fourth area concerns Boyle's alleged failure to impeach Zilisch on the basis of a criminal history. However, Rozenski concedes that "technically" Zilisch had no prior criminal record. He nevertheless insists that a "documented prior instance of untruthfulness" exists. This is illustrated in Rozenski's brief by a reference to an alleged Marathon County Sheriff's narrative report from the year 2000 concerning an underage drinking and driving incident in which Zilisch was a passenger. Rozenski also claims Zilisch could have been impeached "with evidence of the benefits he received in exchange for his testimony, i.e., bench warrants were cleared on two separate occasions…." Rozenski provides no citations to the record to support these assertions other than a citation to his appendix and a citation to a Marathon County court case. Rozenski may not compensate for his failure to ensure an adequate record by including missing materials in the appendix to his appellate brief. In addition to these flaws, as a matter of logic, a sheriff's report itself contains neither evidence about Zilisch's character for truthfulness nor evidence of untruthful conduct.

[3] In his reply brief, Rozenski replies to only one of the State's arguments regarding the alleged ineffectiveness of Boyle for failing to obtain additional exculpatory evidence: the failure to impeach Zilisch. We consider contentions regarding underdeveloped arguments on the other three areas in which Rozenski claims Boyle was ineffective for failing to obtain additional exculpatory evidence to be waived. *See* ***Reiman Assocs.***, 102 Wis. 2d at 306 n.1.

Rozenski also insists that Boyle failed to conduct her own investigation into Zilisch and "unearth the evidence to impeach him." There is no indication any further investigation by Boyle would have "unearthed" evidence to impeach Zilisch.

¶22 Rozenski next argues Boyle was ineffective for failing to hire a medical expert. Several hours after the rape, Drehmel went to a hospital emergency room. Drehmel complained about abdominal pain but the emergency room doctor detected no abdominal tenderness upon examination. Drehmel also had no vaginal discharge, bleeding or trace of injury to the pelvic area. The doctor testified to performing over a hundred emergency room sexual assault examinations and stated, "I have seen rape victims that have had no [cervical motion] tenderness and some that have had a lot more tenderness. There is a lot of variability, depending on circumstances." The doctor found no obvious trauma on the rest of Drehmel's body, but nevertheless testified unequivocally that the lack of physical evidence did not mean that Drehmel had not been sexually assaulted.

¶23 Rozenski argues that Boyle "at a minimum, should have attempted to retain an expert witness to testify to the implausibility of Ms. Drehmel's claims and, thus, the State's entire case." Rozenski's theory is that Drehmel's description of a brutal sexual assault is implausible in light of the absence of physical injury. However, Rozenski has not identified any expert who would testify on his behalf, nor how such an expert would testify if called. Complaints of uncalled witnesses are not favored because such allegations are largely speculative. *See* ***State v. Street***, 202 Wis. 2d 533, 549, 551 N.W.2d 830 (Ct. App. 1996). Although Rozenski insists in his reply brief that a "myriad of … 'expert opinion' [is available] on the subject of sexual assault," he has not suggested that an expert is

available who would testify that physical injuries must be present on the body of a sexual assault victim.

¶24 Moreover, Boyle testified at the ***Machner*** hearing essentially that because the absence of physical injuries neither proves nor disproves a sexual assault, Boyle decided not to call an expert witness. Boyle's decision not to call an expert for this issue was a reasoned strategic choice and therefore "virtually unchallengeable." *See* ***State v. Chu***, 2002 WI App 98, ¶52, 253 Wis. 2d 666, 643 N.W.2d 878. Furthermore, in cross-examination Boyle explored Drehmel's lack of physical injury with the doctor and others. Rozenski fails to prove deficient performance.

¶25 Rozenski next argues Boyle was ineffective in four respects for failing to object to the prosecutor's closing argument. Rozenski asserts the prosecutor made the following four types of improper remarks: (1) vouching for witnesses; (2) claiming facts not in evidence; (3) expressing her opinion of Rozenski's guilt and credibility; and (4) making inflammatory remarks. Boyle did not object on these grounds, and was therefore ineffective in Rozenski's view.

¶26 First, the prosecutor did not vouch for Drehmel. Most of the comments were merely descriptive of Drehmel's demeanor, such as "sweetheart" and "compassionate." The use of the word "God-fearing," while perhaps overdramatic, was based upon Drehmel's testimony about her religious beliefs. Moreover, the prosecutor's argument that Drehmel was truthful was an unobjectionable argument in a case involving conflicting testimony. "Urging the jury to believe the government's witnesses' testimony did 'not constitute a vouching for the credibility of the witnesses….'" *See* ***State v. Johnson***, 153 Wis. 2d 121, 132 n.11, 449 N.W.2d 845 (1990) (citing ***United States v. Spain***, 536

F.2d 170, 174 (7th Cir. 1976)). Similarly, a comment that Drehmel's mother is "[d]eeply religious" was supported by testimony, as well as Rozenski's own statement to the police.

¶27 Even if it could be assumed any remarks were improper, Rozenski suffered no prejudice. The jury was instructed that closing arguments are not evidence and also that the jury is the sole judge of credibility. The jury is presumed to follow the court's instructions and Rozenski provides no reason to believe that it did not do so in this case. *See* ***State v. Delgado***, 2002 WI App 38, ¶17, 250 Wis. 2d 689, 641 N.W.2d 490.

¶28 Rozenski's argument that the prosecutor's closing argument referred to facts not in evidence also fails. All of the excerpts cited by Rozenski as facts not in evidence are either supported as a matter of fact by trial testimony, addressed in some fashion by Boyle or the court, or fell short of argument requiring an objection from defense counsel. There was no deficient performance or prejudice in this regard.

¶29 Similarly, the specific statements alleged by Rozenski to be opinions of Rozenski's guilt and credibility have been addressed or are unobjectionable. *See* ***Johnson***, 153 Wis. 2d at 132-33; *see also* ***Spain***, 536 F.2d at 174.

¶30 Rozenski's fourth objection to the closing arguments concerns the following allegedly inflammatory remarks: (1) Rozenski "worked at a big Milwaukee law firm, Foley and Lardner"; (2) Rozenski's statement to the police was "pure and total fantasy" and a "somewhat pornographic fantasy"; and (3) Zilisch heard "blood-curdling screams." However, Rozenski himself testified that he worked at Foley & Lardner. Portions of Rozenski's statement, which the jury heard through the testimony of a police officer, could fairly be described as

"pornographic." And, Zilisch testified that he "heard yelling, screaming, like someone was actually getting murdered. I thought she was gonna die.... [It sounded like a] movie, a scary movie, a death movie." Accordingly, Boyle was not deficient for failing to object to the prosecutor's closing argument. Rozenski suffered no prejudice because the jury was instructed regarding its role as the sole arbiter of credibility and also the fact that closing arguments are not evidence.[4]

¶31 Rozenski next argues Boyle's failure to object to Drehmel's statement being sent to the jury room was ineffective assistance. Rozenski's argument is based in part upon the improper premise that the statement was not received in evidence. Rozenski also asserts the trial court erred by giving Drehmel's statement to the jury without balancing it with a copy of Rozenski's statement.[5]

¶32 The decision whether to send evidence to the jury room is a matter of trial court discretion. *See* ***State v. Mayer***, 220 Wis. 2d 419, 424-25, 583 N.W.2d 430 (Ct. App. 1998). Here, the court did not erroneously exercise its discretion because the record demonstrates the statement aided the jury in considering the case. The jury's purpose in requesting the statement is unknown, but likely was to review one or more factual assertions made by Drehmel against Rozenski's trial testimony. The prejudice to Rozenski, if any, was minimal because the jury heard Rozenski's testimony that very morning and therefore was

[4] We note that Rozenski did not reply to the State's arguments on Boyle's alleged ineffectiveness for failing to object to the prosecutor's closing arguments. As indicated above, the stated positions are deemed conceded.

[5] Rozenski cites as authority two federal cases which are not binding on this court. *See* ***State v. Maloney***, 2005 WI 74, ¶23, 281 Wis. 2d 595, 698 N.W.2d 583.

able to recall or process the testimony offered on his behalf. *See* ***id.*** at 426. Further, since Rozenski does not allege the statement contained hearsay or other improper matter, there is no indication the statement could be subjected to improper use by the jury in its deliberations. *See* ***id.*** at 424.

¶33 Moreover, the court did not send the statement to the jury room on its own initiative, but in response to a request from the jury. Furthermore, Drehmel's statement was essentially no more than a repetition of the testimony she gave at trial. Finally, Boyle's reason for consenting to the submission of the statement to the jury was a deliberate and reasonable trial strategy, which Rozenski himself endorsed. Boyle had brought to the court's attention a passage in the statement indicating that Drehmel had consensual sex with Zilisch the night before the rape, "which is something that we weren't obviously allowed to get into." The prosecutor responded that it was not prejudicial to the defendant but rather more prejudicial to the State's case, and in violation of the rape shield law. Nevertheless, the prosecutor did not ask for a mistrial. The court asked the defense if it would move for a mistrial, and Boyle responded: "No, I'm not, and I have discussed it with my client, and he does not want me to ask to move for a mistrial." Rozenski cannot now complain about the choice Boyle made. *See, e.g.*, ***State v. Oswald***, 2000 WI App 3, ¶50, 232 Wis. 2d 103, 606 N.W.2d 238.

II. Prosecutorial Misconduct

¶34 Rozenski next asserts that prosecutorial misconduct warrants a new trial. First, Rozenski claims "the prosecutor willfully solicited hearsay testimony in order to produce a conviction." Rozenski does not specify instances of solicited hearsay, but merely cites to his appendix in an attempt to incorporate by reference a trial court brief. This he may not do. *See* ***State v. Flynn***, 190 Wis. 2d 31, 58,

527 N.W.2d 343 (Ct. App. 1994). In addition, Rozenski has not shown that any alleged incident of hearsay testimony was caused by prosecutorial misconduct as opposed to an inattentive or overzealous witness. Furthermore, the court instructed the jury to disregard all stricken testimony and Rozenski has provided no basis to conclude the jury did not follow that instruction.

¶35 Second, Rozenski asserts the prosecutor "repetitively expressed her personal opinion to the credibility of the state's witnesses ... [and] the guilt of Rozenski." He again cites to a trial court brief. Rozenski also fails to adequately develop the argument as he neither cites to specific examples of alleged improprieties nor even identifies which witnesses he refers to. *See* ***State v. Jones***, 2002 WI App 196, 257 Wis. 2d 319, 342 n.6, 651 N.W.2d 305.

¶36 Third, Rozenski contends the prosecutor "made material misstatements of fact in summation." Rozenski again improperly cites to a trial court brief and fails to develop the argument by adequately specifying what "misstatements of fact" he is referring to. We will not consider this argument. ***Flynn***, 190 Wis. 2d at 58.

¶37 Rozenski next argues the State violated his due process right because his conviction was based on perjured testimony, consisting of: (1) statements by Drehmel that she was no longer involved in a relationship with him at the time of the rape; (2) testimony of Drehmel's parents concerning their understanding of the state of the relationship; and (3) testimony of Zilisch that he heard Drehmel screaming. Here, Rozenski confuses perjured testimony with testimony that conflicted with his own, but was believed by the jury. *See* ***State v. Whiting***, 136 Wis. 2d 400, 418, 402 N.W.2d 723 (Ct. App. 1987). Rozenski's factual disagreements with the State's witnesses do not demonstrate their testimony was

perjurious. Rozenski offers no proof of perjury beyond the evidence supporting his theory of defense at trial, in direct contravention of the trial court's specific finding at the ***Machner*** hearing that "there was not perjury presented at the trial." And, even if we could assume one or more of the witnesses perjured themselves, Rozenski offers no proof the State knowingly offered perjured testimony or even that it later discovered that it unwittingly used perjured testimony. Rozenski's claims fail. *See* ***State v. Nerison***, 136 Wis. 2d 37, 54, 401 N.W.2d 1 (1987).

¶38 Related to Rozenski's perjury argument is his contention that the State violated his discovery rights pursuant to ***Brady v. Maryland***, 373 U.S. 83 (1963). Rozenski claims the State had access to, but failed to disclose, Drehmel's and her parents' telephone records. According to Rozenski, these records were exculpatory because they would have "proven unequivocally" that he and Drehmel spoke on the telephone every day "with no measurable decline during the February 7, 2002 through February 22, 2002 time period."

¶39 Rozenski's claims in this regard fail for three reasons. First, the State does not violate ***Brady*** unless the evidence in question is in the "exclusive possession of the State." ***State v. Cole***, 50 Wis. 2d 449, 457, 184 N.W.2d 75 (1971). Here, Rozenski does not show that this condition has been met. The records involved a private person contracting with a private telephone company, and are thus by their very nature, if retained, in the possession of the private subscriber and the telephone company.

¶40 Second, the exculpatory nature of these records was not "so clearly and obviously supportive of [Rozenski's] claim of innocence" that the State should have known to disclose them to the defense, even if we could somehow assume the records were in the possession of the State. *See* ***State v. Humphrey***,

107 Wis. 2d 107, 115, 318 N.W.2d 386 (1982). Rozenski merely made general requests for "exculpatory evidence."

¶41 Third, the telephone records were not material in the constitutional sense. "The mere possibility that an item of undisclosed information might have helped the defense ... does not establish 'materiality' in the constitutional sense." ***State v. Harris***, 2004 WI 64, ¶16, 272 Wis. 2d 80, 680 N.W.2d 737 (citation omitted). As discussed previously, Drehmel never denied speaking to Rozenski frequently on the telephone during the month of February. Indeed, Drehmel testified extensively about a lengthy cell phone conversation she had with Rozenski while working out at the gym on February 21. Further details about telephone contact between the two would not raise a reasonable probability that the results of the proceeding would have been different. *See* ***Strickler v. Greene***, 527 U.S. 263, 281 (1999).

By the Court.—Judgment and order affirmed.

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