COURT OF APPEALS DECISION DATED AND FILED

September 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 97-2104-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL L. PIASKOWSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: JAMES T. BAYORGEON, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

CANE, C.J. Michael L. Piaskowski appeals the judgment of conviction and postconviction order as a result of the November 1992 murder of Thomas Monfils. Following a joint trial, a jury convicted Piaskowski and five

other defendants[1] of first-degree intentional homicide, party to a crime, contrary to §§ 940.01(1) and 939.05, STATS. On appeal, Piaskowski argues that: (1) insufficiency of the evidence entitles him to a new trial; (2) newly discovered evidence entitles him to a new trial; (3) the trial court erred by admitting a codefendant's hearsay statement; (4) denial of his severance motion violated his right to a fair trial; (5) denial of cross-examination of a State witness violated his confrontation rights; and (6) the State failed to disclose exculpatory evidence. We reject these arguments. In addition, Piaskowski requests that we review a State investigator's sealed personnel records to determine whether they impeach the investigator's credibility. We have reviewed the personnel records and agree with the trial court that they contain no relevant evidence. Accordingly, we affirm the judgment and postconviction order.

1. Sufficiency of the Evidence

Piaskowski argues that he is entitled to a new trial because the evidence is insufficient to support his conviction. To support this argument, Piaskowski cites ***Frankovis v. State***, 94 Wis.2d 141, 148, 287 N.W.2d 791, 794 (1980), for the proposition that the test of sufficiency is whether the evidence is "strong enough to exclude to a moral certainty every reasonable hypothesis of innocence." Piaskowski predicates his entire argument on this standard. In ***State v. Poellinger***, 153 Wis.2d 493, 506-07, 451 N.W.2d 752, 757-58 (1990), however,

[1] Defendants Dale Basten, Michael Johnson, and Reynold Moore's appeals were consolidated and affirmed in February 1998. ***State v. Basten***, Nos. 97-0918-CR, 97-0919-CR, 97-1193-CR, unpublished slip op. (Wis. Ct. App. Feb. 17, 1998). We affirmed Michael Hirn's conviction in June 1998. ***State v. Hirn***, No. 97-3518-CR, unpublished slip op. (Wis. Ct. App. June 30, 1998).

our supreme court rejected the ***Frankovis*** standard.[2] Contrary to Piaskowski's assertion, ***Poellinger*** governs our review, which is the same whether the evidence is direct or circumstantial. ***Id***.

We may not reverse a conviction "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***Id***. at 507, 451 N.W.2d at 757-58. "If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, [we] may not overturn a verdict even if [we] believe that the trier of fact should not have found guilt based on the evidence before it." ***Id***. at 507, 451 N.W.2d at 758. We are bound to accept the jury's reasonable inferences unless the evidence on which the inferences are based is incredible as a matter of law. ***Id***. at 507, 451 N.W.2d at 757. We need only decide if the "theory of guilt accepted by the trier of fact is supported by sufficient evidence to sustain the verdict rendered." ***Id.*** at 508, 451 N.W.2d at 758.

The State presented evidence that on November 10, 1992, the police received an anonymous call reporting that Keith Kutska, an employee of the James River Corporation, intended to steal an expensive electrical cord from his employer. After Kutska finished his shift, he tried to leave the premises, but a security guard asked to inspect his bag. Because Kutska refused to open the bag,

[2] ***Poellinger*** provides that "[t]o the extent that prior decisions of this court have suggested that these hypothesis of innocence rule is in any way applicable in reviewing the sufficiency of the evidence to support a conviction, we disapprove of those decisions and take the opportunity presented in this case to clearly state that it is not." ***State v. Poellinger***, 153 Wis.2d 493, 506, 451 N.W.2d 752, 757 (1990) (footnote omitted). In short, the supreme court specifically disapproved of ***Frankovis v. State***, 94 Wis.2d 141, 287 N.W.2d 791 (1980). ***Poellinger***, 153 Wis.2d at 506 & n.6, 451 N.W.2d at 757, & n.6.

he received a five-day unpaid suspension. Kutska later obtained a tape of the call from police. On November 20, Kutska approached Piaskowski near the No. 7 coop[3] and told him about his suspension and tape of the telephone call. About 5:30 p.m., after Kutska's shift was over, he called Piaskowski at work and played the entire tape for him, and Piaskowski recognized the voice as Monfils'. Kutska implied that he had talked to the union and explained to Piaskowski that because Monfils did not identify himself on the tape, he needed two or three witnesses to identify Monfils before he could file union charges against him. Piaskowski was scheduled to work the next day, and he agreed to be a witness for Kutska when he played the tape for Monfils.

On November 21 at approximately 7 a.m., Kutska and Randy LePak entered the No. 7 coop; Piaskowski and Monfils were already in the coop. Kutska turned on a tape recorder, played the tape, and asked Piaskowski to "name this tune." Monfils admitted he had indeed made the call. Kutska left the coop, and Piaskowski and LePak remained. On his way out of the coop, Piaskowski said, "Geez, Tom, I just fuckin' don't believe you'd do that." Piaskowski admitted that he was upset and disgusted that Monfils had made the call to police. Kutska then went to the No. 9 coop and played the tape again for those who entered the coop. Later, at approximately 7:30 a.m., Monfils performed a turnover (a change in the paper roll) on his paper machine. At approximately 8 a.m., Monfils was reported missing. The State presented evidence that between 7:30 and 8 a.m., a group of employees, including Piaskowski and the five other defendants, confronted Monfils. A verbal confrontation became physical, and Monfils was beaten. A blow to the back of the head rendered Monfils unconscious. The following day,

[3] Located across from each paper machine is a control room or "coop."

Monfils' partially decomposed body was found in a pulp vat. A heavy weight was found tied around Monfils' neck.

Brian Kellner, a friend of Kutska's, testified that on July 4, 1994, while at the Fox Den Bar, Kutska described the November 21 confrontation with Monfils, himself, Basten, Moore, Johnson, Piaskowski and Hirn. Kutska told Kellner that he stood back and watched as the others shouted at Monfils and shook the tape in his face. Kutska described the events in terms of "what if" somebody had hit Monfils in the head with a wrench or a board.

James River employee David Wiener testified that on November 21 at approximately 7:40 a.m., he saw codefendants Dale Basten and Michael Johnson walking toward a vat connecting the No. 7 and No. 9 paper machines. They were walking hunched over, approximately six feet apart, and appeared to be carrying something. At approximately 7:45 a.m., Moore and Kutska entered the No. 7 coop. Shortly thereafter, Piaskowski entered the coop, and Kutska told Piaskowski to notify the foreman that Monfils was missing. According to Piaskowski, he informed the foreman that "some heavy shit" was "coming down" and recommended that the foreman "talk to Keith [Kutska] to find out what happened." Piaskowski testified that he called the foreman to "get Tom in trouble with the company."

A conspiracy requires a meeting of minds to accomplish a common purpose. ***O'Neil v. State***, 237 Wis. 391, 404-05, 296 N.W. 96, 102 (1941). The two elements of conspiracy are an agreement among two or more persons to accomplish a criminal objective and an individual intent to accomplish that objective. ***State v. Hecht***, 116 Wis.2d 605, 625, 342 N.W.2d 721, 732 (1984). Circumstantial evidence is sufficient to establish that an agreement exists. ***Id***. No

express agreement is required; rather, a "mere tacit understanding of a shared goal is sufficient." ***Id***. Further, while intent may be inferred from conduct, mere presence and ambivalent conduct at a crime scene are insufficient to support a conviction. ***Id***. at 627, 342 N.W.2d at 733.[4]

Although there is no evidence that Piaskowski directly killed Monfils by throwing him into the vat, the jury could reasonably infer that Piaskowski was part of the conspiracy to beat Monfils and cover up his death. The evidence establishes that Piaskowski was present at the confrontation and told the foreman that Monfils was missing and that "some heavy shit" was "coming down." There was also evidence that Piaskowski and the other defendants kicked and beat Monfils. From this evidence, it was reasonable for the jury to infer that Piaskowski played a larger role than that of a mere observer, that he took overt action to beat Monfils and cover up the murder when he reported Monfils as missing. The jury could reasonably infer that Piaskowski knew that Monfils was missing because he knew Monfils had been dumped into a vat.

A conspiracy continues "'while the conspirators continue to be active in taking measures to prevent the discovery of the crime or the identity of those connected with its perpetration.'" ***Gelosi v. State***, 215 Wis. 649, 656, 255 N.W. 893, 896 (1934) (quoted source omitted). Further, when murder is committed under circumstances in which the victim's body must be disposed of to avoid detection, the conspiracy continues while the conspirators dispose of the body. *See* ***id***. Piaskowski's role reasonably reflects a tacit agreement and intent to beat

[4] Piaskowski also argues that each member of the conspiracy must have an individual stake in the venture. An individual stake is not a third element of conspiracy; a lack of a stake in the venture does not absolve a party to a crime of liability. ***State v. Hecht***, 116 Wis.2d 605, 627, 342 N.W.2d 721, 733 (1984).

Monfils and cover up the murder by disposing of Monfils' body. Sufficient evidence supports the jury's verdict, and inferences from that evidence are not unreasonable as a matter of law.[5] We therefore must reject Piaskowski's request for a new trial based on insufficiency of the evidence.

2. Newly Discovered Evidence

Piaskowski next asserts that the following newly discovered evidence entitles him to a new trial: (1) Brian Kellner recanted his trial testimony; and (2) David Wiener "virtually admitted" his involvement in Monfils' death. He insists the trial court applied the wrong legal standard when it assessed credibility rather than deciding if the new evidence would create a reasonable doubt at a new trial. We disagree.

At trial, Kellner testified that Kutska had told him that Hirn, Moore, Basten, Johnson, Piaskowski, Kutska and another individual were present at the confrontation with Monfils outside the No. 7 coop. In contrast, at the postconviction motion, he recanted this testimony and testified that Kutska's identification to him was not of those present at the confrontation, but of those individuals present in the No. 9 coop when the tape was being played. Contrary to his trial testimony, Kellner testified post-trial that the entire conversation occurred in the context of "what if."

Kellner testified that he felt the police had badgered him and that he had not agreed with everything Sergeant Randy Winkler, the investigating officer,

[5] Because we conclude that sufficient evidence supports a conspiracy, we do not address whether the evidence is sufficient under ***Poellinger*** to prove that Piaskowski aided and abetted the murder.

had put in his statement. At the post-trial hearing, however, Kellner testified that he gave untruthful answers at trial because the police threatened him with the loss of his children and job. Additionally, Kellner testified that he had experienced difficulties at his job since the trial because he had testified against fellow union members. He further testified post-trial that Kutska and Piaskowski were very close friends of his, and he felt he had been forced to testify against them.

Two Wisconsin cases provide the proper standard for reviewing a defendant's motion for a new trial based on a witness's recantation. *See* ***State v. Terrance J.W***., 202 Wis.2d 496, 500, 550 N.W.2d 445, 447 (Ct. App. 1996); ***State v. McCallum***, 208 Wis.2d 463, 473, 561 N.W.2d 707, 710-11 (1997). A motion for a new trial based on a witness' recantation is entertained with great caution, and we submit the motion to the trial court's sound discretion. ***Terrance J.W***., 202 Wis.2d at 496, 500, 550 N.W.2d at 447. We will affirm the trial court's exercise of discretion if it has a reasonable basis and was made in accordance with accepted legal standards and the facts of the record. ***Id***.

To obtain a new trial based on newly discovered evidence, the moving party must establish, by clear and convincing evidence, that: (1) the evidence was discovered after trial; (2) the moving party was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; (4) the evidence is not merely cumulative to evidence introduced at trial; and (5) it is reasonably probable that a different result would be reached at a new trial. ***Id***. In addition, when the newly discovered evidence is a witness's recantation of trial testimony, other newly discovered evidence must sufficiently corroborate the recantation before the defendant is entitled to a new trial. ***Id.*** at 500, 550 N.W.2d at 447. In this case, the trial court found that the first three requirements were met. In addressing the fourth requirement, the trial court found Kellner's reasons for his

recantation cumulative to evidence the jury heard at trial. Regarding the fifth requirement, the trial court found that the recantation was not credible and, therefore, concluded that there was no reasonable probability of a different outcome at a new trial.

Piaskowski maintains that under ***McCallum***, the question under the fifth prong is whether *the jury* could find the recantation sufficiently credible to raise a reasonable doubt, not whether the trial judge personally believes the recantation is credible.[6] In ***McCallum***, however, the court explained that a trial court's finding that a recantation *is incredible* is sufficient to show that the recantation would not lead a jury to have a reasonable doubt about the defendant's guilt. ***Id.*** at 475, 561 N.W.2d at 711. By contrast, a trial court's finding that a recantation is *less credible* does not lead to the same conclusion. ***Id***. Under ***McCallum***, it is the trial court's role to determine whether the recanting witness is worthy of belief, whether a witness is within the realm of believability, and whether the recantation has any indicia of credibility persuasive to a reasonable juror if presented at a new trial. ***Id.*** at 487, 561 N.W.2d at 716. On review, this court will not upset a finding of credibility unless it is clearly erroneous. ***Id***. at 488, 561 N.W.2d at 716.

The trial court heard Kellner's trial and postconviction testimony and had the opportunity to observe his demeanor while testifying. In its decision and order, the trial court determined that the recantation was not credible.[7] The

[6] More precisely, the standard for the fifth requirement is whether there is a reasonable probability that a jury, considering both the trial testimony and the recantation, would have a reasonable doubt as to the defendant's guilt. ***State v. McCallum***, 208 Wis.2d 463, 474, 561 N.W.2d 707, 711 (1997).

[7] The trial court wrote, "This Court has a great deal of difficulty in accepting that the recantation is in fact credible …."

(continued)

trial court observed Kellner's testimony both at trial and at post-trial hearings and found Kellner's reasons for changing his testimony unworthy of belief; it found the testimony not credible. Contrary to Piaskowski's assertion, the trial court applied the proper test. While Piaskowski may disagree with ***McCallum***, it is binding authority upon this court, and we are bound to apply its holding. The trial court's incredibility finding is sufficient to show that Kellner's recantation would not lead a reasonable jury to have a reasonable doubt about Piaskowski's guilt. *See* ***id.*** at 475-76, 561 N.W.2d at 711.

Piaskowski next argues that he is entitled to a new trial because David Wiener "virtually admitted" his involvement in Monfils' murder. Specifically, he contends that Wiener admitted killing Monfils to three fellow prison inmates, Harrison Marcum, Edwin Wnek, and Michael Grunkowski. Wnek, Wiener's fellow inmate, testified to conversations he had with Wiener while they were both incarcerated at the Oshkosh Correctional Institution. According to Wnek, Wiener told him that he did not see anybody carry the body across the plant; this was contrary to Wiener's testimony at trial that he saw Basten and Johnson hunched over as if carrying something toward one of the vats. Wnek also testified that Wiener said, "What would they do to me if they really found out that I killed him?" He then stood up and added, "Boy, they'd really be surprised if they found out I'm the one that did it."

The trial court also observed that "even if such recantation were believable and a jury were to accept it as truthful, there is still no reasonable probability of a different result in the jury verdict." We wish to comment on the trial court's assertion that even "if the recantation was credible, there was still no reasonable probability of a different result." ***McCallum*** directly rejects that logic. ***Id.*** at 475-76, 561 N.W.2d at 711. Given that the trial court indeed found the recantation not credible and phrased its second reason in the "even if it was" context, this assertion, though it contradicts ***McCallum***, does not affect our review.

Grunkowski, another inmate at Oshkosh, testified that with "almost a sly, cocky demeanor, as if he had gotten away with something," Wiener told him that he wondered "what could happen to him now if they were to find out that he's the one who killed Tom Monfils." Another inmate, Marcum, likewise testified that Wiener said to him, "What do you think they would do to me now if they found out I killed him?" Piaskowski also notes that Cheryl Gawryleski claims that Wiener killed his brother, Tim, to prevent him from revealing Wiener's role in the murder.

In its postconviction decision and order, the trial court applied the five requirements set forth in ***McCallum*** and concluded that newly discovered evidence regarding Wiener did not warrant a new trial. While the trial court found the evidence met the first four requirements, it found that the fifth requirement was not met:

> Quite frankly, the testimony and affidavits submitted both in support of and in denial of defense's present contentions might be described as imaginative, resourceful, and innovative, but *in no event could the word "credible" be attached to them.* [E]vidence presented for that impeachment would interject a sideshow atmosphere that would have a tendency to, or indeed result in the creation of a full three-ring circus. (Emphasis added.)

Following the logic of ***McCallum***, if a trial court finds newly discovered impeachment evidence not credible, it likewise leads us to conclude that the impeachment evidence would not lead to a different result at a new trial. At postconviction motions, the trial court heard inmates Marcum, Wnek, and Grunkowksi and had the opportunity to observe their demeanors and hear them explain the context and circumstances in which these statements were made. In the trial court's opinion, these witnesses' testimony not only contained "gratuitous

information" having little probative value, but the witnesses perhaps harbored "suspect agendas." The trial court's findings regarding the credibility of Wnek, Marcum, and Grunkowski were not clearly erroneous.

Based on our review of the voluminous record, it does not appear that Gawryleski gave live testimony at the postconviction hearings. Nonetheless, the trial court did pass on the credibility of her affidavit. We will affirm the trial court's findings regarding Gawryleski's incredibility if the inference of incredibility may reasonably be drawn from her affidavit. *See* ***Eau Claire Press Co. v. Gordon***, 176 Wis.2d 154, 160-62, 499 N.W.2d 918, 920-21 (Ct. App. 1993).[8]

Gawryleski was living with Tim Wiener at the time David Wiener killed Tim. In her affidavit, she states that she overheard a telephone conversation during which Tim told David that "he was going to narc on him." She further states that she has always believed Tim was referring to David's involvement in the Monfils case and that in her opinion, "that is the reason or part of the reason that David shot him." Significantly, however, Gawryleski never heard Tim tell David that he would "narc" on him specifically for David's alleged role in the Monfils' murder, yet she offers the opinion that this furnished part of the motive

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[8] Although there is some dispute whether we should defer to the trial court's findings relative to the affidavits, it is our opinion that the better rule is to defer to the reasonable inferences the trial court drew from these two affidavits. *See* Honorable Thomas Cane & Kevin M. Long, *Shifting the Main Event: The Documentary Evidence Exception Improperly Converts the Appellate Courts Into Fact-Finding Tribunals*, 77 MARQ. L. REV. 475, 488 (Spring 1994). This court is in no better position than the trial court to pass on the credibility of this documentary evidence. *See generally* ***id***. The trial court heard all the testimony in this 28-day trial and was in a superior position to draw reasonable inferences from these affidavits than this court. In our opinion, the documentary evidence exception to the clearly erroneous rule "turns appellate courts into fact-finding tribunals, wastes judicial resources, and lengthens the already arduous road to judicial finality." *See* ***id***. at 475-76.

for Tim's murder. In contrast, she offers pure speculation that the potential "narc" dealt with Monfils' murder. For these reasons, the trial court could reasonably find her proposed testimony not only incredible, but also irrelevant. Thus, there is no reasonable probability that the introduction of such information at a new trial could lead a jury to have a reasonable doubt as to Piaskowski's guilt. Accordingly, we affirm the trial court's denial of a new trial based upon newly discovered evidence about Wiener.

3. Admission of Codefendant's Hearsay Statement

Piaskowski claims Kellner's trial testimony regarding his conversation with Kutska at the Fox Den Bar was inadmissible hearsay. Kellner testified that sometime between 8 and 10 p.m., Kutska began discussing the events of November 21, 1992, the day of Monfils's murder. Kellner further testified that Kutska described the playing of the tape in the No. 9 coop, including the names of the people present at that time. The jury heard the following testimony:

> Q. Can you tell the jury who Mr. Kutska told you were present in the No. 9 coop after the tape had initially been played to Mr. Monfils?
>
> A. Yes, sir. There was Rey Moore, he was the last man in. There was Mike Johnson, Dale Basten, Keith, John Mineau, Mike Hirn.
>
> Q. Did he indicate anyone else?
>
> A. Yes, sir. He said there was two others, but I don't remember who they are.
>
> Q. What did he say occurred?
>
> A. He said that they played the tape. I don't know if the guys in the coop were getting wound up about it and that they wanted to go confront Tom [Monfils] about it.
>
> ….
>
> Q. Do you recall Mr. Kutska telling you that Mike Piaskowski was in the coop at that time?
>
> A. Yes, sir.

> ….
>
> Q. So the people in the coop just after the playing of the tape or prior to their leaving the coop, the No. 9 coop, who were they?
>
> A. Dale Basten, Mike Hirn, Rey Moore, Keith, John Mineau and Mike Piaskowski.
>
> Q. And that's what Mr. Kutska told you on that occasion?
>
> A. Yes, sir.

Kellner also testified that Kutska directed himself, Kellner's wife, and Kutska's wife in a role-play of the confrontation and explained events in the context of "what if" situations. Kellner testified as follows:

> Q. What did [Kutska] say happened?
>
> A. He said that during this confrontation that somebody had come up and given Tom [Monfils] a slap upside the back of his head.
>
> ….
>
> Q. Did Mr. Kutska ever indicate that Tom [Monfils] had been struck in any other manner at that time?
>
> A. He did. That what if somebody had used a wrench or board or something from that area ….

The trial court rejected the plaintiffs' motion to suppress the testimony as hearsay and found the statements admissible as statements against interest. For that reason, it included an accomplice instruction in its preliminary instructions to the jury at the start of the trial. However, no cautionary or limiting instruction regarding the jury's use of Kellner's testimony against any or all defendants was either requested or given directly before or after Kellner testified. Counsel for all defendants cross-examined Kellner regarding his recollection of the events, his state of intoxication, and the specifics of what Kutska said. Kutska testified in his own defense, and counsel likewise examined him at length regarding his statement to Kellner and the events of November 21. Kutska denied

ever having a conversation with Kellner at the Fox Den describing a confrontation or being involved in any role-playing.

Under § 808.01(3), STATS., hearsay is an out of court statement offered to prove the truth of the matter asserted. To be admitted, hearsay must satisfy one of the exceptions to the hearsay rule. Section 908.02, STATS. Generally, a decision on the admission of hearsay evidence is a matter within the trial court's sound discretion. ***State v. Stevens,*** 171 Wis.2d 106, 111, 490 N.W.2d 753, 756 (Ct. App. 1992). We will not reverse unless there has been a misuse of discretion or the trial court based its decision on an erroneous view of the law. ***Id***. Whether a statement is admissible under a hearsay exception, however, is a question of law we review de novo. ***Id.*** at 112, 490 N.W.2d at 756.

We now turn to whether Kutska's statement was admissible under § 908.045(4), STATS., as an exception to § 908.02, STATS., the hearsay rule. Under this section, an out-of-court statement is admissible if the declarant is unavailable and the statement is against the declarant's penal, societal, or pecuniary interest. ***State v. Buelow***, 122 Wis.2d 465, 474-76, 363 N.W.2d 255, 260-62 (Ct. App. 1984). The rationale for admission of statements against interest is that they possess circumstantial guarantees of trustworthiness based on the assumption that people do not falsely make damaging statements about themselves unless true. *See* ***Id.*** at 477, 363 N.W.2d at 262 (citing Advisory Committee Notes on Proposed Rules, 28 U.S.C. Rule 804(b)(3) (1982)), *rev'd on other grounds,* ***Buelow v. Dickey***, 847 F.2d 420 (8th Cir. 1988).[9]

[9] Wisconsin's statement against interest exception is essentially the same as FED. R. EVID. 804(b)(3).

The trial court found Kutska unavailable because he was a named defendant in a criminal trial, and the State could not compel him to testify. Relying on ***State v. McConnohie***, 121 Wis.2d 57, 75-76, 358 N.W.2d 256, 265-66 (1984), Piaskowski argues that the declarant is not deemed unavailable unless he is called to the stand and actually invokes his Fifth Amendment privilege.[10] We disagree.

McConnohie was charged, along with codefendant LaFrance, with party to the crime of armed robbery. LaFrance pled no contest to the charge one day before McConnohie's trial. McConnohie testified in his own defense and sought to introduce evidence that he heard LaFrance say that LaFrance and an individual named Serio committed the armed robbery. ***Id***. at 61, 358 N.W.2d at 258. The court explained that at the time McConnohie attempted to testify to LaFrance's statement, § 908.045(4), STATS., was not applicable because there had been "no showing by the defendant of LaFrance's unavailability at the time the defendant testified. Although LaFrance possessed a fifth amendment privilege, it was not known that he would invoke that privilege until he was actually called." ***McConnohie***, 121 Wis.2d at 75-76, 358 N.W.2d at 265-66.

The declarant, LaFrance, was in a substantially different situation from Kutska. LaFrance, no longer a defendant, had entered a no contest plea and was awaiting sentencing at the time of McConnohie's trial. *See* ***id***. at 61-62, 358 N.W.2d at 259. Importantly, because LaFrance no longer remained a codefendant, he could be called as a witness to determine whether he would claim the Fifth

[10] The Fifth Amendment to the United States Constitution provides that "No person ... shall be compelled in any criminal case to be a witness against himself …." The same protection is provided under the Wisconsin Constitution by art. I, § 8, which provides, "No person ... may be compelled in any criminal case to be a witness against himself …."

Amendment privilege and therefore be unavailable. In sharp contrast to ***McConnohie***, Kutska had entered a not guilty plea and was in the midst of a jury trial on the charge at the time the statement was offered. It is elementary that under no circumstances could the State call Kutska as a witness to determine whether he would assert the Fifth Amendment privilege without incurring a mistrial. *See* U.S. CONST., AMEND. V. Therefore, he was unavailable.

Given that Kutska was unavailable, we next address whether Kutska's statement meets the criteria for a statement against interest under § 908.045(4), STATS. The statute provides in part:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> ….
>
> **(4)** STATEMENT AGAINST INTEREST. A statement which ... at the time of its making … so far tended to subject the declarant to civil or criminal liability ... or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true.

A statement against interest need not amount to a confession, but it must *tend* to subject the declarant to criminal liability. ***Ryan v. State,*** 95 Wis.2d 83, 97, 289 N.W.2d 349, 355 (Ct. App. 1980), *overruled on other grounds by* ***State v. Anderson***, 141 Wis.2d 653, 416 N.W.2d 276 (1987). Piaskowski contends that Kutska's July 4, 1994, conversation with Kellner can be distilled to an exculpatory statement, stating that "he merely watched what other people did during the

confrontation." We disagree and conclude that because the statement was against Kutska's penal and societal interests, it was admissible.[11]

Whether a statement is against penal interest is determined under the circumstances existing at the time the statement was made. ***United States v. Hamilton***, 19 F.3d 350, 357 (7th Cir. 1994) (citing Advisory Committee Note to Rule 804(b)(3)). The record reveals that approximately two years had passed from the date of Monfils' murder to the time Kutska made the statements to Kellner. Although police had questioned Kutska on numerous occasions, they had made no arrests in the case and the investigation was still pending. Additionally, James River had discharged Kutska from his job, and Monfils' widow and children had named Kutska as a party in a civil wrongful death action. Under the circumstances existing at the time Kutska made his statement to Kellner, the content and nature of the conversation were of the kind that would tend to subject Kutska to criminal charges, at least for party to the crime of battery, if not homicide. Although Kutska may have subjectively believed he was exculpating himself by stating he was not actively involved in the confrontation, a reasonable person would not untruthfully assert his involvement in a verbal and physical confrontation with a man who was murdered minutes later.

We alternatively address whether the statements were against Kutska’s societal interests. Two requirements must be satisfied to admit a statement against societal interests: (1) the declarant must objectively face the risk of hatred, ridicule, or disgrace; and (2) the declarant must subjectively

[11] Because we conclude that the statements are admissible under § 908.045(4), we need not address the State's argument that the statements are admissible as prior inconsistent statements. *See* ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983).

appreciate the statement's propensity to subject him to such disgrace. ***Stevens***, 171 Wis.2d at 113-14, 490 N.W.2d at 757. We evaluate the statement from the standpoint of whether Kutska actually faced a risk of hatred, ridicule, or disgrace. "[T]he real issue is the extent of the declarant's personal connection to the activity reported in his or her declaration," as the declarant must have a personal interest in keeping the statement secret. ***Id.*** at 118, 490 N.W.2d at 759.

We have no difficulty concluding that Kutska's statement, in which he admitted his role in inciting a confrontation with Monfils and his presence at the confrontation, establishes a close personal connection to the events immediately before Monfils' murder. This is the type of statement that would objectively inspire hatred, ridicule, or disgrace if it became known in the larger community. Kutska couched his comments in terms of "what if" certain things had occurred, and this demonstrates that he appreciated the risk of social disapproval. Accordingly, we conclude that Kutska's statement was admissible under § 908.045(4), STATS., as a statement against both his penal and societal interests.

4. Severance

Piaskowski claims the trial court erred when it refused to sever his trial from Kutska's. He contends that because the State introduced an entire line of evidence against Kutska that did not apply to him, the plain language of § 971.12(3), STATS., mandates severance. Additionally, Piaskowski argues that Kutska's hearsay statements were inadmissible against Piaskowski, and that to the extent that Kutska's statements exculpated him by pointing the finger at others, they were inadmissible because they were not statements against Kutska's penal or

societal interests. Finally, he argues that the trial court compounded its error by failing to give a limiting instruction. We affirm the court's denial of severance.

A trial court may try defendants together when they are charged with the same offense arising out of the same transaction and provable by the same evidence. ***State v. Brown***, 114 Wis.2d 554, 559, 338 N.W.2d 857, 860 (Ct. App. 1983). The decision whether to grant or deny a motion for severance is within the trial court's discretion, and we will not disturb its decision unless there has been a misuse of discretion. ***Id.*** Whether there has been a misuse of discretion is determined based on the facts of each case. ***Jung v. State***, 32 Wis.2d 541, 545-46, 145 N.W.2d 684, 686 (1966). We will affirm the trial court if there is a reasonable basis for its decision. ***State v. Nelson***, 146 Wis.2d 442, 456, 432 N.W.2d 115, 121 (Ct. App. 1988).

If it appears that a defendant is prejudiced by the joinder of his trial with other defendants, the court may grant a severance of defendants or provide whatever other relief justice requires. Section 971.12(3), STATS. If it appears during the course of trial that "an entire line of evidence" is produced that is only admissible as to one defendant and is unduly prejudicial to other defendants, then the trial court may order a severance at that time, or the court may elect to give the jury a cautionary instruction to the effect that "evidence against one may not be treated as evidence against all, simply because they are being tried together." ***State v. Jennaro***, 76 Wis.2d 499, 505, 251 N.W.2d 800, 803 (1977) (quoting ***State v. DiMaggio***, 49 Wis.2d 565, 577, 182 N.W.2d 466, 473 (1971)). Further, when evidence is admissible against all defendants, there is no prejudice because the evidence could be introduced at separate trials. ***Id.***

Here, the trial court determined that because all defendants were charged with the same offense, as party to a crime, involving the same victim, the elements of the offense were provable by the same evidence, and it further concluded that the bulk of the evidence would have been presented against each defendant if tried separately. It recognized that some evidence would not apply to certain defendants and cautioned the jury as follows:

> Some evidence has been received in this trial which relates to one or more of the defendants, without having any reference to the remaining defendants. In considering and evaluating such evidence, you should exercise the utmost care and discretion. *Such evidence may be used only in considering whether the individual or individuals with whom it is concerned are guilty or not guilty. Such evidence must not be used or considered in any way against any of the other defendants who are not implicated by such evidence, either directly or by inference, except insofar as you may consider that evidence in connection with the instructions which have been given you regarding a conspiracy.* (Emphasis added.)

This instruction guarded against the risk that jurors would apply all evidence in a blanket fashion against all defendants. ***State v. Lukensmeyer***, 140 Wis.2d 92, 110, 409 N.W.2d 395, 403 (Ct. App. 1987) (we presume jurors follow such admonitory instructions).

We next address whether Kutska's hearsay statement mandates severance because it was admissible at trial only against Kutska. Under § 971.12(3), STATS., if the State intends to use the statement of a codefendant that implicates another defendant in the crime charged, the judge shall grant a severance as to any such defendant. ***Id.*** The purpose of § 971.12(3) is to provide a mechanism to ensuring compliance with ***Bruton v. United States***, 391 U.S. 123 (1968), which prevents the use of a codefendant’s statement inculpating another

defendant at a joint trial based on the codefendant's Sixth Amendment right to confront witnesses. ***Pohl v. State***, 96 Wis.2d 290, 301, 291 N.W.2d 554, 559 (1980). We conclude that the trial court did not misuse its discretion.

Kutska's statement was self-inculpatory and directly admissible against all of his codefendants under a firmly-rooted hearsay exception. S*ee* ***Williamson v. United States***, 512 U.S. 594, 601 (1994). The statement was made by a declarant-defendant in a social setting to a friend. In Kutska's conversation with Kellner, he did not engage in "finger-pointing" or specifically blame another person. He described the events of the confrontation in "what if" terms, saying, "what if somebody had used a wrench or board or something from that area" to strike Monfils. Rather than making specific incriminating and inculpatory statement about his codefendants, he emphasized to Kellner that he knew who had hit Monfils but would not say who had done it.

The ***Williamson*** Court's comments are instructive:

> For instance, a declarant's squarely self-inculpatory confession … will likely be admissible under Rule 804(b)(3) against accomplices of his who are being tried under a co-conspirator liability theory. Likewise, by showing that the declarant knew something, a self-inculpatory statement can in some situations help the jury infer that his confederates knew it as well. And when seen with other evidence, an accomplice's self-inculpatory statement can inculpate the defendant directly: "I was robbing the bank on Friday morning," coupled with someone's testimony that the declarant and the defendant drove off together Friday morning, is evidence that the defendant also participated in the robbery.
>
> Moreover, whether a statement is self-inculpatory or not can only be determined by viewing it in context. ... The question under Rule 804(b)(3) is always whether the statement was sufficiently against the declarant's penal interest "that a reasonable person in the declarant's position would not have made the statement unless believing it to be

> true," and this question can only be answered in light of all the surrounding circumstances.

Id. at 603-04 (citation omitted).

Kutska's description of the events establishes his involvement in a confrontation with Monfils close to the time of Monfils' murder. Each part of Kutska's statement to Kellner was self-inculpatory in nature and not an attempt to deflect Kutska's blameworthiness to others. Any of his statements tending to establish the presence or actions of any other persons are sufficiently closely connected to the inculpatory statements and satisfy the requirement of trustworthiness. Because Kutska's statement consisted of self-inculpatory statements, it was properly admissible as evidence, not only against Kutska, but also against Piaskowski. The trial court had a proper basis for denying severance and gave an appropriate cautionary instruction; consequently, there was no misuse of discretion and we therefore affirm.[12]

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[12] In support of his argument, Piaskowski cites ***Cranmore v. State***, 85 Wis.2d 722, 739-40, 744, 271 N.W.2d 402 (Ct. App. 1978) for the proposition that defendant's out-of-court statement is inadmissible against a codefendant. We reject this argument. In ***Cranmore***, the court recognized that ***Bruton v. United States***, 391 U.S. 123 (1968), stands for the proposition that "the admission into evidence of a statement by one defendant, implicating a codefendant in that trial, where the declarant exercised his fifth amendment privilege not to testify was constitutionally impermissible." ***Id***. at 744-45, 271 N.W.2d at 414. In other words, the court concluded that the confrontation clause was violated because the codefendant exercised his Fifth Amendment right; moreover, it noted that a cautionary instruction could not cure the violation. ***Id***. Unlike in ***Bruton***, here Kutska did not exercise his Fifth Amendment privilege; rather, he took the stand and was cross-examined.

In addition, even if the trial court committed error by denying the motion to sever, any error under § 971.12(3), STATS., and ***Bruton*** was consequently rendered harmless by Kutska's eventually testifying in his own defense and his codefendants' opportunity to cross-examine him concerning his alleged statements to Kellner naming them as participants in the confrontation with Monfils. *See* ***State v. King***, 205 Wis.2d 81, 94-95, 555 N.W.2d 189, 194-95 (Ct. App. 1996).

5. Confrontation Clause Violation

Piaskowski next claims that the trial court improperly denied his request to cross-examine David Wiener regarding his alleged "deal" with the State and Wiener's resulting bias. At the time of trial, Wiener was serving a sentence for an unrelated homicide conviction. After hearing arguments outside the jury's presence, the court set parameters regarding cross-examination of the alleged deal. First, counsel could ask whether Wiener had a "deal" with the State, and, if so, counsel could "inquire into it." If there was no deal, then counsel could ask if Wiener expected to receive a deal. Second, the trial court concluded that the length of his sentence and nature of his crime were irrelevant and collateral. Significantly, in response to the State's questions, Wiener testified on both direct and cross-examination that the State made him no promises in exchange for his testimony. When Basten's counsel asked if Wiener had directed his attorney to continue negotiations on his behalf, the trial court sustained the State's relevancy objection.

The scope of cross-examination for impeachment purposes is within the trial court's sound discretion, ***Rogers v. State***, 93 Wis.2d 682, 689, 287 N.W.2d 774, 777 (1980), and we will affirm if there is a reasonable basis for the trial court's determination. ***State v. McCall***, 202 Wis.2d 29, 35, 549 N.W.2d 418, 421(1996). When a witness believes that the State may benefit him if he shades his testimony, the defendant has a constitutional right to explore potential bias. ***Lindh v. Murphy***, 124 F.3d 899, 901 (7th Cir. 1997). However, a defendant's constitutional right to confrontation does not include the right to present irrelevant, immaterial, or prejudicial evidence. *See* ***McCall***, 202 Wis.2d at 44, 549 N.W.2d at 424. Courts should permit inquiry into crimes unrelated to its case when the State and the witness made a deal in exchange for the witness's testimony in the case

then before the court. *See **id***. at 42, 549 N.W.2d at 423 (no misuse of discretion when the trial court concluded that "further inquiry into the existence of an alleged, though unproven agreement, would be wholly distracting and speculative"). In this case, Wiener's testimony that he had made no deal with the State provides a reasonable basis for the trial court's decision. The trial court properly prohibited further inquiry into this alleged, but unproven agreement. *See **id***. There was no violation of Piaskowski's right to confrontation.

6. Exculpatory Evidence

Piaskowski argues the State failed to disclose it had information that a previous statement of Kellner's contained inaccuracies. About six weeks before trial, Kellner spoke to Piaskowski's investigator and told him that he had misgivings about the statement he had previously given to police. As a result, Kellner gave a new statement in which he indicated that all of Kutska's statements began with "what if" or "this is what the police think." The State contends that it obtained a copy of the new statement and disseminated it to all defendants. Then, about a week before trial, Kellner met with the State to discuss the differences between the two statements. The State’s failure to disclose the contents of this discussion form the basis of Piaskowski’s objection.

Due process requires disclosure of evidence that is both favorable to the accused and material either to guilt or punishment. ***State v. Ray***, 166 Wis.2d 855, 870, 481 N.W.2d 288, 294 (Ct. App. 1992) (citing ***State v. Garrity***, 161 Wis.2d 842, 848, 469 N.W.2d 219, 221 (Ct. App. 1991)). Evidence is material only "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." ***Id***. A reasonable probability is one "sufficient to undermine confidence in the outcome."

Id. While we agree that the new statement is favorable to Piaskowski, we conclude that it was not material.

Under the ***Brady*** materiality test, there is no reasonable probability that had the State given the information to Piaskowski, a different result would have occurred. Kellner still would have been subject to impeachment based on his several statements and the ultimate determination of believability would still have remained in the hands of the jury, which evaluates the versions and decides which, if either, to believe. The inconsistencies in Kellner's second statement are not sufficient to undermine our confidence that the outcome would change. We recognize that disclosure of Kellner's misgivings would have been helpful to Piaskowski; however, the State is not under a constitutional obligation to provide Piaskowski with discovery of helpful, but nonexculpatory evidence. *See* ***State v. Denny***, 120 Wis.2d 614, 628, 357 N.W.2d 12, 19 (Ct. App. 1984).

7. Randy Winkler's Personnel Records

Finally, Piaskowski asks this court to review Randy Winkler's sealed personnel records to determine whether they impeach his credibility. The trial court conducted an in-camera review and determined that the records were irrelevant to Winkler's credibility.[13] In denying to turn the file over to the defense, the trial court noted that the file did not demonstrate any complaints or concerns about Winkler's investigation of the Monfils murder, but instead concerns

[13] In his reply brief, Piaskowski argues for the first time that he has constitutional right to exculpatory evidence (here the personnel records) in the State's possession, citing ***Kyles v. Whitley***, 514 U.S. 419, 433-34 (1995), and ***Giglio v. United States***, 405 U.S. 150, 154 (1972). A party cannot raise an argument for the first time in a reply brief, so we decline to consider this argument. *See* ***Hogan v. Musolf***, 157 Wis.2d 362, 381 n.16, 459 N.W.2d 865, 873 n.16 (Ct. App. 1990), *rev'd on other grounds*, 163 Wis.2d 1, 471 N.W.2d 216 (1991).

unrelated personnel matters. Further, the trial court found that Winkler's credibility was repeatedly attacked during trial. Under ***State v. O'Brien***, 214 Wis.2d 327, 340, 572 N.W.2d 870, 876-77 (Ct. App. 1997), the party filing the postconviction request must convince the trial court, among other things, that the anticipated results of the postconviction discovery are relevant. ***Id.*** We review the trial court's relevancy finding for a misuse of discretion. ***Id.*** at 341, 572 N.W.2d at 877-78. As appellant counsel requested in his brief, we have reviewed Winkler's entire personnel file. After reviewing the file, we agree with the trial court's conclusion that its contents are irrelevant. Accordingly, we affirm the trial court's denial of Piaskowski's request for postconviction discovery.

By the Court.— Judgment and order affirmed.

Not recommended for publication in the official reports.