COURT OF APPEALS DECISION DATED AND FILED

July 27, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP161-CR

Cir. Ct. No. 2011CF409

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM J. THURBER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: DANIEL J. BISSETT, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 GUNDRUM, J. William J. Thurber was convicted after a jury trial of twelve counts of burglary, as a party to the crime, for his role in burglarizing twelve motor homes located at a storage facility. He appeals his judgment of conviction, arguing the trial court erred when it made a midtrial ruling precluding

him from calling a witness to the stand due to his failure to list the witness prior to trial. Thurber also challenges the court's denial of his postconviction motion seeking a new trial, asserting his trial counsel provided him ineffective assistance by failing to list the witness prior to trial; call a certain additional witness to the stand; obtain and use a surveillance video, map and photographs at trial; and "consult more" with Thurber prior to trial. We conclude the court[1] did not err in its midtrial ruling or its determination that Thurber's trial counsel was not ineffective. We affirm.

Background

¶2 Thurber was convicted of burglarizing, as a party to the crime, twelve motor homes, also referred to herein as RVs, at American Mini Storage (American) in the City of Menasha in Winnebago County. Relevant trial testimony follows.

¶3 Twelve witnesses testified their motor homes, stored at American, were burglarized on or around July 21, 2010. One of the witnesses testified "[t]he driver's side window was smashed in." Another witness testified his motor home and seven others had also been "vandalized" at American about four months prior to the burglaries in this case.

¶4 The State also called Jacob Kent as a witness. On direct examination, Kent admitted to burglarizing the motor homes at American in July 2010, stating he got there in a red, two-door truck. He testified he knew

[1] We note that the same judge presided over both Thurber's trial and the postconviction proceedings. We refer to this same court as "trial court" or "postconviction court" as appropriate.

Thurber through "work[ing] for [Thurber's] brother." When asked if he had had a conversation in early August 2010 with "Deputy Carpenter"[2] in which he indicated he "had done burglaries at [American] with William Thurber," Kent stated, "I really don't remember telling him that." Kent testified he rode with Carpenter and a "Detective Tauber"[3] and led them "to the places where I burglarized." When asked if he "also took them to American," Kent responded, "Where I burglared, yes." Testimony continued:

> [State:] And did you tell Detective Tauber and Deputy Carpenter that you had been at your residence when William Thurber came and got you? Do you remember telling them that?
>
> [Kent:] No, I don't remember telling him that.
>
> ….
>
> [State:] Didn't you tell Deputy Carpenter that the defendant came and got you at your residence to help him with the removal of TVs and other items from RVs at American Mini Storage?
>
> [Kent:] I don't remember.
>
> ….
>
> [State:] Do you remember telling Detective Carpenter that the defendant William Thurber had broken into all of the units and gotten the TVs and other items all set for you to come and pick up?
>
> [Kent:] No, I don't remember that.
>
> [State:] Do you remember telling Detective Tauber and Deputy Carpenter that you went to American Mini Storage in the defendant's truck?

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[2] Staff Sergeant Ryan Carpenter of the Outagamie County Sheriff's Department also testified at Thurber's trial.

[3] Carpenter testified he and a "Sergeant Tauber from [the] Appleton Police Department" met with Kent.

> [Kent:] No.
>
> [State:] Do you remember telling them that you went into all of the vehicles and that you didn't do any damage to the vehicles because the defendant had done all of the damage before?
>
> [Kent:] No, I don't.
>
> [State:] Do you remember telling Sergeant Carpenter that you in fact had cut yourself and that there was blood left on the seat?
>
> [Kent:] Yeah, from my burglarizing them.
>
> [State:] And, in fact, you still have that scar from that. Is that correct?
>
> [Kent:] That's correct.

Kent showed the jury the scar, and testimony continued:

> [State:] Did you tell Officer Carpenter that there would be blood found on the seat of one of the RVs?
>
> [Kent:] Yep.
>
> [State:] And did you tell him that that was the only place they would find any evidence like that because—
>
> [Kent:] No.
>
> [State:] —because the defendant had ripped out all of the TVs and then left them for you?
>
> [Kent:] No.
>
> ….
>
> [State:] You're saying you didn't or you don't remember that?
>
> [Kent:] No, I didn't say that.
>
> [State:] Now, do you remember telling … Sergeant Carpenter that you had gotten anywhere between 10 to 12 TVs on that occasion?
>
> [Kent:] Could have.

[State:] Could have. You say you did it by yourself. What did you do with the TVs?

[Kent:] Put them at a residence.

[State:] You put them at a residence. Whose residence?

[Kent:] A woman named Stockman I think her last name was.

[State:] So you put all of the TVs there?

[Kent:] No. I sold a couple TVs. You know, being a crack head, needed to keep getting high, that's what I was doing to support my highness.

[State:] And who did you sell the TVs to?

[Kent:] Oh, everybody. Everybody I knew had one. Could randomly walk down the road. If you had some money in your hands, that was cool. Help me.

….

[State:] Do you remember [Detective Jagla[4]] talking to you in the interview room at the Outagamie County jail … August 10, 2010[?]

[Kent:] I don't know.

[State:] Could have happened?

[Kent:] Could have happened, yes.

[State:] Do you remember that he read you your Miranda rights?

[Kent:] Yes.

[State:] And you acknowledged those and you gave a statement. Is that correct?

[Kent:] Yep.

[State:] And you not only gave an oral statement but you also gave a written statement. Is that correct?

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[4] City of Menasha Police Detective David Jagla also testified at trial.

[Kent:] Yep.

….

[State:] Were you aware that he had tape recorded that conversation?

[Kent:] No.

[State:] And at that time, did you tell him that you had done some burglaries at the storage—American Mini Storage?

[Kent:] Where is what [sic]?

[State:] That's where the RVs were.

[Kent:] I didn't do the storage units. I did some RVs.

[State:] Did you tell him that William Thurber had asked you to help him?

[Kent:] Sure, I guess. I don't know. If you got it on recording, I guess you would know more than I would know.

[State:] And did you tell [Jagla] that you had received a call from the defendant asking you if you were willing to help and you told him that you were willing to help?

[Kent:] I guess. You got the recording.

[State:] And then you indicated that you told him that sometime later the defendant picked you up in a maroon Chevy pick-up truck. Do you remember that?

[Kent:] No, not really. I guess if you're saying it happened, … if you got it on paperwork and you got a video tape of it.

….

[State:] And did you acknowledge that you were involved in the burglaries with Mr. Thurber?

[Kent:] I don't recall.

[State:] And didn't you indicate that you were guilty of participating with William Thurber maybe for doing all of the entries and getting all of the items ready to be taken. Do you remember telling him that?

> [Kent:] I went to court and got sentenced so I guess I was guilty.
>
> [State:] Now, didn't you also tell Detective Jagla that you had been in the trailer park area for approximately three hours getting all of the equipment out of the trailers that had already been readied by the defendant?
>
> [Kent:] I don't recall.
>
> [State:] Did you talk to Detective Jagla also about going into one of the trailers and crawling in the driver's window and getting cut?
>
> [Kent:] I got myself cut but I don't recall telling him that.

¶5 Kent was then shown and testified regarding a written statement he provided Jagla on August 10, 2010.

> [State:] What's the first line in that statement that is written?
>
> [Kent:] Billy Thurber called me up to help him something stuff—move stuff—Help him move—move some stuff.
>
> [State:] And in this statement, don't you indicate that when we got there it was motor homes, he had me moving TVs out of the motor homes?
>
> [Kent:] That's what it says.
>
> [State:] And, in fact, you end it by saying that the motor homes were broken into already before I got there?
>
> [Kent:] I really don't think that statement would be real reliable because I was still—I was still messed up on drugs when I wrote that six days after being incarcerated.
>
> [State:] But in that statement, that's signed by you. Isn't that correct?
>
> [Kent:] Anybody could have signed that.
>
> [State:] Is that your signature?
>
> [Kent:] That's my name.
>
> [State:] Did you write that?

> [Kent:] Yes.
>
> ….
>
> [State:] Why don't you read the statement to the jury.
>
> [Kent:] "Billy Thurber called me up to help him move some stuff. When we got there it was motor homes. He had me moving TV [sic] out from the motor homes. I grabbed about a dozen TVs out for him. He had this plan before I got there. All the motor homes were broke into already before I got there. I only had to open the doors. The TVs were right thee [sic] next to the doors."

After reading his written statement, Kent immediately added, without any additional question from the State, "I burglared them. How did my blood get in there if the doors were—if the TV was sitting next to the door, my question is." Testimony regarding the statement continued:

> [State:] And you told Officer Jagla that that was the truth. Is that correct?
>
> [Kent:] I guess, at the time.
>
> [State:] And that was consistent with the oral statement that you gave Detective Jagla. Isn't that correct?
>
> [Kent:] I guess, at the time.

¶6 On cross-examination, Kent testified:

> [Trial Counsel:] And it's your testimony today that what you wrote on that is not true. Is that correct?
>
> [Kent:] Yes.
>
> [Trial Counsel:] …. [W]here were you when you gave this statement?
>
> [Kent:] Incarcerated, behind bars.
>
> [Trial Counsel:] For what?
>
> [Kent:] They were trying to charge me with burglary in Outagamie County at the time.

[Trial Counsel:] So you had pending burglary charges that they were investigating up in Outagamie County on August 10th, 2010. Is that correct?

[Kent:] Yes.

….

[Trial Counsel:] Now, at that time, did you have reason to believe or did the officers talking with you indicate in any way that Mr. Thurber, the defendant, had turned you in for all those charges?

[Kent:] That's what they said.

[Trial Counsel:] And did that invoke some form of anger in you at the time?

[Kent:] Yes, it did.

….

[Trial Counsel:] Well, how angry were you when you made this statement?

[Kent:] I was angry.

[Trial Counsel:] Angry enough to lie?

[Kent:] Oh, yes.

[Trial Counsel:] Angry enough to get him in trouble?

[Kent:] Yes.

[Trial Counsel:] Angry enough to get him charged with things that he may not have committed?

[Kent:] Yes.

….

[Trial Counsel:] Is it your testimony here today that the defendant had no involvement with you in relation to these American Mini Storage burglaries?

[Kent:] No.

[Trial Counsel:] Would you consider yourself a friend of Mr. Thurber?

> [Kent:] I believed that, yes.
>
> ….
>
> [Trial Counsel:] Were you promised or threatened [by the State] in any way for your testimony here today?
>
> [Kent:] I would say a threat, yes.
>
> [Trial Counsel:] Do you want to explain that, please?
>
> [Kent:] Well, … this gentleman right here … assistant DA, whatever—he told me that if I didn't come here today and testify against … the man standing trial that I would be prosecuted for these charges, and, to me, I believe that's a threat. I mean, I'm trying to tell the truth. I did these burglaries on my own and he don't believe me now. He kept saying William Thurber put you in prison for your next 12 years. No, Mr. Thurber didn't put me in prison. I put myself here for the next 12 years. And he kept telling me that if I didn't get up here to testify on his behalf that I was going to be charged with these charges, not only me, some of my family members, my—my child's mother would be charged on something, too. Tried to—how would you say that—tick me off in a way or something.
>
> [Trial Counsel:] As far as these Winnebago County cases now, have you been charged with them?
>
> [Kent:] Yes. That's what I'm—part of the reason I'm in prison right now.
>
> [Trial Counsel:] And so as far as these charges relate to you, that's all resolved. Is that correct?
>
> [Kent:] Yes, everything is down and tooken [sic] care of.
>
> [Trial Counsel:] And you're on the record as having admitted to committing these offenses. Is that true?
>
> [Kent:] Yes.
>
> [Trial Counsel:] Did you ever receive money from Mr. Thurber in exchange for helping him commit these burglaries?
>
> [Kent:] No. I don't think so, no.

> [Trial Counsel:] Did you ever receive any of the stolen property from these American Mini Storage cases in Menasha, Wisconsin, from Mr. Thurber?
>
> [Kent:] No….

¶7 On redirect examination, Kent testified:

> [State:] Isn't it true that you told Investigator Curtis[5] from the district attorney's office that you've been threatened in prison that if you testify things are going to happen to you?
>
> [Kent:] I don't recall that.
>
> [State:] Do you remember saying that you've been threatened by people of the Aryan Nation, Aryan Brotherhood, that you are not supposed to testify?
>
> [Kent:] Only person I was threatened by was you and the other person.
>
> [State:] Did you also indicate that the defendant has threatened your daughter, that when he gets out he said he's going to kill her?
>
> [Kent:] I don't recall that.
>
> [State:] You don't recall. You might have said that?
>
> [Kent:] No.
>
> [State:] Or you don't recall. Well, you said you don't recall.
>
> [Kent:] You're right. I don't—I didn't say that.
>
> [State:] So you're sure you didn't say that now?
>
> [Kent:] I'm positive.

On recross-examination, Kent confirmed he had not had any "direct contact" with Thurber in the last two years.

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[5] James Curtis, an investigator in the Winnebago County District Attorney's office, also testified at the trial.

¶8 Jagla testified next. On August 9, 2010, he received a call from Carpenter that prompted Jagla to meet with Kent on August 10, 2010, in the Outagamie County Jail. Regarding the "break-ins" at American, Kent told Jagla:

> That he had been involved, that he had received a phone call from William Thurber asking for his help, that help apparently consisted of helping him get items out of these vehicles and motor homes to steal. He indicated that he had been told that everything was ready to go, all he had to do was carry the stuff, and then alluded to the fact that Mr. Thurber had some back issues.

Jagla's testimony continued:

> [State:] And did [Kent] indicate how he got to the mini storage area?
>
> [Jagla:] I believe if I remember correctly Mr. Thurber picked him up in a pick-up truck.
>
> ….
>
> [State:] Now, … when both individuals got back to the storage area, what did Mr. Kent say happened?
>
> [Jagla:] That he was to go to these motor homes that had already been broke into, retrieve the items, and bring them back to the truck, load it up.

Kent told Jagla how he had cut himself climbing through a broken driver's door window in one of the motor homes and that when he climbed through, a drop of blood landed on a leather seat. Jagla testified this "matched" evidence he had found at the scene, confirming he had found a drop of blood in the location where Kent said it would be. Kent told Jagla he spent about three hours helping Thurber take electronic equipment, like flat screen TVs, that had already been set aside; the items went to Thurber's home in Outagamie County; Kent was paid between $100 and $150; and Thurber was a "crack addict." Kent wrote a statement and

confirmed to Jagla that it was true and correct. Jagla confirmed that the written statement Kent had previously testified to on the stand was that statement.

¶9 On cross-examination, Jagla testified he believed Kent was "upset" with "the police" and Thurber during the August 10 meeting. Jagla believed Kent was upset with Thurber because Kent "felt Mr. Thurber told the police where he—Jacob Kent—was." During the meeting, it did not appear to Jagla as if Kent was on any kind of drugs. When asked if he had an opinion at the time as to whether Kent might be lying about the extent of his involvement, Jagla responded:

> I probably did have reservations about what he was telling me. It sounded awfully one-sided. I know that he had worked with Mr. Thurber before, so, I mean, we have a relationship here with this kind of stuff, and I just—I didn't think it sounded like something that he wouldn't have any knowledge of.

¶10 Jagla further testified on cross-examination that he began his investigation of the burglaries on July 22, 2010, and became aware of several security cameras at American, one of which captured traffic entering the gate, and another in the back of the facility with a view of the motor homes. Jagla had recovered and viewed video covering the time frame when the burglaries were supposed to have occurred, but only from the camera covering the gate area because the camera covering the back area had not been working. Regarding why the back camera had not been working, Jagla testified:

> [Jagla:] [T]he girl at the office could not explain to me why it went down. That actually made me suspect the guy that was repairing it as being one of the suspects in this. I looked into him because of the way that this camera system stopped working that night and then a week's worth of video footage had been erased.
>
> [Trial Counsel:] How did that week's worth of video footage get erased?

> [Jagla:] She couldn't explain it to me.
>
> [Trial Counsel:] To your knowledge, was that video footage ever in the hands of this I guess you indicate an individual you initially suspected as being involved?
>
> [Jagla:] No, not that I'm aware of.
>
> [Trial Counsel:] Who was this individual?
>
> [Jagla:] I do not recall his name. He was working on the system prior to our getting this call.
>
> [Trial Counsel:] So he was responsible for installing and managing that system, correct?
>
> [Jagla:] Or repairing it, yes. They had some issues with it.

¶11 Trial counsel asked Jagla if he recalled seeing anyone on the video "enter the premises probably the evening that these are alleged to have occurred at 1:30 in the morning." Jagla responded: "I recall I believe a pick-up truck and then a Ford or a Mercury vehicle, yes." Testimony continued:

> [Trial Counsel:] Did you trace that pick-up truck in any way?
>
> [Jagla:] I don't believe so, no. I don't think it was a good enough picture.
>
> [Trial Counsel:] There was no follow-up done on that pick-up entering the premises?
>
> [Jagla:] Not that I recall.
>
> [Trial Counsel:] Well, let me ask you this: Was that the vehicle that entered the premises at 1:30 am?
>
> [Jagla:] I don't know.
>
> ….
>
> [Trial Counsel:] Do you recall any knowledge or learning of any black vehicle that may have entered the premises on that evening at 1:30 AM?
>
> ….

> [Jagla:] I do not specifically recall viewing a black pick-up truck on the video at 1:30. She—that's Melissa, the employee in the office where these travel trailers are stored—advised me of that and then she's the one that gave me the name of Andy Lutzow, I believe. They called him and he was the one supposedly fixing the system. And I believe it was between there and or after that that I received a call from [Sergeant] Carpenter who directed our attention towards Thurber and Kent, therefore making it unnecessary for me to … follow up further with this possible suspect here.

Jagla testified he had followed up on the Mercury vehicle that had entered the storage facility and confirmed it was not involved in the burglaries, but did not do any follow up regarding Lutzow. Counsel questioned Jagla: "And it's your testimony after you were informed that Mr. Kent was in custody and he was talking potentially about this American Mini Storage place, your investigation stopped in regards to any other leads or potential suspects, correct?" Jagla responded, "Yes."

¶12 Trial counsel attempted to ask Jagla if he knew whether American employee Melissa Blank had reviewed footage from the security cameras and if during his investigation anyone had ever "advised [him] of Andy Lutzow or who he may be"; however, the trial court sustained hearsay objections by the State to this questioning.

¶13 On redirect examination, Jagla testified that after taking Kent's written statement, he asked Kent to provide a "buccal swab" sample, telling him that if he was telling the truth regarding his involvement in the burglaries, he would agree to provide the sample. Jagla confirmed Kent "readily" provided the sample.

¶14 On the second day of trial, Carpenter testified that on August 6, 2010, he and Tauber spoke with Kent in the Outagamie County Jail

regarding his involvement in "several burglaries in Outagamie County." They informed Kent that Thurber had implicated him in the burglaries and had told them

> [t]hat Mr. Kent was the mastermind, if you will, of the burglaries that occurred in Outagamie County, that Mr. Kent was the one that set up the storage units, broke into the storage units, and basically set up the property to be taken.
>
> ….
>
> ... Mr. Thurber's role, according to Mr. Thurber, was just to assist with the heavy lifting and take possession of the property.

Carpenter testified Kent was "very upset" upon hearing this and "told us that it was the other way around, that in fact Mr. Thurber was the mastermind, if you will, of the burglaries and that [Kent] was just along to do the heavy lifting and assist with that end of it."

¶15 Carpenter testified he and Tauber asked Kent to show them where the burglaries had occurred, and Kent led them to four storage locations in Outagamie County and "a storage location in the City of Menasha,"[6] in neighboring Winnebago County. With regard to the storage facilities in Outagamie County, Kent explained to Carpenter and Tauber that "Thurber would pick the sites for these locations and … go to the locations and cut the locks on the storage units," and then Kent and Thurber "would enter the storage units and take items" out of them. Kent received property and cash in exchange for his help.

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[6] Prior to Carpenter's testimony, multiple witnesses testified that American is located in the City of Menasha.

¶16 Carpenter testified the Outagamie County burglaries had occurred "from mid June 2010 to mid July 2010." Regarding the burglaries at American, in Winnebago County, Carpenter testified:

> Mr. Kent directed us to that location, indicating that he did a break-in or was assisted with a break-in by Mr. Thurber … and he pointed to the location as we went by…. He indicated that he went there with Mr. Thurber, and when he arrived, all of the RVs were already broken into and the RVs that he couldn't get into Mr. Thurber had broken a window…. He assisted Mr. Thurber in taking items out of the RVs. He also … indicated that one of the windows were [sic] broken when Mr. Kent went through that window in order to enter that RV…. Mr. Kent [said he] got there after all of the RVs were already broken into.

Kent told Carpenter he assisted with taking the items from the RVs and putting them in the vehicle they drove there, which Kent identified as Thurber's brother's truck.

¶17 On cross-examination, Carpenter confirmed Kent was "very uncooperative" when he was first taken into custody. When Carpenter subsequently spoke with Kent and informed him Thurber was claiming Kent was responsible for the Outagamie County crimes, Kent became "angry," "wanted to give us his side of the story," and drove with and directed the officers to the locations of the burglaries. Carpenter confirmed Kent was aware he was in custody at the time and "facing quite a bit of time potentially if he [was] … ultimately convicted" of the crimes. At some point Carpenter notified Winnebago County authorities regarding Kent's potential involvement in the burglaries at American.

¶18 After the State rested its case, Thurber sought to call Blank to the stand. The State objected because the defense had not listed her as a witness. Looking to WIS. STAT. § 971.23 (2013-14),[7] the trial court precluded Blank from testifying, noting the State had made a discovery demand for defense witnesses, Thurber had not identified Blank as a witness prior to trial, and Thurber was seeking to utilize Blank for substantive testimony in his case-in-chief not as a rebuttal or impeachment witness.

¶19 Thurber testified as the sole defense witness. He told the jury he was currently incarcerated, and had been for two years, for "[e]ight counts of burglary and party to the crime of burglary in Outagamie." He explained how he was involved in the Outagamie County burglaries with Kent, and confirmed these were the same burglaries to which Carpenter testified; but testified he was not involved in the burglaries at American, never received any stolen property from the RVs at that location, and was not aware of Kent's involvement in those burglaries. Thurber confirmed that he considered himself to have been "cooperative" with Outagamie County authorities in solving these burglaries. He explained that he knew Kent "through my brother"; "Jacob Kent was staying in between places; my place, my brother's, friends, so forth." Thurber further testified he had been convicted of twenty-three crimes, with nine of those being in Wisconsin.

¶20 On cross-examination, the prosecutor asked Thurber if he was "saying [he was] always cooperative with the individuals in Outagamie County,"

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

to which Thurber responded that he "was always cooperative with … Sergeant Dan Tauber." The prosecutor then directed Thurber's attention to the afternoon of July 29, 2010, asking, "Didn't you tell Sergeant Tauber you don't know who the fuck you're messing with?" Thurber responded, "I'm pretty sure I told him that." Testimony continued:

> [State:] And you also told him that Officer Tauber was fucking with the wrong person and that Officer Tauber better not fuck with you?
>
> [Thurber:] I'm pretty sure I told him that.
>
> [State:] And, in fact, you told him that you were part of the outlaws. Isn't that right?
>
> [Thurber:] Sure did.
>
> ….
>
> [State:] Isn't it a fact that you told him that you had beaten a 21-year wrap for involuntar[y] manslaughter on a technicality? Didn't you tell Officer Tauber that?
>
> [Thurber:] That is the truth, but I don't remember telling him that.

Thurber testified he eventually "calm[ed] … down" and began cooperating with law enforcement. Thurber's testimony continued:

> [State:] Well, but you didn't tell him the truth right away, did you?
>
> [Thurber:] I did tell—I came in the next morning and told him, right.
>
> [State:] Well, later you told him the truth, but, in fact, you had indicated that you didn't have stolen property, correct?
>
> [Thurber:] Did I tell him that?
>
> [State:] Originally in the first conversation back on July 29 of 2010.
>
> [Thurber:] Well, of course I told him that. I wasn't going to admit to anything right there without an attorney.

….

[State:] So you lied to him first?

[Thurber:] I wouldn't call that a lie.

[State:] Did you tell him the truth?

[Thurber:] No. I didn't tell him the truth.

[State:] Okay. So if you don't tell the truth, is that a lie?

[Thurber:] Yes.

Thurber testified he was a "drug dealer" and acknowledged telling Tauber that he "supplied" Kent with drugs.

¶21 On redirect examination, Thurber testified he was not in the presence of the officers when he made his threatening statements on July 29, 2010, but he was "real pissed off" about the officers being on his property. He stated he was cooperative with law enforcement when he was in their presence five days later and confirmed that at that point he "agreed to implicate other people or help with their investigation as far as the Outagamie burglaries" were concerned. On recross-examination, Thurber said he informed Tauber he was part of the "Outlaws" "[t]o intimidate him."

¶22 In rebuttal testimony for the State, Curtis testified that on September 6, 2012, four days before the start of Thurber's trial, he, along with the prosecutor, spoke with Kent in prison. Curtis's testimony went as follows:

> [State:] Did you ask Jacob Kent whether or not he knew William Thurber?
>
> [Curtis:] Yes, you did. Originally his answer was "No, I don't know him."
>
> [State:] And … did Mr. Kent make any statements about any threats that he had received?

> [Curtis:] Yes, he did.
>
> [State:] What did he say?
>
> [Curtis:] There [were] two specific threats, one from the defendant that he would kill his daughter when he got out if he testified, and the second was threats inside the prison from the Aryan Brotherhood that they don't like snitches.
>
> [State:] And did Mr. Kent indicate what he was going to do in terms of testifying?
>
> [Curtis:] Originally he said he was going to say he never saw or knew the defendant and he was going to say he had no involvement whatsoever.
>
> [State:] And did he talk about Mr. Kent's family?
>
> [Curtis:] Jacob, yes. It was very clear throughout the interview that he was more concerned about the safety of his family and also his safety while he was in prison. That was the primary goal. He said nothing else mattered.

On cross-examination, Curtis testified that it was his opinion that Kent "did [not] want to participate in this trial at all." Curtis acknowledged that he never followed up on any "threats."

¶23 The jury convicted Thurber of twelve counts of burglary. He filed a motion for postconviction relief, claiming the trial court erred in its midtrial decision to not permit Melissa Blank to testify and that trial counsel was ineffective for multiple reasons, including failing to list Blank as a witness prior to trial. The postconviction hearing was held over two days, two weeks apart, and several witnesses testified. We recite relevant parts of Blank's and Lutzow's testimony here, and later reference other testimony as necessary.

¶24 Blank worked at American in July 2010, and following some "break-ins" to RVs, she reviewed videos from security cameras that were functioning the night of the burglaries. Because of a "previous break-in," American upgraded its

security system; at the time of the burglaries, there were four cameras. Although Blank's testimony is far from a picture of clarity, it appears as if two of the cameras covering the area of the RVs were not working at the time of the burglaries. Those cameras previously had been working, but stopped working prior to the burglaries due to "[a] power outage."

¶25 Blank confirmed there were three routes "in and out" of American—the main driveway, which had been appropriately monitored by a working camera at the time of the burglaries, and routes by the "storage units" and the "grassy area," which had both been covered by the same, nonworking camera. She stated the camera monitoring the main driveway "did not show any vehicle that presumably would have been driven" by Thurber or Kent; however, they could have entered the facility by another route.

¶26 Blank testified Lutzow was the "internet guy" for American around the time of the burglaries and confirmed he was "in charge of putting in" the security cameras. She confirmed observing on video that the night of the burglaries only "a Mercury" and Lutzow's truck entered American by the main driveway. Blank never observed on the video Lutzow's truck leaving American, but stated it could have departed by one of the other routes without being captured by a functioning camera. Additional testimony was presented:

> [Postconviction Counsel:] And those cameras would have been pointed in such a direction that any activities of robberies that did occur would have been picked up by a camera if it had been working, correct?
>
> [Blank:] Yes.
>
> [Postconviction Counsel:] Was that why you assumed then that this was something of a potential inside job or someone who really knew security?
>
> [Blank:] I don't know.

> [Postconviction Counsel:] What was your first thought as far as who might have done this when the robberies first came to light?
>
> [Blank:] Well, the first truck I saw pull in there was [Lutzow's] truck and why is he there at 1:00, 1:30 in the morning? That was the question.

Testimony continued regarding Lutzow's apparent presence on the property the night of the burglaries, in addition to Blank confirming she informed Jagla about "everything [she] saw on the videos," including "the positioning of those cameras" and observing Lutzow's truck.

¶27 Lutzow was in the courtroom when Blank testified at the hearing[8] and was called to the stand by Thurber's postconviction counsel immediately following her testimony. He repeatedly and emphatically invoked the Fifth Amendment, refused to testify, and insisted he be granted immunity in exchange for his testimony. The court told Lutzow he would have to be sworn in or be taken into custody because "[t]here may be questions that don't incriminate you that you might be required to answer." Lutzow responded:

> Correct. But if there's ever so slight a chance even if one were telling the truth, okay, and if one were innocent that it could ever so slightly increase their chance of, you know … it could increase one's chance of being charged in this case or anything like that.

The court then asked Lutzow if he had spoken with an attorney "about this," and Lutzow responded, "No." After further discussion, the court adjourned the portion of the hearing related to Lutzow's testimony to afford Lutzow an opportunity to

[8] During his testimony on the second day of the postconviction hearing, Lutzow confirmed he was "in the courtroom when Melissa [Blank] testified."

speak with an attorney or the district attorney's office, or think about his decision not to testify.

¶28 The hearing continued two weeks later, and in the interim, Lutzow spoke with postconviction counsel via phone. Lutzow testified at the second day of the hearing without incident, limitations, or seeking a grant of immunity. He testified that he ran his own computer consulting business and was hired to install additional security cameras at American so American would have video cameras covering the back lot area where the RVs were stored "because they were having all of these break-ins and tampering and all that." It was Lutzow's "first and only security system job," and he was working on installing the cameras in the summer of 2010, stating it "might have been July." The system "took a while" to install because "the whole system in the back was having problems" "the whole time" due to a problem with underground electrical lines and a "lack of electricity getting to the system." Lutzow stated he was not done installing the cameras when the burglaries occurred, but if it had not been for the electrical problems, the two cameras covering the back RV area would have been working. No one from law enforcement ever spoke with him regarding these burglaries or any other break-ins.

¶29 Lutzow did not remember being at American the night of the burglaries but stated he was not surprised his vehicle may have been captured on video entering American around 1:30 a.m. because he frequently worked at that time: "It's just easier. There's nobody, you know, … working on the computer, whatnot " and with all the "break-ins" and "tampering," "[t]here was a … concern that we weren't getting, you know, we wanted to get this stuff done." Lutzow testified he did not know Thurber or a Jacob Kent.

¶30 The postconviction court denied Thurber's motion for postconviction relief and he appeals. Additional facts are included as needed.

Discussion

Preclusion of Blank from Testifying at Trial

¶31 Thurber first claims the trial court erred in precluding him from calling Blank as a witness at trial.[9] He acknowledges WIS. STAT. § 971.23(2m) required him to list Blank as a witness prior to trial and that he failed to do so;[10] however, he asserts the court should have utilized a "less drastic" measure, such as a continuance, rather than preclude her from testifying. We conclude the court did not err.

¶32 WISCONSIN STAT. § 971.23(7m)(a) provides: "The court shall exclude any witness not listed or evidence not presented for inspection or copying required by this section, unless good cause is shown for failure to comply. The

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[9] The trial court ruled it would not permit Blank to testify "[u]nless she's testifying for rebuttal or impeachment purposes only, which are exclusions under [WIS. STAT. §] 971.23(2m)(a)." Thurber never called Blank as a witness for rebuttal or impeachment purposes only.

[10] WISCONSIN STAT. § 971.23(2m) provides in relevant part:

> WHAT A DEFENDANT MUST DISCLOSE TO THE DISTRICT ATTORNEY. Upon demand, the defendant or his or her attorney shall, within a reasonable time before trial, disclose to the district attorney …
>
> (a) A list of witnesses, other than the defendant, whom the defendant intends to call at trial, together with their addresses. This paragraph does not apply to rebuttal witnesses or those called for impeachment only.

Section 971.23(1) places a nearly identical requirement upon the State.

court may in appropriate cases grant the opposing party a recess or a continuance." Here, the relevant facts related to the trial court's decision to exclude Blank's testimony are not in dispute. Applying undisputed facts to the language of a statute is a matter of law we review de novo. ***State v. Jensen***, 2010 WI 38, ¶8, 324 Wis. 2d 586, 782 N.W.2d 415. Few Wisconsin cases address § 971.23(7m)(a) from the perspective of precluding testimony of a defense witness. ***State v. Gribble***, 2001 WI App 227, ¶¶28-29, 248 Wis. 2d 409, 636 N.W.2d 488, however, is one of these cases, and we find it instructive.

¶33 Gribble was convicted at trial of first-degree reckless homicide of a child. ***Id.***, ¶¶1, 3. During the trial testimony of a defense witness, it was learned Gribble had failed to disclose to the State a tape-recorded statement made of a conversation between that witness and another defense witness. ***Id.***, ¶¶22, 24. Gribble argued he was not required to turn over the recorded statement to the State because the first witness's testimony related to the statement was impeachment testimony against the other defense witness. ***Id.***, ¶¶24-25. The trial court determined the testimony went beyond impeachment and was substantive evidence, and concluded Gribble had violated one of the discovery requirements of WIS. STAT. § 971.23(2m) by failing to previously disclose the statement. ***Gribble***, 248 Wis. 2d 409, ¶25. After further concluding Gribble had not shown good cause for the failure, the court struck the first witness's testimony regarding what the other defense witness told him in the recorded statement. ***Id.***

¶34 On appeal, Gribble again argued that the requirement to disclose witness statements did not apply. ***Id.***, ¶26. Looking to the language of WIS. STAT. § 971.23(2m), we stated:

> A defendant may choose not to disclose witnesses that will be called only in rebuttal or impeachment, but if the

> defendant wants the option of calling a witness for other than those purposes, the witness must be on the list under para. (a) and relevant written or recorded statements of that witness must be provided under para. (am).

Gribble, 248 Wis. 2d 409, ¶27. Turning to the question of sanctions, we noted that § 971.23(7m) "*requires* the trial court to exclude evidence that is not produced as required by the statute '*unless* good cause is shown for failure to comply.' Exclusion is not mandatory *if* the court finds 'good cause.'" ***Gribble***, 248 Wis. 2d 409, ¶28 (emphasis added).

¶35 Gribble also argued that even if the circuit court properly determined he did not have good cause for failing to disclose the recorded statement, WIS. STAT. § 971.23(7m) states a court "may in appropriate cases grant the opposing party a recess or a continuance," and he contended the circuit court erroneously exercised its discretion when it rejected his trial counsel's suggestion of a continuance and instead excluded the first witness's testimony. ***Gribble***, 248 Wis. 2d 409, ¶34. We responded, "Gribble misreads the statute .... If the party does not show good cause, the court '*shall* exclude any witness not listed or evidence not presented.'" ***Id.*** (quoting § 971.23(7m)).

¶36 The case before us also is similar to ***State v. Jones***, No. 2013AP1731, unpublished slip op. (WI App July 30, 2014), which we find persuasive. Jones argued, similar to Gribble, that rather than exclude expert testimony due to his trial counsel's failure to provide an expert report as discovery, the court instead "should have ordered a recess or continuance in accordance with WIS. STAT. § 971.23(7m)(a)." ***Jones***, No. 2013AP1731, unpublished slip op. ¶10. We disagreed:

> Jones misreads the statute. A circuit court "shall exclude any witness not listed or evidence not presented" unless there is good cause shown for failure to comply with a

> valid discovery request. Sec. 971.23(7m)(a). The word "shall" means that but for the exception, all such evidence is mandated to be excluded. The circuit court excluded the expert testimony because the State was not properly provided notice of it in accordance with § 971.23(2m)(am). No good cause was offered for the lack of notice, and therefore, no recess or continuance was required. The circuit court did not err.

Jones, No. 2013AP1731, unpublished slip op. ¶10 (citing ***Gribble***, 248 Wis. 2d 409, ¶¶34-35).

¶37 Despite briefly acknowledging WIS. STAT. § 971.23(7m)(a) once in his briefs on appeal, Thurber completely fails to address the "shall exclude" or "good cause" requirements therein, asserting instead that "[t]he prosecution never enunciated [at trial] what prejudice they would suffer as a result of Melissa Blank's testimony." The determinative question before the trial court, however, was whether Thurber demonstrated good cause for his failure to list Blank as a witness prior to trial. Because Thurber was the one who failed to list Blank as a witness—as he properly admits was required by § 971.23(2m)—but then attempted to call her to the stand midtrial, it was *his burden* under § 971.23(7m) to demonstrate *good cause* for failing to list her. *See* § 971.23(2m)(a) (emphasis added); ***State v. Prieto***, 2016 WI App 15, ¶11, 366 Wis. 2d 794, 876 N.W.2d 154 (2015) (holding that where a party, there the State, fails to submit a witness list "within a reasonable time before trial," that party violates § 971.23, in which case the burden is on that party "to show that it had good cause for this violation, not on [the opposing party] to show that [it] was prejudiced."); *compare also* § 971.23(7m) with § 971.23(9)(c), in which the legislature specifically added a prejudice requirement.

¶38 Thurber failed to satisfy this burden. When the State objected to Thurber's attempt to call Blank as a witness in his case-in-chief at trial, Thurber's

counsel told the trial court she had not listed Blank as a witness prior to trial because she expected she would be able to introduce more of the Blank-related evidence she desired through Jagla's testimony. She was ultimately unable to do so, in part due to hearsay objections by the State that the court sustained. Counsel acknowledged to the court, however, that Blank was "in all of the discovery reports of the officers" and had "significant information."

¶39 Thurber complains on appeal that it is "a challenge for defense attorneys to predict any and all witnesses whose testimony might be required until the state puts in its case" and, in this case, it "only … became obvious … Blank would have to testify" after his counsel was unable to secure from Jagla the testimony she desired and expected regarding the video security system at American. We reject Thurber's complaint not only because reading WIS. STAT. § 971.23(2m)(a) in a manner responsive to it would be inconsistent with the plain language of the statute, but also because such a reading would effectively nullify that language, for in every case a defendant could claim he/she did not know how a State witness would testify until the witness actually testified and thus the defendant did not know until then who he/she might need to call as a witness.

¶40 Thurber argues the trial court should not have precluded Blank from testifying, but instead should have employed a "less drastic" measure, such as a

continuance.[11] Based upon the plain language of WIS. STAT. § 971.23(7m)(a) and our faithful adherence to that language in ***Gribble*** and ***Jones***, however, we can only conclude the trial court employed the proper remedy by precluding Blank's testimony.[12]

¶41 Thurber asserted to the trial and postconviction court, and asserts on appeal, that Blank was a relevant, knowledgeable and important witness who could provide testimony valuable to the defense case. Indeed, Thurber states on appeal Blank was "an obvious witness" and "[h]er name was all over the

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[11] The only case Thurber cites in support of his argument that the trial court should have permitted Blank to testify is ***Kutchera v. State***, 69 Wis. 2d 534, 230 N.W.2d 750 (1975). As to this case, he writes only two sentences:

> ***Kutchera*** … states that it's preferable to not strike the witness but to allow a surprised or prejudiced party a continuance sufficient to interview the witness. The ***Kutchera*** holding should be even stronger for defendants in that there are no DA constitutional rights to prosecute individuals, but there are very strong constitutional rights to allow defendants to put forth their defenses.

To begin, Thurber's "argument" based on ***Kutchera***, including his constitutional assertion, is undeveloped, and therefore we will not consider it. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988) (We need not consider arguments which are "unexplained and undeveloped."); *see also* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 ("[W]e will not abandon our neutrality to develop arguments" for a party.). Moreover, ***State v. Gribble***, 2001 WI App 227, 248 Wis. 2d 409, 636 N.W.2d 488, is more applicable to the present case. ***Kutchera*** dealt with a prior version of the criminal discovery statute, whereas ***Gribble*** is based upon the current version. Further, ***Kutchera*** addressed the situation where the circuit court *permitted* testimony from State witnesses despite a discovery violation by the State, whereas ***Gribble*** is one of the few Wisconsin cases addressing the situation before us now, where the court *precluded* testimony from a defense witness because of a discovery violation by the defense.

[12] We further note the trial court's consistency in applying the remedy of precluding testimony. Just one day earlier, on the first day of trial, the court granted Thurber's request to preclude the State's expert witness from testifying with regard to DNA evidence found at the scene of the burglaries at American. The court precluded the testimony because the State had failed to notify Thurber within the time frame required by WIS. STAT. § 971.23 of its intent to introduce DNA evidence.

discovery providing integral information about the security system." If Thurber believed Blank's testimony might be of value to his case, he should have listed her as a witness prior to trial. *See* ***Gribble***, 248 Wis. 2d 409, ¶27 ("[I]f the defendant wants the option of calling a witness for other than [impeachment or rebuttal] purposes, the witness must be" listed pursuant to WIS. STAT. § 971.23(2m)(a).). He did not do so. Further, Thurber failed to demonstrate to the trial court and has failed to demonstrate to us that he had good cause for not listing her.[13] The trial court did not err in excluding Blank as a witness.

Ineffective Assistance of Counsel

¶42 Thurber also argues his trial counsel provided him ineffective assistance by failing to list Blank as a witness prior to trial; call Lutzow to the stand; obtain and use a surveillance video, map and photographs at trial; and consult more with Thurber prior to trial. Except for the last complaint, Thurber's assertions all relate to his contention that his trial counsel should have presented more evidence that Lutzow bore responsibility for the burglaries. We are unconvinced, however, that even if such evidence had been presented, there is a reasonable probability the result of Thurber's trial would have been different. In addition, Thurber has not shown that his trial counsel was ineffective with regard to her consultation with him prior to trial.

[13] As part of his appellate argument that his trial counsel provided ineffective assistance in failing to list Blank as a witness, Thurber asserts "[t]here was no excuse for [trial counsel's] failure to provide the required notice that prevented this key witness from being heard by the jury." We would be hard pressed to conclude Thurber had good cause for failing to list Blank as a witness when he asserts trial counsel had "no excuse" for failing to do so.

Legal Standard

¶43 To succeed on an ineffective assistance of counsel claim, a defendant must show that counsel's performance was deficient and the deficiency prejudiced him/her. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). The defendant bears the burden of proof on both prongs, ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997), and if he/she fails to prove one prong, we need not address the other, ***Strickland v. Washington***, 466 U.S. 668, 697 (1984).

¶44 To prove deficient performance, the defendant must show that counsel's failures were "outside the wide range of professionally competent assistance," ***id.*** at 690, and were "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," ***State v. Maloney***, 2005 WI 74, ¶24, 281 Wis. 2d 595, 698 N.W.2d 583. The defendant must overcome a strong presumption he/she received adequate assistance and counsel acted reasonably within professional norms. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990); *see also* ***State v. Domke***, 2011 WI 95, ¶36, 337 Wis. 2d 268, 805 N.W.2d 364; ***State v. Kimbrough***, 2001 WI App 138, ¶¶31-35, 246 Wis. 2d 648, 630 N.W.2d 752. We will only find counsel's performance deficient if the defendant proves counsel's challenged acts or omissions were objectively unreasonable under all the circumstances of the case. *See* ***Kimbrough***, 246 Wis. 2d 648, ¶35. "When evaluating counsel's performance, courts are to be 'highly deferential' and must avoid the 'distorting effects of hindsight.'" ***State v. Thiel***, 2003 WI 111, ¶19, 264 Wis. 2d 571, 665 N.W.2d 305 (citation omitted). "Counsel need not be perfect, indeed not even very good, to be constitutionally adequate." ***Id.*** (citation omitted).

¶45 To prove prejudice, the defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. An error is prejudicial if it undermines confidence in the outcome. ***State v. Pitsch***, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985). "It is not sufficient for the defendant to show that his counsel's errors 'had some conceivable effect on the outcome of the proceeding,'" ***Domke***, 337 Wis. 2d 268, ¶54 (citations omitted); speculation about what the result of the proceeding might have been is insufficient, ***Erickson***, 227 Wis. 2d at 774. The defendant must demonstrate that an alleged error of counsel actually had some adverse effect. ***State v. Keeran***, 2004 WI App 4, ¶19, 268 Wis. 2d 761, 674 N.W.2d 570 (2003).

¶46 Both deficient performance and prejudice present mixed questions of fact and law. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. We uphold the trial court's factual findings unless clearly erroneous. ***Thiel***, 264 Wis. 2d 571, ¶21. Whether counsel's performance is deficient or prejudicial is a question of law we review de novo. ***Jeannie M.P.***, 286 Wis. 2d 721, ¶6.

Failure to List Blank as a Witness

¶47 As discussed, the trial court did not permit Blank to testify at trial because Thurber had not previously listed her as a witness. Thurber contends his trial counsel's failure to list Blank constituted ineffective assistance. Relatedly, he appears to argue that if Blank had testified at trial in the manner she did at the postconviction hearing, the jury may well have suspected Lutzow, not Thurber, committed the burglaries, and found reasonable doubt as to Thurber's guilt. Because Thurber has failed to convince us there is a reasonable probability he

would not have been convicted if trial counsel had listed Blank as a witness, we conclude counsel did not perform ineffectively.

¶48 Thurber points to Blank's postconviction testimony indicating Lutzow's truck was seen on video entering the property on the night of the burglaries. However, there is *no other evidence* suggesting Lutzow committed these burglaries instead of Kent and Thurber. Furthermore, Blank also testified there were three routes into American and that two were not captured by security cameras—establishing two routes Kent and Thurber could have utilized without notice.

¶49 The jury had before it overwhelming evidence that Kent was directly involved with the burglaries at American. Kent admitted on the stand that he committed them and testified that he confessed to law enforcement, just weeks after the burglaries occurred, that he had committed them. The jury heard Kent testify to showing officers various sites he had burglarized, including American. Kent showed the jury the scar he received from cutting himself while entering one of the RVs at American through a broken window, adding that there was blood left on the seat. Kent testified he had sold some of the "TVs" from the burglary because he had been "a crack head, needed to keep getting high, that's what I was doing to support my highness," and that he "went to court," "got sentenced," and was in prison in part because of the burglaries at American.

¶50 Jagla testified that evidence at the scene of the burglaries matched both the account Kent gave in 2010 and at trial, including Jagla finding a drop of blood on an RV seat where Kent told him it would be found. When Jagla asked Kent to provide a "buccal swab" and told him if he was telling the truth about his role in the burglaries at American he would provide the sample, Kent "readily" did

so. Carpenter testified Kent confessed to him about committing the burglaries and led him and Tauber to various sites he had burglarized, including American. Thurber has failed to identify any evidence undermining Kent's admission to committing the burglaries at American.

¶51 The jury also had before it compelling evidence Kent did not commit the burglaries alone, contrary to his testimony, but committed them with Thurber; evidence which included Kent's obvious effort to impede the State's case against Thurber through the manner in which he responded to the State's questions. Kent testified he knew Thurber through "work[ing] for [Thurber's] brother," and that he considered Thurber a friend. When the prosecutor questioned Kent regarding various statements he purportedly made to Carpenter and/or Tauber in early August 2010 related to Thurber's involvement in the burglaries at American, Kent consistently testified he did not remember making such statements. When the prosecutor then turned the questioning to Kent's conversation with Jagla on August 10, 2010, and informed Kent the conversation had been "tape recorded," Kent's memory improved slightly.

> [State:] Did you tell him that William Thurber had asked you to help him?
>
> [Kent:] Sure, I guess. I don't know. If you got it on recording, I guess you would know more than I would know.
>
> [State:] And did you tell [Jagla] that you had received a call from the defendant asking you if you were willing to help and you told him that you were willing to help?
>
> [Kent:] I guess. You got the recording.
>
> [State:] And then you indicated that you told him that sometime later the defendant picked you up in a maroon Chevy pick-up truck. Do you remember that?

> [Kent:] No, not really. I guess if you're saying it happened, … if you got it on paperwork and you got a video tape of it.
>
> ….
>
> [State:] And didn't you indicate that you were guilty of participating with William Thurber maybe for doing all of the entries and getting all of the items ready to be taken. Do you remember telling him that?
>
> [Kent:] I went to court and got sentenced so I guess I was guilty.

When the prosecutor questioned Kent regarding the written statement he provided law enforcement three weeks after the burglaries at American, a statement indicating Thurber instigated the burglaries, Kent provided a nonresponsive answer to one of the prosecutor's questions, stating: "I really don't think that statement would be real reliable because I was still—I was still messed up on drugs when I wrote that six days after being incarcerated." When asked if he had signed the statement, Kent first responded, "Anybody could have signed that," but then admitted the signature was his. At the prosecutor's request, Kent read that statement to the jury:

> Billy Thurber called me up to help him move some stuff. When we got there it was motor homes. He had me moving TV [sic] out from the motor home. I grabbed about a dozen TVs out for him. He had this plan before I even got there. All the motor homes were broke into already before I got there. I only had to open the doors. The TVs were right thee [sic] next to the doors.

Before the prosecutor could ask another question, Kent added unsolicited commentary that could only be viewed as an intentional effort to aid Thurber's defense: "I burglared them. How did my blood get in there if the doors were—if the TV was sitting next to the door, my question is." Kent admitted that at the time he wrote the statement, he told Jagla the statement was the truth.

¶52 Jagla's and Carpenter's testimony also confirmed Kent's 2010 statements implicating Thurber in the burglaries at American. Jagla testified Kent told him on August 10, 2010, that Thurber had called Kent to ask for help in burglarizing American, picked Kent up in a pick-up truck to do so, burglarized the RVs with Kent, and paid Kent "between 100 and 150" for helping him. Jagla confirmed that the written statement to which Kent testified at trial was the statement Kent had provided him in August 2010. Jagla also testified he knew Kent "had worked with Mr. Thurber before, so, I mean, we have a relationship here with this kind of stuff."

¶53 Carpenter testified that after he and Tauber informed Kent that Thurber had implicated Kent in several Outagamie County burglaries, calling Kent the "mastermind," and said his own role, "according to Mr. Thurber, was just to assist with the heavy lifting and take possession of the property," Kent responded angrily that "it was the other way around, that in fact Mr. Thurber was the mastermind." Kent "wanted to give … his side of the story," and detailed his and Thurber's various roles in the string of burglaries, including the burglaries at American, to show that Thurber, not Kent, played the more significant role. Carpenter testified the Outagamie County burglaries had occurred "from mid June 2010 to mid July 2010." The burglaries at American, in neighboring Winnebago County, occurred on or around July 21, 2010. Carpenter told the jury about Kent showing him and Tauber the facilities he and Thurber burglarized together, and American was one of those sites. Carpenter testified that Kent explained how he and Thurber put the items they stole from the RVs at American in Thurber's brother's truck, which they had driven there.

¶54 While the jury heard Kent, Jagla, and Carpenter all testify Kent was angry with Thurber at the time Kent provided his statements implicating himself

and Thurber, between the statements Kent and Thurber made to law enforcement in 2010, there was never a suggestion they were not both involved in the string of burglaries in the area in the summer of 2010, just a dispute over who played the more significant role. In addition, the jury heard an apparent slip in Kent's efforts to protect Thurber when Thurber's counsel asked Kent: "Did you ever receive money from Mr. Thurber in exchange for helping him commit these burglaries?" Rather than providing a response one would expect if Kent had committed the burglaries alone—a response such as "Of course not, as I said, I committed the burglaries alone"—Kent instead responded, "No. *I don't think so*, no." (Emphasis added.) While Kent did profess at trial that he committed the burglaries at American alone, not with Thurber, the jury's conviction of Thurber indicates this attempt to deny Thurber's involvement was not credible.

¶55 Through the testimony of Curtis, the jury was also presented with a reasonable explanation for the inconsistencies between Kent's prior statements to law enforcement and his testimony at trial—"two specific threats." Kent told Curtis during a meeting at the prison just days before Thurber's trial that Thurber had threatened to "kill [Kent's] daughter when he got out if [Kent] testified" and Kent had been threatened "inside the prison from the Aryan Brotherhood that they don't like snitches." Even though Curtis testified the meeting took place just days earlier, when Kent was asked by the prosecutor: "Isn't it true that you told Investigator Curtis … that you've been threatened in prison that if you testify things are going to happen to you," Kent responded, "I don't recall that." When then asked, "Did you also indicate that the defendant has threatened your daughter, that when he gets out he said he's going to kill her," Kent again responded, "I don't recall that." After the prosecutor followed with "You don't recall that. You

might have said that?" and a few exchanges between the prosecutor and Kent, Kent then stated he was "positive" he did not say that.

¶56 In addition to the above evidence, the jury also heard directly from Thurber,[14] who admitted to having committed, and already being convicted of, "[e]ight counts of burglary and party to the crime of burglary in Outagamie." He confirmed that the Outagamie County burglaries involving Kent to which Carpenter testified were the same burglaries for which Thurber was incarcerated. Thurber nonetheless professed his innocence with regard to the burglaries at American for which he was on trial, which, again, occurred around the same time frame as the burglaries he committed with Kent in neighboring Outagamie County. Thurber further testified he had been convicted of twenty-three crimes, was a drug dealer, and "supplied" Kent with drugs. He admitted that when he spoke with Tauber about a week after the burglaries, he attempted to intimidate Tauber by telling Tauber he was part of the "Outlaws" and lied to Tauber about stolen property Tauber observed on Thurber's property. Thurber also testified to "beat[ing] a 21-year wrap for involuntar[y] manslaughter on a technicality."

¶57 Significantly, Thurber never attempts to reconcile Kent's undisputed commission of the burglaries at American with Thurber's suggestion that, instead, Lutzow committed them. Nor does he suggest that Lutzow was involved with Kent; and Kent professed at trial to having committed the burglaries alone, not with some person other than Thurber. At the postconviction hearing, Lutzow

[14] On appeal Thurber does not suggest he would not have testified at his trial if postconviction testimony related to Lutzow had been presented at trial.

testified he knew neither Kent nor Thurber, and no testimony at either the trial or postconviction hearing suggests to the contrary.

¶58 Blank testified at the postconviction hearing that Lutzow installed and was responsible for maintaining the security cameras. She stated Lutzow's pick-up truck was captured on a working security camera entering American by the main driveway around 1:30 a.m., and added, "[W]hy is he there at 1:00, 1:30 in the morning?" Even if the truck Blank observed on the video entering American was indeed Lutzow's truck, as the person most likely to have been aware of the capabilities of the security cameras, it is unlikely he would have allowed himself to be captured on video—by driving into the facility using the only route covered by a working camera—on the night of the burglaries, if in fact he had committed the burglaries himself. As mentioned, Blank provided no evidence that Lutzow committed the burglaries other than the alleged sighting of Lutzow's truck on the video. Moreover, she testified there were two other routes by which a vehicle could have entered the property on the night of the burglaries without being detected because the security cameras covering those areas were not working. Thus, while her testimony identifies Lutzow's truck as being at American, it also significantly undermines Thurber's attempt to accuse Lutzow, as she provided a ready explanation as to why Kent and Thurber were not captured on video.

¶59 Thurber has failed to convince us there is a reasonable probability he would not have been found guilty had Blank testified at his trial. Speculation arising from a sighting of a current worker at the scene at an unusual hour does not cast reasonable doubt on the overwhelming evidence of Kent's and Thurber's commission of the burglaries. The jury found Thurber guilty, and the

postconviction evidence does not dispute or undermine any of the evidence considered by the jury, or undermine our confidence in the verdict.[15]

Failure to Call Lutzow as a Witness

¶60 Thurber claims his trial counsel was ineffective for failing to call Lutzow as a witness at trial.[16] We reject this claim.

¶61 In his substantive testimony at the postconviction hearing, Lutzow stated that he did not know if he was at American on the night of the burglaries but he "could have been." He explained that if he was on the property that night, it would have been because he frequently did his work during the night as others would not be working on the computer at that time. He also explained why the

[15] The dissent writes that the security cameras monitoring the American property "[i]nexplicably" failed on the night of the burglaries. Dissent, ¶79. There is nothing inexplicable about the failure of the cameras. Blank testified at the postconviction hearing that the cameras were not working because of insufficient electrical power at American, a "power outage." The dissent further writes that "Blank could not explain why or how the security tapes from the night of the burglaries had been erased and would have testified that Lutzow was at American *at the time* of the burglaries." ***Id.*** (emphasis added). Blank was never asked at the postconviction hearing about erasure of any security tapes; but testified, more than once, that Jagla himself had the opportunity to review the video from the night of the burglaries. Furthermore, Blank never testified that she observed "Lutzow" at American "at the time of the burglaries." She testified that she observed Lutzow's truck on video entering American around 1:00 or 1:30 a.m. She did not testify, however, that she observed Lutzow as the driver of the truck, nor is there evidence confirming the burglaries occurred "at the time" Lutzow was presumably on the property. At bottom, however, the dissent comes up short in the same manner as Thurber—both suggest Lutzow committed these burglaries but completely fail to suggest how such a theory is consistent with the undisputed fact that Kent committed them. Furthermore, neither provides any indication there was any connection between Lutzow and Kent whatsoever; and even if Lutzow was involved in some unknown way, it in no way undermines Thurber's involvement in the burglaries.

[16] Our review of the record indicates Thurber failed to list Lutzow as a witness prior to trial, just as with Blank. Presumably then, absent a showing of good cause, even if Thurber had attempted to call Lutzow as a witness midtrial, as he attempted with Blank, the trial court also would have precluded Lutzow's testimony on the basis of failing to list him as a witness.

cameras he was installing to cover the RVs in the back of American were not working, testifying that a power shortage issue had caused problems with those cameras.[17] Thus, it is not surprising that on appeal the only statements by Lutzow that Thurber references from the two-day postconviction hearing are Lutzow's repeated statements from the first day of the hearing when he refused to testify without a grant of immunity and invoked his Fifth Amendment right against self-incrimination. As to the sixteen pages of substantive testimony Lutzow provided without incident two weeks later, Thurber makes no reference, except to state, "A great deal of quoting is not needed, but suffice it to say that Mr. Lutzow denied involvement" in the burglaries.[18]

¶62 Thurber's main, though underdeveloped, point regarding Lutzow appears to be that it would have been helpful to his case if Lutzow had been called by Thurber as a witness at trial and refused to testify in front of the jury in the same manner he did on the first day of the postconviction hearing. Thurber states that based in part upon "the incredible reluctance of Andrew Lutzow to testify at the first Postconviction Hearing, it is obvious that something more should be inferred to have been going on." His reliance upon Lutzow's initial refusal to testify, however, is completely dependent on hindsight and speculation, neither of which can serve as the basis for a successful ineffective assistance of counsel claim. *See* ***State v. Hunt***, 2014 WI 102, ¶39, 360 Wis. 2d 576, 851 N.W.2d 434 (quoting ***Strickland***, 466 U.S. at 689) ("In assessing counsel's performance, a

[17] While Thurber suggests Lutzow may have had something to do with the security cameras not working, he presented no evidence of tampering, and this theory fails to explain why Lutzow would have used the front entrance where he would have been captured on video.

[18] Thurber also makes no reference whatsoever to Lutzow's postconviction testimony in his reply brief.

court must make 'every effort … to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'"); ***State v. O'Brien***, 214 Wis. 2d 328, 349-50, 572 N.W.2d 870 (Ct. App. 1997) (holding speculation cannot be a basis for an ineffective assistance of trial counsel claim").

¶63 Thurber speculates that if Lutzow had been called to testify in front of the jury at his trial, he would have reacted in the same manner he did at the postconviction hearing two years later. We are unconvinced. The postconviction hearing transcript shows Lutzow was in the courtroom when Blank testified at that hearing. Through the questions asked by Thurber's postconviction counsel and Blank's testimony in response, it became clear counsel was attempting to show the court that Lutzow was responsible for the burglaries. Lutzow was called to testify immediately following Blank's testimony, at which time he invoked the Fifth Amendment and sought a grant of immunity in exchange for his testimony. At Thurber's jury trial, however, the trial court ordered witnesses sequestered. Thus, even if Blank and Lutzow had been called as witnesses at trial, Lutzow would not have heard similar questioning or testimony implicating him as a possible suspect. Thurber has identified no other evidence suggesting Lutzow would have had any reason to believe he was a potential suspect in the burglaries,[19] which belief appears to have been what prompted him to refuse to testify and invoke the Fifth Amendment at the postconviction hearing. Considering the significantly different circumstances that existed between the postconviction hearing and the trial, we have no basis for concluding, as Thurber would like us to do, that if Lutzow had

[19] Indeed, when Lutzow did testify on the second day of the postconviction hearing, he stated law enforcement had never spoken with him about the burglaries.

been called to the stand at Thurber's trial, he would have reacted in front of the jury in a manner similar to how he reacted when called to the stand on the first day of the postconviction hearing.[20]

¶64 Further, even if Lutzow would have reacted similarly if called to the stand at trial, Thurber has failed to suggest how his trial counsel might have known prior to Thurber's trial that Lutzow would react in such a manner, and we will not conclude counsel was deficient based upon hindsight. And, as the State points out, it is unlikely Lutzow's refusal to testify and request for immunity would have played out in front of the jury in the manner it did at the postconviction hearing, rather than being largely addressed outside the jury's presence. In fact, the postconviction court stated as much: "The Court would not have allowed that to be presented in front of the jury. It would have certainly had the jury excused and would have addressed those immunity/5th Amendment type issues outside of the presence of the jury." Lastly, as previously discussed, even if Lutzow had reacted in front of the jury in a manner which suggested he was somehow involved with the burglaries, there is no reasonable probability such reaction would have undermined the jury's finding that Thurber and Kent were also involved.

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[20] The dissent characterizes Lutzow's conduct on the first day of the postconviction hearing as a "*Perry Mason* moment." *See* Dissent, ¶78. His conduct, however, stemmed from the fact he was subpoenaed for the postconviction hearing four years after the burglaries; during that four years, he had never been approached by law enforcement with regard to the burglaries; yet he found himself sitting in the courtroom when Blank was being questioned about Lutzow having committed the burglaries, and he was then called to the stand to testify without having had an opportunity to consult with any legal counsel. Under these circumstances, it is not surprising Lutzow chose to act in that moment in the guarded manner he did as opposed to acting in the unguarded manner he did when he testified without reservation two weeks later.

¶65 Thurber has not made the case that trial counsel performed deficiently in failing to call Lutzow as a witness at his trial or that such failure prejudiced him.

Failure to Obtain and Use Surveillance Video, a Map and Photographs

¶66 Thurber also asserts trial counsel was ineffective for failing to obtain and use at trial the surveillance video covering American's main gate the night of the burglaries or a map and photographs of the facility. He contends video evidence showing Lutzow's truck entering the facility "at 1:00 a.m." would have been "powerful." He adds that "a map and photographs showing precisely which clearly visible cameras were not working would have been extremely helpful to show how outrageous it was for experienced thieves to rob a clearly secure area." We are unpersuaded.

¶67 To begin, as already explained, we do not believe there is a reasonable probability that raising a question at Thurber's trial as to Lutzow's potential involvement in the burglaries would have translated into less certainty by the jury as to Thurber's involvement, and thus Thurber would still have been found guilty. Ultimately, however, Thurber's video-map-photographs argument goes nowhere because Thurber did not present any video, maps or photographs as evidence at the postconviction hearing, and we are unable to otherwise locate any such evidence in the record. As a result, we are not, nor was the postconviction court, in a position to determine how "helpful" such potential evidence might have been at his trial. It was Thurber's burden to produce any video, map or photographs he wanted the postconviction court and us to consider, *see* ***Schaidler***

v. Mercy Med. Ctr. of Oshkosh, Inc., 209 Wis. 2d 457, 469, 563 N.W.2d 554 (Ct. App. 1997), and he has failed to satisfy that burden.[21] Instead, Thurber calls upon us to speculate regarding the value of such potential evidence; something we will not do. Again, speculation is insufficient to demonstrate prejudice.

¶68 Additionally, as to the video, Jagla testified he saw video of a Mercury and pick-up truck entering through the front gate of American the night of the burglaries, and he investigated the Mercury, concluding it was unconnected to the burglaries, but did not investigate the pick-up. He also testified Blank had told him of a black pick-up truck entering American by the main gate around 1:30 a.m. on the night of the burglaries and made the connection to the individual responsible for the security system, Lutzow. We are unconvinced presenting at trial a video merely showing what Jagla had effectively described for the jury would have made any significant impact.

¶69 As to a "map and photographs," Thurber suggests that if the jury had seen such evidence showing the location of the security cameras, it would have been less likely to believe "experienced thieves" such as he and Kent would have been so foolish as to "rob a clearly secure area." This argument falls flat because experienced-criminal Kent admitted to the jury that he was involved in the burglaries at American and that he already had been convicted for the crimes, so a map and photographs showing the locations of security cameras would have done

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[21] Indeed, during questioning by postconviction counsel at the postconviction hearing regarding where video cameras at the facility were located, Lutzow stated: "There was some on a building, some on a pole. Better if we like had a diagram to look at because obviously that would make things very clear, you know." Postconviction counsel responded: "I don't think we need to do that for purposes of this hearing.… Just in general there were some cameras that were either on structures or poles that were pointed to that back area. Is that right?"

nothing to raise doubt as to his culpability. As to Thurber, he testified at trial to his twenty-three prior criminal convictions—i.e., circumstances where he was caught and convicted of criminal acts—including the eight convictions for the burglaries he committed with Kent in Outagamie County around the same time as the burglaries at American. Thus, his criminal record attests precisely to his *lack of skill* in committing criminal acts undetected. The failure to use a map and photographs at trial made no difference.

¶70 Thurber has failed to demonstrate trial counsel was deficient in failing to use the video-map-photographs evidence of which he complains or that he was prejudiced by such failure.

Failure to "consult[] more with Thurber"

¶71 Lastly, Thurber argues his trial counsel was ineffective for not consulting more with him prior to trial. We disagree.

¶72 To begin, Thurber fails to adequately develop this argument or cite to any legal support for it, so we could properly reject it on those grounds alone. That said, after our own review of the record, we conclude the postconviction court did not err in rejecting Thurber's ineffective assistance of counsel claim related to this point.

¶73 Both Thurber and his trial counsel testified at the postconviction hearing. Counsel described Thurber as a client who was "very" communicative and involved in his own defense, "significantly more than other clients." She testified she "absolutely" updated Thurber on anything significant in the case, communicating with him through correspondence, in person, and "a couple of times also by video recording" in the "weeks and months leading up to the trial."

She added, "There was quite a bit of correspondence between the two of us" and she "thoroughly" responded to Thurber's letters. She stated Thurber never complained to her that she was not communicating enough with him.

¶74 Counsel testified she specifically recalled communicating with Thurber regarding information in the police reports, the "pros and cons of going to trial," "potential witnesses or potential theories of defense," "what the State or possibly the defense could or could not bring up at trial," possible penalties if Thurber were to be convicted of one or more burglaries, and plea negotiations with the State. She indicated that "from the beginning of the case [Thurber] seemed to want to try this." Counsel acknowledged, however, she never went to visit Thurber at Fox Lake Correctional Institution (Fox Lake) and would not have shown him any surveillance video while he was in jail because "the jails won't let you bring in video recordings like that."

¶75 Thurber testified his trial counsel's communication with him was inadequate. He stated he did not expect to be raised at trial his threats to Tauber related to the Outagamie County case, his prior manslaughter charge, or his affiliation with the "Outlaws," and if counsel had told him those issues would arise, he "[n]ever" would have testified. Thurber stated trial counsel never came to visit him at Fox Lake and only had one video conference with him, a week before trial, in which counsel "just" informed him who would be testifying for the State and discussed with him witnesses they should consider calling to the stand, including Blank, Lutzow and others.[22] He acknowledged that trial counsel would

[22] Before the start of the first day of trial, trial counsel indicated to the trial court, without contrary comment from Thurber or anyone else, that she had had a one hour and forty minute video conference with Thurber four days earlier.

meet with him "before various court appearances," but stated there were no other "face-to-face meetings." Thurber testified he has dyslexia and has difficulties with written communication, but he would communicate by having others write his letters for him.

¶76 The postconviction court found trial counsel more credible than Thurber and accepted her testimony that "there was a very active communication line" between her and Thurber. The court concluded there was adequate communication between Thurber and trial counsel.

¶77 On appeal, Thurber points out, as he testified at the postconviction hearing, that he is "dyslexic." That said, he did not present evidence that trial counsel was aware of this condition. Thurber also testified at the hearing that he accommodates this condition by utilizing others to assist with written communications. Thurber does not challenge the implicit finding by the postconviction court that despite his alleged dyslexia, he could adequately participate in written communications and that the written communications between him and trial counsel were sufficient. He essentially just asserts the postconviction court was wrong, but fails to develop an adequate argument to demonstrate that counsel's consultation with him was "outside the wide range of professionally competent assistance," *see* ***Strickland***, 466 U.S. at 690. As a result, Thurber has not overcome the strong presumption that he received adequate assistance and counsel acted reasonably within professional norms. *See* ***Johnson***, 153 Wis. 2d at 127.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

¶78 REILLY, P.J. (*dissenting*).

> [Lutzow:] Before I'm sworn in, I'd like to ask the prosecution that I be granted immunity in this case.
>
> [State:] I can't do anything of the sort.
>
> [The Court:] Well, I'll have you sworn in, sir.
>
> [Lutzow:] I'll exercise my 5th Amendment right then.
>
> [The Court:] Well, let me swear you in first and I'll give you that opportunity.
>
> [Lutzow:] I'm not going to. I won't—I won't testify in this case unless I'm granted immunity.
>
> [The Court:] We'll hold you in custody.
>
> [Lutzow:] Okay.

Andrew Lutzow's invocation of his privilege against self-incrimination is enough of a *Perry Mason* moment for me to respectfully dissent. But I also dissent as the trial court erred in precluding City of Menasha Police Detective David Jagla from testifying as to what Melissa Blank told him and erred in not allowing Blank to testify. I also dissent as William Thurber's trial counsel was prejudicially ineffective for failing to investigate and call Lutzow.

¶79 Lutzow was the security system contractor for American Mini Storage (American). Four security cameras monitored the American property. Inexplicably, the cameras monitoring the areas where the burglaries occurred all failed on the night of burglaries, while Lutzow was on the American property during the early morning hours. Blank could not explain why or how the security tapes from the night of the burglaries had been erased and would have testified that Lutzow was at American at the time of the burglaries.

Preclusion of Blank from Testifying at Trial

¶80 Thurber argues that the trial court erred by excluding Blank's testimony after Thurber failed to include Blank on his witness list. The majority takes an alternate view, finding that Thurber failed to satisfy his burden to show good cause for his failure to include Blank on the witness list and, thus, exclusion was the only statutory option. Majority, ¶38. I disagree as a court faced with a discovery violation has options other than witness exclusion (recess, continuance, or notice to the jury). *See* WIS. STAT. § 971.23(7m)(a)-(b). The right to present witnesses in one's own defense is a fundamental constitutional right, and "[t]he penalty for breach of disclosure should fit the nature of the proffered evidence and remove any harmful effect on the defendant." *See* ***Wold v. State***, 57 Wis. 2d 344, 351, 204 N.W.2d 482 (1973); ***State v. Denny***, 120 Wis.2d 614, 622, 357 N.W.2d 12 (Ct. App. 1984).

¶81 The majority's mechanistic application of the discovery rule is not the law. If a trial court concludes that a party has violated its statutory discovery obligation, the court "must then determine whether the [defendant] has shown good cause for the violation and, if not, whether the [State] was prejudiced by the evidence or testimony." ***State v. Harris***, 2008 WI 15, ¶15, 307 Wis. 2d 555, 745 N.W.2d 397. Accepting for purposes of argument that Thurber violated the discovery statute, the trial court is required to make a prejudice determination. ***Id.*** The court failed to do so in this case.

¶82 Thurber demonstrated good cause for the failure to include Blank on his witness list. Trial counsel testified that she believed that Jagla would testify in accord with his police report. When Jagla's testimony diverted from what was in his police report, including that he could not recall what Blank had told him, trial

counsel attempted to refresh his memory with his own report, but the State lodged a hearsay objection. The trial court erred as WIS. STAT. § 906.12 (writing used to refresh recollection), WIS. STAT. § 908.03(5) (recorded recollection), and WIS. STAT. § 908.03(8) (public records and reports) would all provide grounds for receipt of the evidence from Jagla's report.

¶83 The State never asserted that it would suffer any prejudice as a result of Blank's testimony. Blank was present and available at the courthouse, yet the trial court refused counsel's request to call Blank without finding prejudice to the State. Blank was known to the State through Jagla's investigation, and the information Blank would have testified to at trial regarding the video surveillance system was included in the discovery documents and the police report. In this case, Blank was not an undisclosed witness (she was disclosed by the State in its discovery documents), and no surprise or prejudice would have befallen the State had Blank's testimony been received. The court erred in its refusal to allow Blank to testify when the State made no assertion of prejudice and Blank's testimony was both probative and relevant.

Ineffective Assistance of Counsel

¶84 The majority concludes that trial counsel's performance was not deficient nor prejudicial. Majority, ¶¶60, 65, 70, 77. I disagree as Thurber's trial counsel admitted that she never saw the videotapes from the American security system and never spoke with Lutzow prior to trial.[1]

[1] Trial counsel testified that she believed that Lutzow was not easy to locate at the time, but she learned at the postconviction motion hearing that he was still doing contract work for American.

Deficient Performance

¶85 To provide "competent assistance," counsel has a duty "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." ***Strickland v. Washington***, 466 U.S. 668, 691 (1984); *see also* ***Pavel v. Hollins***, 261 F.3d 210, 221 (2d Cir. 2001) (faulting counsel for not interviewing "readily-available fact witnesses"); ***Maddox v. Lord***, 818 F.2d 1058, 1061-62 (2d Cir. 1987) (faulting counsel for failing to interview an available witness). While a trial strategy "chosen after full investigation is entitled to almost automatic approval by the courts, a strategy chosen after partial investigation must be scrutinized more closely in order to safeguard the rights of criminal defendants." ***Washington v. Strickland***, 693 F.2d 1243, 1255 (5th Cir. 1982), *rev'd on other grounds*, ***Strickland***, 466 U.S. at 700.

¶86 Thurber's counsel decided not to prepare a defense solely because she was confident that the State's case was weak and the State would fail to meet its burden. The failure to investigate a known suspect (Lutzow) and evidentiary proof of the same (security tapes) is constitutionally deficient performance. *See* ***Montgomery v. Petersen***, 846 F.2d 407, 412 (7th Cir. 1988) (nonstrategic decision not to investigate is inadequate performance); ***United States ex rel. Cosey v. Wolff***, 727 F.2d 656, 658 (7th Cir. 1984) (defense counsel's decision not to call witness because prosecution's case was so weak falls below the minimum standards of professional competence), *overruled on other grounds by* ***United States v. Payne***, 741 F.2d 887, 891 n.4 (7th Cir. 1984); ***Crisp v. Duckworth***, 743 F.2d 580, 584 (7th Cir. 1984) (counsel should not be allowed to shield his failure to investigate simply by raising claim of "trial strategy and tactics").

¶87 It is not a reasonable trial strategy to sit back and do nothing under the guise of "making the State prove its case." Trial counsel's failure to independently investigate Lutzow and the surveillance footage was "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690.

Prejudice

¶88 To satisfy the prejudice prong of ***Strickland***, Thurber must demonstrate that trial counsel's errors were sufficiently serious so as to deprive him a fair trial and a reliable outcome. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The majority argues that the jury had "overwhelming evidence that *Kent* was directly involved with the burglaries at American." Majority, ¶49 (emphasis added). That was not the case for Thurber. The State presented no physical evidence linking Thurber to the burglaries. Kent was an unreliable witness at best, considering he first denied both knowing Thurber and denied involvement in the robberies, then implicated Thurber, then recanted his statement at trial. Even Jagla questioned Kent's recanted version of Thurber's involvement, explaining, "I probably did have reservations about what he was telling me. It sounded awfully one-sided."

¶89 Lutzow should have been a suspect in these burglaries.[2] Blank testified at the postconviction motion hearing that she questioned why Lutzow was on video at American in the early morning hours: "Well, the first truck I saw pull

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[2] Lutzow's involvement as a suspect would be admissible under the standard set forth in ***State v. Denny***, 120 Wis. 2d 614, 622, 357 N.W.2d 12 (Ct. App. 1984). Lutzow could have committed the crime and he had the "motive, opportunity and direct connection" to do so. ***Id.*** at 625. Thurber's counsel had evidence of all three via the surveillance tapes, Blank's testimony, and Lutzow's invocation of his Fifth Amendment privilege.

in [to American] was [Lutzow's] truck and why is he there at 1:00, 1:30 in the morning? That was the question." Jagla also found Lutzow suspicious, and he testified that when he was unable to obtain videotape from American's security system "[t]hat actually made me suspect the guy that was repairing it as being one of the suspects in this." Yet, no one, not the State or trial counsel, investigated Lutzow's knowledge of or involvement in the burglaries. By not investigating Lutzow, trial counsel left Thurber's liberty interests to the unknown.

¶90 The majority speculates that Lutzow only invoked his Fifth Amendment privilege because he witnessed Blank's testimony at the postconviction motion hearing. Majority, ¶63. According to the majority, Lutzow may not have reacted the same way at trial, and, even if he did, "it is unlikely Lutzow's refusal to testify and request for immunity would have played out in front of the jury in the manner it did at the postconviction hearing." Majority, ¶64. I disagree, as the majority is engaging in the same "speculation" and "distort[ed] effects of hindsight" that it accused Thurber's arguments of perpetuating. Majority, ¶62. The jury would have at least heard that Lutzow had invoked his Fifth Amendment right, if not the entire interaction where Lutzow was threatened with custody. Regardless of how Lutzow's testimony would have unfolded had he been called to the stand at trial, the questions surrounding the missing security footage, the unexplained erasure of the tapes, the fact that Lutzow was at American during the time the burglaries were allegedly taking place, and the fact that he invoked his Fifth Amendment privilege would have been presented to the jury.

Conclusion

¶91 Looking at the big picture, I am forced to ask: Was Thurber's trial a game being played or was it a trial designed to search for the truth? Thurber is certainly no angel as evidenced by his current long-term incarceration for crimes apart from this case. I believe the justice system best defines itself by scrupulously adhering to high standards when the worst of the worst comes before it. We travel a slippery slope when we excuse mistakes by the judiciary, the State, and defense counsel because we "know" the defendant is a criminal.