COURT OF APPEALS
DECISION
DATED AND FILED

February 22, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal Nos. 2011AP38-CR
2011AP39-CR

Cir. Ct. Nos. 2006CF273
2006CF278

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY E. JACOBSON,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Chippewa County: RODERICK A. CAMERON, Judge. *Affirmed*.

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

¶1 PER CURIAM. Anthony Jacobson appeals two judgments convicting him of multiple offenses and an order denying his motion for postconviction relief. Jacobson argues: (1) he was denied his right to a speedy

trial; (2) the circuit court erroneously excluded certain evidence; (3) the exclusion of the evidence violated Jacobson's right to confront witnesses; and (4) his trial attorney was ineffective. He also seeks a new trial in the interest of justice. We reject Jacobson's arguments and affirm.

BACKGROUND

¶2 David and Vicky Crane and Timothy and Sheri Harvey resided on adjacent properties in Chippewa County. On May 1, 2006, someone entered the Crane home without consent and stole jewelry, camera equipment, silverware, a black and gray Toshiba laptop computer, and prescription medications. On the same day, jewelry, cash, a wristwatch, and a duffel bag containing miscellaneous items were taken from the Harvey residence.

¶3 About six weeks later, an anonymous tip implicated Jacobson in the Crane and Harvey burglaries. On June 15, 2006, Jacobson was arrested for operating after revocation. Officers searched Jacobson's vehicle and discovered two "gem packs" containing the prescription medications Ambien and Effexor, which were later identified as belonging to Vicky Crane. At the time of his arrest, Jacobson possessed a distinctive gold ring that the Cranes identified as a ring David had personally made as a gift for Vicky. Police also found a wristwatch on Jacobson that was identical to the one stolen from the Harvey residence.

¶4 In Chippewa County case No. 2006CF273, Jacobson was charged with first-offense operating after revocation and four counts of felony bail jumping, all as a repeater. In Chippewa County case No. 2006CF278, Jacobson was charged with burglary of a building or dwelling, misdemeanor theft, two counts of possessing an illegally obtained prescription drug, and four counts of felony bail jumping, all as a repeater. He was bound over for trial on July 28,

2006 and arraigned on August 1. At his arraignment, Jacobson demanded a speedy trial. The circuit court joined Jacobson's two cases for trial and set a trial date of October 11, 2006.

¶5 On October 2, 2006, Jacobson withdrew his speedy trial demand, and the parties jointly requested a continuance. The trial was rescheduled for January 4, 2007. Then, on January 2, Jacobson requested another continuance. The court granted his request, setting a new trial date of April 2, 2007. In the meantime, Jacobson remained incarcerated on both a probation hold and a cash bond. His probation was revoked on January 31, 2007. As a result, he was required to serve an aggregate ten-year, indeterminate sentence that had been imposed and stayed in 1996.

¶6 On March 19, 2007, the State charged another man, Troy Perkins, in connection with the Crane and Harvey burglaries. On March 26, the State requested a continuance of Jacobson's April 2 trial. The State noted that Perkins, a "material witness," was unavailable to testify against Jacobson because he had recently been arrested for armed robbery in Texas. Over Jacobson's objection, the court adjourned Jacobson's trial, stating it would not schedule the trial until Perkins was available to testify. The court ordered the State to pursue an extradition warrant for Perkins and to keep the court and defense counsel informed as to the warrant's execution.

¶7 On May 15, 2007, Jacobson filed a statutory speedy trial request pursuant to WIS. STAT. § 971.11.[1] In response, the State alleged an inability to

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

extradite Perkins and therefore moved to toll the statutory time limits for the disposition of Jacobson's case. The court granted the State's request, explaining, "[T]he information I was given earlier—and I haven't heard anything to the contrary—is until the proceedings are concluded [in Texas], there's no possib[ility] of getting Mr. Perkins back regardless of the case we have up here."

¶8 On January 7, 2008, Perkins was convicted and sentenced to prison in Texas. At a status hearing on April 9, 2008, the State insisted that Jacobson's trial could not occur until after Perkins' Wisconsin charges had been resolved. The State promised the court it would pursue a governor's warrant for Perkins' extradition. The State also informed the court it had been "making inquiries as to what, if any, procedures the Texas authorities want us to pursue to extradite [Perkins] here for the purposes of testifying and for his own prosecution …." The prosecutor asserted his assistant had made those "inquiries" by telephone earlier that week. However, the prosecutor's assistant's activity logs were introduced into evidence at the postconviction hearing and revealed that, on the relevant dates, the assistant simply "printed info on Troy & location from Internet."

¶9 At some later point, the State realized a detainer had never been placed on Perkins. The State did not actually request a detainer until August 18, 2008. On September 4, 2008, the State advised the court it would seek Perkins' temporary custody "next week." Again, the State insisted it was necessary to resolve Perkins' Wisconsin charges before Jacobson's trial could be scheduled.

¶10 On October 23, 2008, the State signed a request for temporary custody of Perkins, pursuant to the interstate agreement on detainers, WIS. STAT. § 976.05(4)(a). Consequently, Perkins was returned to Wisconsin on December 23. On March 19, 2009, Perkins pled guilty to burglary in Wisconsin

and was convicted and sentenced to a prison term, concurrent with his Texas prison sentence. Shortly after sentencing, Perkins asked to be returned to Texas. On April 13, the court scheduled Jacobson's trial for July 14, 2009. Perkins was returned to Texas on April 14. Jacobson's trial finally began on July 20, 2009.

¶11 At trial, Perkins testified that, the night before the burglaries, he and Jacobson spent the evening barhopping and consuming marijuana. The next morning, at about 8:00, Jacobson drove with Perkins to the Crane residence. After instructing Perkins to stay in the vehicle, Jacobson approached the home. A man with wavy hair wearing blue jeans met Jacobson at the front door. One hour later, Jacobson returned to the vehicle with a bag containing jewelry. Jacobson then drove to his mother's house and deposited the jewelry in a hidden compartment under the garage floor.

¶12 After making several phone calls, Jacobson then drove to a farm field, where he and Perkins met the man with wavy hair and another man who was wearing camouflage clothing. These men led Perkins and Jacobson through the field, across a creek, up an embankment, and into the lower level of the Crane residence. Perkins watched as the men ransacked the Crane home. Then, they went next door to the Harvey residence, where Jacobson gained entry by kicking down a garage door and prying open a door to the house. After about fifteen minutes, Jacobson and Perkins returned through the farm field to Jacobson's truck. Jacobson was carrying a white bag containing items from the Crane and Harvey houses. Jacobson and Perkins drove back to Jacobson's mother's garage, where Jacobson deposited the bag.

¶13 Jacobson and Perkins then resumed barhopping. At one of the bars, Perkins saw that Jacobson had a gray and black Toshiba or Acer laptop.

According to Perkins, Jacobson was unfamiliar with how to operate the laptop. The laptop's wallpaper depicted a man whom Jacobson identified as his father. At trial, however, Perkins recognized the man as David Crane. Jacobson asked Perkins to remove the picture and to restore the computer to its factory condition. Perkins complied, and Jacobson retrieved the computer from Perkins the next day.

¶14 In addition to Perkins' testimony, the State introduced evidence connecting Jacobson to several items taken during the Crane and Harvey burglaries—specifically, the prescription medications, the gold ring, the wristwatch, and the laptop. The State pointed out inconsistencies in Jacobson's explanations of how he acquired these items. For instance, before trial, Jacobson told a sheriff's investigator that he had owned the Ambien and Effexor police found in his vehicle for years, but he did not know which doctor had prescribed them or which pharmacy had dispensed them. At trial, Jacobson conceded he did not have a valid prescription for those medications until April 2, 2006, only one month before the burglaries.

¶15 With respect to Vicky Crane's gold ring, Jacobson's acquaintance, Mary Jerome, testified she saw Jacobson wearing a gold "pinky ring" at a tavern about two weeks after the burglaries. While Jacobson initially told investigators he had owned the ring for years, he eventually stated he had stolen the ring from Perkins' girlfriend in May 2006. Jacobson's ex-wife, Jessica Grace, testified she had never seen Jacobson wearing the ring during their marriage, which lasted from August 2002 to September 2006.

¶16 Regarding the wristwatch taken from the Harvey home, Jacobson told investigators he bought the watch in Eau Claire. He could not remember,

though, at which store he purchased it. Grace testified she had never seen Jacobson wearing the watch during their marriage.

¶17 Regarding the laptop, three witnesses testified they saw Jacobson using a black or gray laptop computer at a tavern in May 2006. Jacobson initially told investigators he had been using a DVD player at the time, not a laptop. He later stated he had purchased a gray Toshiba laptop in 2003, but he asserted he disposed of it shortly after Memorial Day in 2006. Grace testified she had never known Jacobson to own a laptop.

¶18 Allison Hagen, Jacobson's girlfriend, testified that shortly after Memorial Day 2006, Jacobson had promised to give her a diamond tennis bracelet as a birthday gift. Hagen's description of the bracelet matched the description of a bracelet stolen from the Crane residence. Jacobson also showed Hagen a pair of earrings similar to some topaz earrings stolen from the Cranes, but he told Hagen they belonged to his grandmother. When questioned by investigators, Jacobson initially admitted showing Hagen some earrings, but he later denied showing her any earrings or speaking to her about jewelry.

¶19 In his statements to investigators, Jacobson suggested that Perkins and another man, Jeff Teubert, had committed the Crane and Harvey burglaries. Jacobson asserted that, on the day of the burglaries, Perkins showed Jacobson a black bag containing jewelry, pills, and other items and offered to trade these items for cocaine. However, after Jacobson told Perkins to "get rid of this stuff," Perkins discarded the bag near the Yellow River. Jacobson took officers to that location, the bag was retrieved, and Timothy Harvey identified the bag and its contents as belonging to him. Jacobson also told investigators that, shortly after

the burglaries, Teubert showed Jacobson a camera and jewelry and described how he and Perkins had committed the crimes.

¶20 The jury also heard that, the day after Jacobson's arrest, officers searched the residence where Jacobson was staying but found nothing incriminating. In September 2006, officers also searched the hidden storage space in Jacobson's mother's garage, but found nothing. The discarded duffel bag and its contents, as well as items gathered from the two crime scenes, were submitted for fingerprint and DNA analysis, but the test results failed to link Jacobson to the crimes. The defense also established that, since at least 2004, multiple area retailers had been selling the brand of wristwatch found in Jacobson's possession.

¶21 Finally, Kevin Bowe, whose grandfather owned the farm field behind the Crane residence, testified he had set up "game cameras" in the field shortly before the burglaries. When he checked the cameras after the burglaries, the only people photographed in the field were the investigating officers.

¶22 The jury convicted Jacobson of two counts of burglary, two counts of felony theft, misdemeanor theft, two counts of possessing an illegally obtained prescription drug, criminal trespass to a dwelling, entry to a locked dwelling, and operating after revocation. In response to Jacobson's postconviction motion, the court vacated the criminal trespass conviction due to insufficient evidence and reduced the second felony theft conviction to a misdemeanor. The court denied Jacobson's postconviction motion in all other respects.

DISCUSSION

I. Jacobson's right to a speedy trial

¶23 On appeal, Jacobson first contends the State violated his right to a speedy trial. "Both the Sixth Amendment to the United States Constitution and article I, section 7 of the Wisconsin Constitution guarantee an accused the right to a speedy trial." ***State v. Urdahl***, 2005 WI App 191, ¶11, 286 Wis. 2d 476, 704 N.W.2d 324. If a speedy trial violation occurred, the charges against the defendant must be dismissed. ***Id.*** Whether a defendant has been denied the right to a speedy trial is a constitutional question that we review independently. ***State v. Leighton***, 2000 WI App 156, ¶5, 237 Wis. 2d 709, 616 N.W.2d 126. However, we uphold the circuit court's underlying findings of historical fact unless they are clearly erroneous. WIS. STAT. § 805.17(2); ***Leighton***, 237 Wis. 2d 709, ¶5.

¶24 To determine whether a defendant's speedy trial right has been violated, we must balance four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right; and (4) the prejudice to the defendant. ***Barker v. Wingo***, 407 U.S. 514, 530 (1972); *see also* ***Day v. State***, 61 Wis. 2d 236, 244, 212 N.W.2d 489 (1973). The right to a speedy trial is not subject to bright-line determinations and must be assessed based on the totality of the circumstances in each specific case. ***Urdahl***, 286 Wis. 2d 476, ¶11. "Essentially, the [***Barker***] test weighs the conduct of the prosecution and the defense and balances the right to bring the defendant to justice against the defendant's right to have that done speedily." ***Id.***

¶25 Here, the State concedes that the first and third ***Barker*** factors weigh in Jacobson's favor. With respect to the first factor—length of the delay—the State concedes that the thirty-seven-month delay between Jacobson's arrest and

trial is presumptively prejudicial. *See* ***Urdahl***, 286 Wis. 2d 476, ¶12 (delay approaching one year is presumptively prejudicial). Regarding the third factor—the defendant's assertion of the right—the State admits that Jacobson "consistently expressed his desire for a speedy trial." Thus, the parties dispute only the application of the second and fourth ***Barker*** factors—the reason for the delay, and the prejudice to the defendant.

¶26 Regarding the reason for the delay, Jacobson argues that, after April 2007, the delay in bringing him to trial was wholly attributable to the State.[2] He argues this delay was caused in part by the State's mistaken assumption that it could not extradite Perkins until his Texas charges had been resolved. Jacobson asserts that, while Perkins' Texas charges were pending, the State should have used the Uniform Act for the Extradition of Prisoners as Witnesses, WIS. STAT. § 976.01(6), to extradite Perkins as a material witness, or should have proceeded under the Uniform Criminal Extradition Act, WIS. STAT. § 976.03, because Perkins was facing felony charges in Wisconsin. Jacobson also notes that, after Perkins' Texas charges were resolved, Jacobson's trial was delayed for another eighteen months. He argues this delay was caused by the State's failure to pursue Perkins' extradition diligently, as well as the State's unwarranted insistence that Jacobson's trial could not be scheduled until Perkins' Wisconsin charges were resolved.

¶27 Jacobson's argument that the State was wholly responsible for the over-two-year delay between April 2007 and July 2009 is persuasive. However,

[2] Jacobson admits that, because he requested continuances in October 2006 and January 2007, the delay between his arrest and April 2007 was not attributable to the State.

even assuming that the State was responsible for the delay, we nevertheless conclude that Jacobson's right to a speedy trial was not violated because the delay did not prejudice Jacobson. In assessing prejudice, we consider three interests that the speedy trial right was designed to protect: (1) prevention of oppressive pretrial incarceration; (2) minimization of the accused's anxiety and concern; and (3) limitation of possible impairment to the defense. ***Barker***, 407 U.S. at 532.

¶28 As the ***Barker*** Court explained, the interest in preventing oppressive pretrial incarceration is based on the concern that time spent in jail awaiting trial has a detrimental effect on the accused's employment, family, rehabilitation, and ability to prepare a defense. ***Id.*** at 532-33. That concern is not present in Jacobson's case. First, there is no evidence that the pending charges had any adverse effect on Jacobson's rehabilitation or ability to defend himself. Second, Jacobson was arrested while on probation for past felonies, for which the court had imposed and stayed an aggregate sentence totaling ten years' imprisonment. Following his arrest, Jacobson was held in custody on both a probation hold and a cash bond. On January 31, 2007, his probation was revoked and he was required to serve the previously-stayed sentence. Thus, from January 31, 2007 on, Jacobson would have been incarcerated regardless of the delay in scheduling his trial. The delay therefore did not cause any oppressive pretrial incarceration.

¶29 As to the interest in minimizing the accused's anxiety and concern, Jacobson asserts that he "necessarily" suffered significant anxiety and concern based on the number of charges against him and the maximum penalties they carried. However, Jacobson does not point to any evidence that he suffered any abnormal distress because of the pending charges. Undoubtedly, any person facing pending criminal charges over an extended period of time will suffer anxiety and concern. Absent evidence of heightened anxiety, though, an accused's

normal anxiety about pending charges adds little to the prejudice analysis. *See* ***Urdahl***, 286 Wis. 2d 476, ¶35 (Although the defendant "no doubt, experience[d] anxiety from having the charges hanging over him … without more than the bare fact of unresolved charges—which exists in every criminal case—we view the prejudice to the second interest as minimal.").

¶30 Finally, regarding the third interest, there is no indication that the delay in Jacobson's trial impaired his defense. Jacobson argues his defense was prejudiced due to the death of Delvin Bowe, a potential defense witness, on July 27, 2007. Bowe owned the farm field where Perkins alleged he and Jacobson parked and walked through on their way to commit the burglaries. Jacobson claims Bowe would have testified that he did not see any tracks on his property on the dates in question and that it would have been difficult to drive through the wet field on the day of the burglaries. Jacobson argues Bowe's testimony would have "demonstrated the unlikelihood that the crimes were committed as Perkins testified, thereby undermining Perkins' credibility."

¶31 However, in lieu of Bowe's testimony, Jacobson presented the testimony of Bowe's grandson, Kevin. Kevin Bowe testified that he had installed game cameras in his grandfather's field shortly before the burglaries and the cameras did not capture images of any people on the property, other than police officers, during the relevant time period. Although not identical to Delvin Bowe's hypothetical testimony, Kevin Bowe's testimony served the same purpose of undermining Perkins' version of events. Moreover, Kevin Bowe's testimony about the game cameras was arguably more effective than Delvin Bowe's testimony about the absence of tracks in the field would have been. The cameras produced documentary evidence that Perkins and Jacobson were not in the field on the date in question. This evidence was not subject to the same kind of credibility

concerns that would have accompanied Delvin Bowe's eyewitness testimony. Moreover, the cameras photographed the investigating officers in the days following the burglaries, which tends to reinforce the reliability of the game camera evidence.

¶32 In summary, none of the three interests under the prejudice prong of the speedy trial analysis are significantly implicated here. Jacobson simply has not shown that the delay in his trial prejudiced him in any way. Accordingly, even though the length of the delay was presumptively unreasonable, and even assuming over two years of the delay was wholly attributable to the State, we nevertheless conclude Jacobson's right to a speedy trial was not violated. *See* ***State v. Allen***, 179 Wis. 2d 67, 79, 505 N.W.2d 801 (Ct. App. 1993) (absence of prejudice can outweigh other ***Barker*** factors).

II. Exclusion of evidence

¶33 Jacobson next argues the circuit court erroneously excluded a letter Perkins wrote to Hagen. On August 11, 2006, the State charged Hagen with conspiracy to commit theft in connection with the Crane and Harvey burglaries. The charge was dismissed two months later, after the State concluded further investigation was needed. On February 14, 2009, Perkins wrote a letter to Hagen, in which he mentioned that he had agreed to testify in the "Perkins-Jacobson-Hagen case." Perkins told Hagen, "You might have an option to keep your name off my list," and then stated, "I could use a large amount of cash to take to the Penitentiary with me when me and [Jacobson] are done in court." Perkins suggested that Hagen "see about making a $10,000.00 donation to my account[.]" He implied that if Hagen failed to make the payment, he would implicate her in the burglaries and she would go to prison.

¶34 During Perkins' cross-examination at trial, Jacobson's attorney asked whether Perkins had "ever tried to extort any people who were involved or potentially involved in this case." Perkins responded, "No." Jacobson's counsel then attempted to introduce the letter to Hagen to impeach Perkins' testimony. However, the court concluded that, because counsel was trying to use the letter as "collateral impeachment … impeachment on something not related to this case[,]" the letter was inadmissible. Counsel asked the court to reconsider its ruling, explaining, "[P]art of our theory is Mr. Perkins himself is a witness for hire so none of his testimony is credible as it stands." The court reiterated that "[the letter] doesn't go to the issue of guilt or innocence, it's a credibility issue based on collateral attack on an issue not part of the trial[.]"

¶35 We will uphold a circuit court's discretionary decision to exclude evidence if the court reviewed the relevant facts, applied a proper standard of law, and used a rational process to reach a reasonable conclusion. ***State v. Rhodes***, 2011 WI 73, ¶22, 336 Wis. 2d 64, 799 N.W.2d 850. Here, the circuit court properly exercised its discretion by excluding the Hagen letter. WISCONSIN STAT. § 906.08(2) provides that "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than a conviction of a crime … may not be proved by extrinsic evidence." Instances of misconduct may be inquired into on cross-examination, if probative of the witness's truthfulness or untruthfulness. WIS. STAT. § 906.08(2). However, if the witness denies the alleged misconduct, the examiner must accept the witness's answer and may not introduce extrinsic evidence to prove the misconduct took place. ***McClelland v. State***, 84 Wis. 2d 145, 159, 267 N.W.2d 843 (1978). In other words, "[i]mpeachment of a witness on the basis of collateral facts introduced by extrinsic [evidence] is forbidden." ***Id.*** A matter is collateral if the

fact upon which the error is based could not have been shown in evidence for any purpose independently of the contradiction. ***State v. Rognrud***, 156 Wis. 2d 783, 787, 457 N.W.2d 573 (Ct. App. 1990).

¶36 The circuit court reasonably concluded Jacobson's counsel was attempting to use the Hagen letter to collaterally attack Perkins' credibility. Hagen was not charged in the case, and Perkins' testimony did not implicate her in the burglaries. The letter did not suggest that Perkins would change his testimony as to Jacobson; it suggested that, for a price, Perkins would avoid implicating Hagen during Jacobson's trial. That evidence could not have been offered for any purpose independent of showing the contradiction between Perkins' past behavior and his trial testimony that he never tried to extort anyone connected with the case. The introduction of the letter would have introduced tangential issues such as whether Hagen was involved in the Crane and Harvey burglaries, whether she ever received the letter, and whether Perkins extorted her. Exclusion of the letter was therefore a reasonable way to avoid confusing the issues, wasting time, and focusing the jury's attention on trivial matters. *See* ***State v. Amos***, 153 Wis. 2d 257, 273, 450 N.W.2d 503 (Ct. App. 1989).

¶37 Jacobson argues that, under ***Amos***, the Hagen letter should have been admitted as evidence of bias based on a witness's attempt to suborn perjury. ***Amos***'s holding is not as broad as Jacobson suggests. The ***Amos*** court held that "where the extrinsic evidence introduced tends to show corrupt testimonial intent for the case at hand, such as subornation of perjury, *which tends to show a consciousness of guilt*, then there is no evidentiary proscription for its use." ***Id.*** (footnotes omitted; emphasis added). In this case, unlike in ***Amos***, the Hagen letter does not tend to show the *defendant's* consciousness of guilt. Jacobson has not cited any Wisconsin case holding that a witness other than the defendant may

be impeached with an attempt to suborn perjury, let alone to suborn perjury as to a nonparty's involvement in the crime.

¶38 Furthermore, under ***Amos***, the relevance of evidence regarding a witness's subornation of perjury depends on "its nearness in time, place, and circumstances to the alleged crime." ***Id.*** Here, the circuit court made the discretionary determination that the Hagen letter was not relevant and lacked the necessary proximity to the charges against Jacobson. In its postconviction decision, the court reasoned, "The letter did not relate to any offer by Perkins to change his testimony as to [Jacobson]. This letter showed no 'corrupt testimonial [intent]' or bias against Jacobson." The court's determination that the letter was aimed at a nonparty in the case, and therefore was not relevant to Perkins' bias or corrupt testimonial intent against Jacobson, had a rational basis and represents a proper exercise of discretion.

¶39 Finally, even if relevant, the Hagen letter would have been properly excluded if the court determined its probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. WIS. STAT. § 904.03. In its postconviction decision, the circuit court essentially concluded that the letter's probative value was low and that the letter would have been cumulative to other "substantial evidence" of Perkins' lack of credibility. We agree.

¶40 The jury had ample evidence on which to conclude Perkins was not a credible witness, including Perkins' significant criminal record, his admission that he was involved in the burglaries, and his admission that he had been convicted and sentenced to six years in connection with the burglaries but would

not have to serve a single day of that sentence. Additionally, although a court ruling prevented Jacobson from establishing that Perkins was currently incarcerated in Texas, Jacobson's counsel asked multiple questions that raised that inference. Jacobson's counsel also brought out multiple inconsistencies in Perkins' trial testimony, which undercut his credibility.[3] Accordingly, the circuit court properly exercised its discretion by concluding the Hagen letter's probative value was outweighed by the needless presentation of cumulative evidence.

III. Jacobson's right to confront witnesses

¶41 Jacobson next contends the court's decision to exclude the Hagen letter violated his right to confront witnesses. A criminal defendant's right to confront witnesses is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 7 of the Wisconsin Constitution. ***State v. Barreau***, 2002 WI App 198, ¶47, 257 Wis. 2d 203, 651 N.W.2d 12. The confrontation right "includes the right to cross-examine adverse witnesses to expose potential bias." ***Id.*** We independently review whether the limitation of cross-examination violates the defendant's right of confrontation. ***Id.***, ¶48.

[3] For instance, although Perkins testified he and Jacobson had walked through Delvin Bowe's farm field on the day of the burglaries, Kevin Bowe testified his game cameras did not capture any images of Perkins or Jacobson in the field. Additionally, while Perkins testified Hagen served him drinks the night before the burglaries, Hagen produced a receipt showing she was out of town that day. Perkins' testimony that Jacobson kicked in a garage door and pried open another door at the Harvey residence did not match officers' observations at the crime scene. Jacobson's counsel also highlighted large, unexplained temporal gaps in Perkins' story.

Additionally, counsel brought out several inconsistencies between Perkins' trial testimony and his previous statements to investigators. For example, in December 2006, Perkins implicated Jeff Teubert in the burglaries, but at trial he denied that Teubert had been involved. Also, during trial Perkins described one of the co-actors in the burglaries as a man with short hair wearing camouflage, but in his statements before trial he gave a different description of the same man.

¶42 Although the exposure of a witness's motivation in testifying is an important function of the right of cross-examination, a circuit court nevertheless retains "wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination" based on concerns about harassment, prejudice, confusion of the issues, the witness's safety, or the needless presentation of cumulative or only marginally relevant evidence. ***Delaware v. Van Arsdall***, 475 U.S. 673, 678-79 (1986). Here, the circuit court imposed a reasonable limit on Jacobson's cross-examination of Perkins, given the court's conclusion that the Hagen letter was not relevant and offered only cumulative evidence of Perkins' general lack of credibility.

¶43 Furthermore, a defendant's right of confrontation is not denied in every instance where potentially relevant evidence is excluded. *See* ***Barreau***, 257 Wis. 2d 203, ¶53. Instead, the operative question is whether the defendant was denied the opportunity to cross-examine a witness effectively. ***Id.*** If the record shows the witness's credibility was adequately tested, the defendant's right of confrontation was not violated. ***Id.***

¶44 Jacobson adequately tested Perkins' credibility. As explained above, during trial, Jacobson had the opportunity to bring out Perkins' many past convictions, his involvement in the Crane and Harvey burglaries, his conviction and six-year sentence stemming from those burglaries, and the fact that he would not have to serve the six-year sentence. Additionally, there was a strong inference that Perkins was currently incarcerated. Jacobson's counsel also highlighted many inconsistencies in Perkins' trial testimony. *See supra*, ¶40 n.3. We conclude Perkins' credibility was adequately tested, and exclusion of the Hagen letter did not violate Jacobson's right to confrontation.

¶45 Finally, even assuming the circuit court violated Jacobson's right to confrontation, a Confrontation Clause violation does not require automatic reversal if the error was harmless. *See* ***State v. Weed***, 2003 WI 85, ¶28, 263 Wis. 2d 434, 666 N.W.2d 485. We may conclude an error was harmless if we determine, beyond a reasonable doubt, that a rational jury would have found the defendant guilty absent the error. ***Id.***, ¶29.

¶46 Even if Jacobson had been allowed to cross-examine Perkins regarding the Hagen letter, causing the jury to discredit Perkins' testimony entirely, we nevertheless conclude a rational jury would have found Jacobson guilty based on the other evidence presented. Other witnesses' testimony connected Jacobson to items taken during both the Crane and Harvey burglaries. Three witnesses claimed to have seen Jacobson in a tavern in May 2006 with a laptop matching the description of the Cranes' stolen laptop. When he was arrested, Jacobson was wearing a ring identical to Vicky Crane's unique gold ring, and a witness testified she had seen Jacobson wearing a gold pinky ring shortly after the burglaries. Arresting officers also recovered a watch from Jacobson that was identical to the watch taken from the Harvey residence, as well as prescription medications later identified as belonging to Vicky Crane. In addition, Hagen testified that, shortly after the burglaries, Jacobson promised to give her a diamond tennis bracelet matching the description of a bracelet stolen from Vicky Crane. Hagen also testified Jacobson showed her a pair of earrings matching the description of earrings taken from the Cranes. This evidence goes well beyond the possibility of mere multiple coincidences.

¶47 Moreover, the probative value of this evidence was strengthened by Jacobson's shifting explanations of where he obtained these items. For instance, when asked about the laptop, Jacobson initially told investigators that he did not

own a laptop and had been using a DVD player in the bar in May 2006. Jacobson later stated he had purchased a gray Toshiba laptop in 2003, but he did not remember how much it cost or how he paid for it. He told investigators he had thrown the laptop into a dumpster at his employer's place of business after it stopped working around Memorial Day in 2006. Investigators went to Jacobson's place of employment in November 2006 but did not see any dumpster. Jacobson's ex-wife testified Jacobson never owned a laptop during their marriage. Trial testimony revealed similar inconsistencies in Jacobson's explanations about his possession of the gold ring, the watch, and the prescription medications. *See supra*, ¶¶14-16. These inconsistent stories undercut any inference that Jacobson merely received the stolen items from the "real" burglars.

¶48 Overall, the State's case against Jacobson was strong, even without Perkins' testimony. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990) (finding of guilt may rest upon circumstantial evidence, which can often be stronger than direct evidence). Any error regarding the exclusion of the Hagen letter was harmless, and a new trial is not warranted.

IV. Ineffective assistance

¶49 Jacobson also argues his trial attorney was ineffective. To establish ineffective assistance, a defendant must prove both that counsel performed deficiently and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both prongs of the ***Strickland*** test if the defendant fails to make a sufficient showing on one. ***Id.*** When reviewing an ineffective assistance claim, we uphold the circuit court's findings of fact unless they are clearly erroneous, but we independently determine

whether the defendant received ineffective assistance. ***State v. Johnson***, 153 Wis. 2d 121, 127-28, 449 N.W.2d 845 (1990).

¶50 Jacobson argues his trial attorney performed deficiently in four respects, by failing: (1) to seek admission of letters Perkins wrote in 2009 to Jacobson's attorney, the prosecutor, and a sheriff's investigator requesting remuneration for favorable testimony; (2) to elicit the details of Perkins' plea agreement; (3) to request pattern jury instructions on the weight given to the testimony of accomplices and witnesses who received concessions for their testimony; and (4) to impeach Mary Jerome and Jessica Grace with their past criminal convictions. In its postconviction decision, the circuit court agreed Jacobson's trial attorney performed deficiently in all four respects. On appeal, the State concedes counsel's performance was deficient in three respects, but it argues counsel was not deficient in failing to elicit the details of Perkins' plea agreement.

¶51 Even if Jacobson's counsel was deficient in all four respects, we nevertheless conclude counsel's deficiencies did not prejudice the defense. To prove prejudice, a defendant must demonstrate a reasonable probability that, but for counsel's deficient performance, the results of the proceeding would have been different. ***Strickland***, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine our confidence in the outcome. ***Id.***

¶52 Jacobson asserts his trial attorney's first three alleged deficiencies "undermined the effort to attack Perkins' credibility" and, but for the deficiencies, there is a reasonable probability Jacobson would not have been convicted. Jacobson's argument suggests that Perkins' credibility was otherwise unsoiled. However, as discussed above, that is not the case. *See supra*, ¶¶40, 44. Even assuming Jacobson's counsel performed deficiently, the jury had ample reason to

question Perkins' credibility. Moreover, even if counsel had not performed deficiently and, as a result, the jury had entirely discounted Perkins' testimony, there was strong circumstantial evidence connecting Jacobson with the burglaries. *See supra*, ¶¶46-47. Jacobson has not established a reasonable probability of a different result, had counsel not been deficient.

¶53 Additionally, Jacobson has not established a reasonable probability of a different result absent counsel's fourth alleged deficiency—that is, counsel's failure to impeach Jerome and Grace with their prior criminal convictions. Jerome testified that, shortly after the burglaries, she saw Jacobson wearing a gold pinky ring and using a laptop similar to the one stolen from David Crane. However, her testimony as to the laptop was cumulative to that of two other witnesses, who stated they saw Jacobson using a similar laptop in May 2006. Jerome's testimony as to the ring was cumulative of stronger evidence that the police actually found the ring on Jacobson when they arrested him. Thus, even if counsel had impeached Jerome with prior convictions, it is unlikely the outcome of the proceeding would have been different.

¶54 Grace testified that Jacobson never owned a laptop during their marriage and she had never seen him wearing the gold ring or wristwatch. Grace also admitted, though, that while her marriage to Jacobson lasted until 2006, she had not seen him since 2005. She conceded she did not know what items Jacobson might have purchased or obtained between 2005 and his June 2006 arrest. Thus, Grace's testimony was not crucial to Jacobson's conviction, and counsel's failure to impeach her with her prior convictions did not prejudice the defense.

V. Interest of justice

¶55 Jacobson also asks us to grant a new trial in the interest of justice, pursuant to WIS. STAT. § 752.35. He bases this argument on a letter Perkins wrote to Jacobson's counsel following Jacobson's conviction, in which Perkins indicated he would help to "vindicate[]" Jacobson on appeal in exchange for $5,000. Jacobson argues that, had this letter been available at trial, it would have undermined Perkins' credibility. Without the letter, Jacobson argues the real controversy was not fully tried. We disagree. Jacobson has not convinced us this is the sort of "exceptional case[]" in which we should exercise our discretionary reversal power. *See* ***Vollmer v. Luety***, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990). As discussed above, ample evidence at trial called Perkins' credibility into question. *See supra*, ¶40 & n.3. Perkins' post-trial letter to Jacobson's counsel would have been cumulative to this other evidence.

¶56 Jacobson argues this case is comparable to ***State v. Cuyler***, 110 Wis. 2d 133, 327 N.W.2d 662 (1983). There, because the circuit court erroneously excluded opinion testimony concerning the defendant's character for truthfulness, our supreme court reversed the defendant's conviction in the interest of justice, concluding the real controversy was not fully tried. ***Id.*** at 136, 141. However, unlike the evidence in ***Cuyler***, Perkins' post-trial letter to Jacobson's attorney did not exist at the time of trial and therefore was never erroneously excluded. Furthermore, the evidence excluded in ***Cuyler*** was not cumulative to other evidence bearing on the defendant's credibility. Consequently, ***Cuyler*** does not require discretionary reversal in this case.

By the Court.—Judgments and order affirmed.

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