COURT OF APPEALS
DECISION
DATED AND FILED

September 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2962-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KEITH M. KUTSKA,

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. Keith Kutska appeals his judgment of conviction and postconviction order. Kutska and five other defendants[1] were tried jointly for the November 21, 1992, murder of Thomas Monfils. A jury convicted Kutska and the other defendants of first-degree intentional homicide, party to a crime, contrary to §§ 940.01(1) and 939.05, STATS.

On appeal, Kutska makes thirteen arguments: (1) insufficiency of the evidence entitles him to a new trial; (2) the trial court erroneously refused to grant his request for severance; (3) "the prosecution exceeded the limits of proper arguments at trial," denying his right to a fair trial; (4) the trial court's admission of Monfils' November 17 phone call to police was error; (5) he is entitled to a new trial based on newly discovered evidence; (6) the prosecution failed to provide exculpatory evidence; (7) the trial court's refusal to allow discovery of police investigative and personnel files was error; (8) the trial court failed to properly instruct the jury on the limited purpose of "other act" and character evidence; (9) exclusion of certain evidence unfairly restricted his right to present his defense; (10) the prosecution's theory of the case violated his right to a unanimous verdict; (11) perjured testimony tainted his trial; (12) he received ineffective assistance of counsel; and (13) our court should reverse for plain error and exercise its powers of discretionary reversal. For the reasons discussed below, we reject these arguments and affirm the judgment and postconviction order.

[1] All six defendants have appealed. Dale Basten, Reynold Moore, and Michael Johnson'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 ***State v. Basten***, Nos. 97-0918-CR, 97-0919-CR, 97-1193-CR, unpublished slip op.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 ***State v. Hirn***, No. 97-3518-CR, unpublished slip op.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). Michael Piaskowski's decision, No. 97-2104-CR, is released simultaneously with this appeal.

ANALYSIS

1. Sufficiency of the Evidence[2]

Kutska argues that he is entitled to a new trial because the evidence is insufficient to support a conviction. While Kutska does not dispute that the State proved Monfils was the victim of a brutal murder, he argues that the evidence against him is insufficient to establish beyond a reasonable doubt that he was guilty as a party to the crime of first-degree intentional homicide. Specifically, he alleges that there was "no evidence" that he committed the crime, aided or abetted the crime, or conspired to commit the crime.

State v. Poellinger, 153 Wis.2d 493, 500, 451 N.W.2d 752, 755 (1990), governs our review, which is the same whether the evidence is direct or circumstantial. We may not reverse a conviction "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***Id***. at 501, 451 N.W.2d at 755. We do not substitute our judgment for the jury's. ***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. Here, it is the State's burden to prove beyond a reasonable doubt

[2] Given this opinion's length, we have set forth the facts in this section.

that the defendants committed the offense by either directly committing the crime, intentionally aiding and abetting the commission of the crime, or being a party to a conspiracy to commit the crime. Section 939.05(2), STATS.

The State presented evidence that on November 10, 1992, the Green Bay Police Department police received an anonymous tip that Keith Kutska intended to steal an expensive electrical cord from his employer, the James River Corporation, a paper manufacturer. At the end of Kutska's shift, a security guard stopped him and asked to search his bag. Kutska hurriedly left the premises before the guard could check his bag and, as a result, he received a five-day suspension without pay. Kutska obtained a tape of the anonymous tip and determined that the caller was Monfils.

On November 21, 1992, Kutska arrived at work and played the tape for various co-workers. Kutska, Michael Piaskowski, and Randy LePak went to the No. 7 coop[3] and played the tape for Monfils, at which time Monfils admitted he had made the call. Later, at 7:30 a.m., Monfils performed a turnover (a change in the paper roll) on his paper machine. Between 7:30 and 8 a.m., a group of employees, including Kutska and the five other defendants, confronted Monfils. A verbal confrontation became physical, and Monfils was beaten.

Brian Kellner, a friend of Kutska's, testified that on July 4, 1994, while at the Fox Den Bar, Kutska described to him 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

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

had hit Monfils in the head with a wrench or a board. Hirn shoved Monfils in the chest. Kutska admitted telling Hirn, whom Kutska considered to be a "good instigator," to "go give [Monfils] some shit." The record also contains evidence that Kutska punched Monfils in the face with his fist.

James River employee David Wiener testified that on November 21, at approximately 7:40 a.m., he saw Basten and 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. Shortly thereafter, Kutska told Piaskowski to notify a supervisor that Monfils was missing. At approximately 8 a.m., Piaskowski informed the supervisor that "some heavy shit was coming down." On November 22, Monfils' partially decomposed body was found in a pulp vat; a heavy weight was tied around his neck. He died from asphyxiation from inhaling paper pulp and strangulation by a rope tied to a weight.

Without reciting all of the evidence,[4] we are satisfied that the jury could reasonably infer that Kutska was present at the confrontation and participated in the verbal and physical assault of Monfils, and that he took action, independently and collectively, to dispose of the evidence of his actions. The jury could reasonably infer from this evidence that Kutska intended to permanently dispose of Monfils' body. Evidence that Kutska was subject to immediate dismissal for participating in the assault on Monfils, as well as his exposure to criminal charges, coupled with evidence that the confrontation escalated to violence rendering Monfils unconscious, provides the basis for a reasonable

[4] The evidentiary portion of the trial covered five and one-half weeks and produced thousands of pages of transcript. Our recitation of the evidence need not be comprehensive to comply with the standard of review.

inference that Kutska and the other defendants had the motive and purpose to dispose of the victim to avoid being identified and suffering the likely consequences of their actions.

The evidence showed that Monfils' body had suffered decomposition in the hours it had been in the pulp vat, and there was testimony that if the body had not been promptly discovered, it would have been completely decomposed as a result of the chemical processes and propellers in the vat. Based on evidence of the time frame of the events and the short time between the confrontation with Monfils and the time he was reported missing, the jury could reasonably infer that Kutska put in motion the actions necessary to cause Monfils' death and dispose of the body.

Kutska argues that Kellner's testimony regarding his July 1994 conversation with Kutska at the Fox Den Bar was "inherently incredible." Likewise, he argues that Wiener's testimony[5] was not worthy of belief. A verdict based on the testimony of both Kellner and Wiener, he argues, cannot be sustained. We disagree. The jury determines the credibility of the witnesses, resolves conflicts in the testimony, weighs the evidence, and draws reasonable inferences from the evidence. ***Poellinger***, 153 Wis.2d at 503, 506, 451 N.W.2d at 756, 757. It is free to choose among conflicting inferences and may, within the bounds of reason, reject an inference that is consistent with the innocence of the accused. ***Id***. at 506, 451 N.W.2d at 757. It was the jury's province, not the court's or the defendant's, to pass on the credibility of Wiener and Kellner.

[5] Kutska states that Wiener "indirectly implicated" Kutska "by his testimony that Michael Johnson and Dale Basten were seen by him carrying something heavy on the morning of Thomas Monfils' disappearance."

We conclude that the evidence in support of the jury's verdict has such probative value and force that a reasonable jury could have drawn the inferences that Kutska committed the offense of first-degree intentional homicide by either directly committing the crime, intentionally aiding and abetting the commission of the crime, or being a party to a conspiracy to commit the crime. *See* § 939.05(2), STATS.

2. Severance

Kutska contends that the trial court erroneously refused to grant his request for severance. He asserts that the following "antagonistic" arguments of counsel for co-defendant Michael Hirn were prejudicial: (1) in his opening statement, he espoused a different theory regarding how Monfils died; (2) he referred to this different theory during presentation of the evidence; and (3) he discredited witnesses whose testimony was consistent with Kutska's, "essentially" accusing Kutska of perjury.

At the jury instruction conference, Kutska's counsel moved for severance, and alternatively, for an opportunity for rebuttal before the State's rebuttal. In denying the motion, the trial court concluded that there had been no "clear presentation of antagonistic defenses" and noted that "some antagonistic views at least" are to be expected among codefendants. The trial court, did, however, grant each defendant a five-minute rebuttal before the State's

rebuttal.[6] At the postconviction hearing, Kutska again argued for severance on the same grounds.

Questions of severance are within the trial court's discretion, and we review the trial court's determination for misuse of discretion. *See* ***Haldane v. State***, 85 Wis.2d 182, 189, 270 N.W.2d 75, 78 (1978). Whether there has been a misuse of discretion is determined on each case's facts. *See* ***Jung v. State***, 32 Wis.2d 541, 545-46, 145 N.W.2d 684, 686-87 (1966). We will affirm the trial court if there is a reasonable basis for its decision, ***State v. Nelson***, 146 Wis.2d 442, 455-56, 432 N.W.2d 115, 121 (Ct. App. 1988), and our review is limited to the state of the record at the time the defendant moves for severance. *See* ***Jung***, 32 Wis.2d at 546, 145 N.W.2d at 687.

Sections 971.12(2) and (3), STATS., govern joinder and severance in criminal cases.[7] A trial court may try defendants together "when they are

[6] The court assured counsel that it was "certainly … aware of the fact that because of the number of defendants we have, the order is such that if everyone would pick [on one defendant] after [that defendant's attorney had finished his closing argument], he sits there without any chance to rebut, and that isn't fair."

[7] Sections 971.12(2) and (3), STATS., provide, in pertinent part:

> **Joinder of crimes and of defendants.**
>
> ….
>
> **(2)** JOINDER OF DEFENDANTS. Two or more defendants may be charged in the same complaint, information or indictment if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting one or more crimes. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.
>
> **(3)** RELIEF FROM PREJUDICIAL JOINDER. If it appears that a defendant or the state is prejudiced by a joinder of crimes or of defendants in a complaint, information or indictment or by such joinder for trial together, the court may order separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. The district attorney shall advise the

(continued)

charged with the same offenses arising out of the same transaction and provable by the same evidence." ***Haldane***, 85 Wis.2d at 189, 270 N.W.2d at 78 (citations omitted); § 971.12(2), STATS. When a joint trial would unduly prejudice a defendant, however, such interests "must yield to the mandates of due process," and the court should grant severance. ***Haldane***, 85 Wis.2d at 189, 270 N.W.2d at 79 (quoted source omitted). To decide if severance is proper, the trial court must weigh the potential prejudice of a joint trial against the public's interest in avoiding repetitive or unnecessary litigation. *See* ***Nelson***, 146 Wis.2d at 455, 432 N.W.2d at 121. Wisconsin courts have stressed that a defendant "should not be forced to face the double burden of having to meet the attack both of the prosecutor and of his co-defendant," yet they have "been slow" to reverse on antagonistic defense grounds. *See* ***Haldane***, 85 Wis.2d at 190, 270 N.W.2d at 79; ***State v. Denny***, 120 Wis.2d 614, 621, 357 N.W.2d 12, 16 (Ct. App. 1984).

Wisconsin courts have not formulated a definitive definition of "antagonistic defenses," but case law provides some guidance. Our supreme court has used "antagonistic defenses" and "conflicting defenses" in the conjunctive; thus, "antagonistic" seems to be used synonymously with "conflicting." *See, e.g.*, ***Haldane***, 85 Wis.2d at 190, 270 N.W.2d at 79. In addition, Wisconsin courts have explained what antagonistic defenses are not. "Broad assertions" that defendants' theories conflict do not constitute "antagonistic defenses"; by contrast, the defendant must allege antagonism with sufficient specificity. ***Id***. Further, neither mutual hostility nor differences in defense tactics mandate severance. ***Id***. at 191, 270 N.W.2d at 79 (discussing mutual hostility); ***Denny***, 120 Wis.2d at 621, 357

> court prior to trial if the district attorney intends to use the statement of a codefendant which implicates another defendant in the crime charged. Thereupon, the judge shall grant a severance as to any such defendant.

N.W.2d at 15-16 (distinguishing different defense tactics from antagonist defense theories).

We now turn to the three instances Kutska claims support his antagonistic defense argument. First, Kutska makes reference to a portion of Hirn's opening statement in which Hirn espoused an "alternative theory of how the death of Thomas Monfils occurred." As the trial court noted, Hirn mentioned another theory, but neither developed the theory nor presented any evidence to support it. Without further explanation, Kutska does not allege this first instance with sufficient specificity; it is no more than a broad assertion. *See* ***Haldane***, 85 Wis.2d at 190, 270 N.W.2d at 79. A promised, yet undeveloped theory certainly cannot be characterized as conflicting or antagonistic. Under Wisconsin law, broad assertions cannot render a defense antagonistic. *See* ***id***.

Kutska's next argument is that Hirn referred to this "promised theory" during presentation of the evidence. In his brief, Kutska cites to the record to support this assertion, but the page to which he refers does not reflect a reference to the "promised theory." Likewise, Kutska's reply brief argues that Hirn made "additional references to the theory during the presentation of the evidence," but he provides no cite to the record. The record from this twenty-eight-day trial is voluminous, and we have no duty to sift and glean the record *in extenso* to find facts that will support an assignment of error. *See* ***Keplin v. Hardware Mut. Cas. Co***., 24 Wis.2d 319, 332, 129 N.W.2d 321, 327 (1964); § 809.19(1)(e), STATS. (requiring citations to parts of the record). Without support in the record, Kutska has failed to allege antagonism with the required specificity. This second instance, like the first, constitutes a broad assertion that fails to establish an antagonistic defense. *See* ***Haldane***, 85 Wis.2d at 190, 270 N.W.2d at 79.

Third, Kutska claims that Hirn's counsel presented an antagonistic defense during closing argument when he: (1) accused Kutska of perjury; (2) "placed the blame" for the murder on Kutska, Piaskowski, and Moore; and (3) accused Kutska of creating an alibi. Portions of closing argument show, Kutska insists, how Hirn's counsel became a "second prosecutor." We disagree.

Hirn's defense was not antagonistic because as the trial court pointed out in its postconviction decision, Hirn and Kutska had the same defense--innocence and ignorance. The same two defenses are not antagonistic or conflicting. ***Denny***, 120 Wis.2d at 620, 357 N.W.2d at 15-16. Kutska lists various passages from Hirn's closing argument, passages he claims show Hirn's antagonistic defense. We have carefully reviewed the passages that Kutska quotes in his brief, as well as the text surrounding these passages. The record reflects that, like Kutska, Hirn's argument during closing was innocence and ignorance. The record does not support Kutska's assertion that Hirn deflected blame, accused Kutska of perjury, or accused Kutska of creating an alibi. The lack of any evidence in the record to support Kutska's motion provides a reasonable basis for the trial court's denial of Kutska's motion for severance.

3. Prosecution's Closing Argument

Kutska next asserts that the "cumulative effect" of the prosecution's "improper argument" during closing argument deprived him of his fundamental right to due process and a fair trial. To build his "cumulative effect" argument, he sets forth four instances that occurred during the State's closing argument. First, he contends that because the trial court had granted the State's motion to exclude David Wiener's homicide conviction, the prosecution then improperly argued that there was no evidence that Wiener was capable of the "vile act" of murdering

Monfils. Second, he argues that the State "personal[ly] abuse[d]" Kutska in characterizing his testimony as "garbage" and referring to him as a "playground bully" and a "coward." Third, Kutska insists the prosecutor improperly "vouched" for Brian Kellner's credibility because he told the jury that Kellner was telling the truth. Finally, he alleges that the State's arguments "went far beyond the evidence." Because Kutska neither objected to these instances during trial nor requested a mistrial, we hold that he failed to preserve this issue on appeal.

"[W]hen no objection is made to an alleged error, the trial court has no opportunity to exercise its discretion, and the error is deemed waived." *See* ***State v. Seeley***, 212 Wis.2d 75, 81, 567 N.W.2d 897, 900 (Ct. App. 1997) (citation omitted). On review of the record, we located no defense objections to any of the specified prosecutorial comments Kutska claims were improper.[8] In this case, then, the court had no opportunity to consider the issue, exercise its discretion, correct its errors, or give this court the benefit of its informed judgment. We will not consider issues raised for the first time on appeal. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443, 287 N.W.2d 140, 145 (1980). Because Kutska failed to make a

[8] In its postconviction decision and order, the court considered an argument that Basten's trial counsel rendered ineffective assistance of counsel. In connection with that issue, the court rejected Basten's argument that his counsel was ineffective because he failed to preserve issues for appeal. The court stated that:

> [A]n objection by one counsel preserved the record with respect to the issue then at hand. It was not necessary for each individual counsel to make an individual objection to every question or to make a separate objection to every ruling the court made. This Court is satisfied that once these actions were consolidated for trial, if the Court made an improper ruling, an objection to that ruling by any of the attorneys is sufficient to preserve the error for all concerned.

Even so, our review of the record did not reveal that *any* defendant objected to the statements Kutska cites in his brief. Kutska therefore cannot rely on his codefendants' objections to preserve this error for appeal.

timely objection to these prosecutorial comments, he failed to preserve this issue for appellate review. *See* ***State v. Coulthard***, 171 Wis.2d 573, 590, 492 N.W.2d 329, 337 (Ct. App. 1992).

4. Admission of Tape Recording of Monfils' November 17 Call to Police

Kutska also argues that the trial court erroneously allowed the admission of a tape recording of a November 17, 1992, telephone call Monfils made to the Green Bay Police Department. In the call, Monfils expressed concern about the possibility that the recording of his first call of November 10 might be released. On the tape of the November 17 call, Monfils explains that he had reported an impending theft at James River, that Kutska was suspended for fleeing when security officers asked him to stop, and that Kutska was attempting to obtain a tape of the first call to identify the party who had reported him. In this second call, Monfils referred to Kutska as a "violent" "biker-type." Monfils also implied that Kutska was capable of murder.[9]

A. Inadmissible Hearsay

On motions in limine, various codefendants objected to the admission of the November 17 tape recording on hearsay grounds. In response, the State invoked the state of mind and excited utterance exceptions to the hearsay rule.[10] In connection with the hearsay objections, the State claimed that the evidence was relevant to show the atmosphere in the mill in the days preceding

[9] Monfils stated: "But that doesn't do me any good if he decides to--you know, someday in the middle of the night I don't show up at home. And it's very well, it sticks with me, and I do, and [in] no way do I think that he wouldn't do it."

[10] We note that these statements are not hearsay under § 908.01, STATS., because the State did not offer the statements to prove the truth of the matter asserted.

Monfils' death, Monfils' lack of suicidal thoughts, and Monfils' fear of Kutska. It does not appear, however, that the State made such relevancy arguments in reference to Kutska's contention that the tape was inadmissible character evidence. Contrary to his argument at trial, Kutska now asserts in his appeal brief that the character statements are inadmissible hearsay. At trial, however, Kutska expressly declined to object on hearsay grounds. Referring to the November 17 recording, Kutska's counsel addressed the trial court as follows:

> Judge, *I concede that--I'm not arguing that the tape is inadmissible on hearsay grounds, that it is not a violation of the hearsay rule*. However--and frankly, I would not necessarily object to that tape being offered if the portions of it, wherein the caller expresses his opinion, without grounds, as to Mr. Kutska's character, were excised. That portion of the tape … is, *on its face, in violation of 904.04, the character statute*, and I don't see that it's admissible in any event on that reason.
>
> *The rest of the tape … if produced, I will not bar its admission, simply the reference to Mr. Monfils' opinion as to presumably Mr. Kutska's character*. (Emphasis added.)

The trial court admitted the tape recording in full, *over Kutska's objection to Monfils' statements regarding Kutska's character* and over the codefendants' hearsay objections. In its one-paragraph ruling on the admissibility of the November 17 tape recording, the trial court stated:

> We're about to begin the testimony in this case, counsel. Before we do, I'm going to briefly give you my ruling with respect to the motion made by … [Kutska's counsel] regarding taped phone conversations of November 10th, 1992, at 4:45 a.m., November 17th, 1992 at 10:46 p.m. Both of those conversations [were] taped at the Green Bay Police Department. I've considered the statements. I've considered the holding in State v. Jackson, 97 Wis.2d 431 [sic].[11] I'm satisfied that those statements can come in. The motion in limine to exclude them will be denied.

[11] The case appears at 187 Wis.2d 431, 523 N.W.2d 126 (Ct. App. 1994).

An evidentiary objection must clearly state the specific ground upon which the objection is based. *See* § 901.03(1)(a), STATS. "[A]n objection preserves for appeal only the specific grounds stated in the objection." ***State v. Hartman***, 145 Wis.2d 1, 9, 426 N.W.2d 320, 323 (1988). In expressly declining to assert a hearsay objection to the November 17 tape at trial, Kutska has waived the right to argue it on appeal.[12] ***Holmes v. State***, 76 Wis.2d 259, 271-72, 251 N.W.2d 56, 62 (1977). Kutska's "deliberate choice of strategy, even if it backfires, amounts to a waiver binding upon the defendant and this court." ***State v. McDonald***, 50 Wis.2d 534, 538, 184 N.W.2d 886, 888 (1971). We therefore decline to review the admissibility of the tape on hearsay grounds.

B. Violation of the Sixth Amendment's Confrontation Clause

Kutska also contends that the tape's admission violated his right to confrontation pursuant to ***Ohio v. Roberts***, 448 U.S. 56 (1980). Characterizing the tape as hearsay, he argues that when the sole purpose of hearsay is to introduce evidence of the defendant's bad character, the confrontation clause is violated. The Confrontation Clause of the Sixth Amendment, made applicable to the states through the Fourteenth Amendment, provides that in "all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against

[12] As discussed previously, the trial court noted that any defense attorneys' objection preserved the issue for appeal for all defendants. It is significant, however, that Kutska expressly stated that he was not arguing that the November 17 recording was inadmissible on hearsay grounds. While the trial court concluded that it was unnecessary for each defendant to make a separate objection, Kutska did and therefore waived his right to make a hearsay argument in his brief. In any event, Kutska's reply brief does not address the State's contention that he objected only to the evidence under § 904.04, STATS., nor does Kutska point to the court's postconviction decision and order we quoted above.

him." U.S. CONST. amend VI; WIS. CONST. art. I, sec. 7.[13] Kutska's argument relies on the characterization of the tape recording of the November 17 call as hearsay. We have already held that Kutska waived any hearsay objection to the tape recording.[14] Kutska makes no other argument for the confrontation clause violation. Accordingly, this claim is unsupported, and we decline to supply additional legal research, analysis, and argument to an appellant whose claims are unsupported. *See* ***State v. Waste Management, Inc.***, 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1978).

C. Character Evidence

Kutska asserts that the tape recording's actual purpose was to prove "bad character" and that its admission therefore violated § 904.04(2), STATS., and ***State v. Sullivan***, 216 Wis.2d 768, 576 N.W.2d 30 (1998). We conclude that although the admission of character evidence was error, the error was harmless.

We review a trial court's admission of evidence for misuse of discretion. ***Id***. at 780, 576 N.W.2d at 36 (quoting ***State v. Pharr***, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983)). A trial court exercises the appropriate discretion when it examines the relevant facts, applies a proper standard of law, uses a "demonstrative rational process," and reaches a conclusion that a reasonable judge could reach. ***Id.*** at 780, 576 N.W.2d at 36. In denying Kutska's motion to exclude the evidence on grounds that it was inadmissible character evidence under

[13] A defendant's confrontation rights are identical under the federal and state constitutions. ***State v. Martinez***, 150 Wis.2d 62, 75 n.6, 440 N.W.2d 783, 788 n.6 (1989).

[14] Further, an objection on hearsay grounds does not preserve an objection based on the right to confrontation. *See* ***State v. Marshall***, 113 Wis.2d 643, 652-53, 335 N.W.2d 612, 616-17 (1983).

§ 904.04, STATS., the trial court did not set forth its reasoning. Therefore, we must independently review the record to determine if a reasonable basis exists to allow the admission of the character statements in the November 17 tape recording. *See* ***Sullivan***, 216 Wis.2d at 781, 576 N.W.2d at 36. We will uphold the trial court's decision if there are facts in the record to support the decision, ***State v. Mainiero***, 189 Wis.2d 80, 94-95, 525 N.W.2d 304, 310 (Ct. App. 1994), even if the court gave the wrong reason or no reason at all. ***State v. Jenkins***, 168 Wis.2d 175, 186, 483 N.W.2d 262, 265-66 (Ct. App. 1992).

The State asserts that, as "far as the only objection Kutska did make" violation of § 904.04(2), STATS., "evidence that Monfils believed that Kutska was violent is relevant to explain why Monfils was in a state of anxiety or fear." By contrast, Kutska points to a portion of the State's closing argument that he claims proves that the State used the tape to argue Kutska's "propensity for violence":

> Because ladies and gentlemen, you just don't have the body of Tom Monfils telling you that. You have his words. Tom Monfils: ["]That doesn't do me any good if he decides to, you know, that some day in the middle of the night, I don't show up at home.["] That's Tom Monfils' words talking about Keith Kutska. He knew what Keith Kutska was capable of. He predicted his own death.

Under § 904.04, STATS., evidence of a person's character is not admissible to show that he acted in conformity with that trait;[15] this is often called

---

[15] Section 904.04, STATS., provides as follows:

> **Character evidence not admissible to prove conduct; exceptions; other crimes. (1)** CHARACTER EVIDENCE GENERALLY. Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

(continued)

the forbidden "propensity inference." *See* 7 DANIEL D. BLINKA, WISCONSIN PRACTICE: EVIDENCE, § 404.1, at 97 (1991). The exceptions to § 904.04's general rule depend, in part, on the status of the person whose character is at issue. *See generally* ***id***. Here, Kutska's character is at issue.

We first note that Kutska incorrectly characterizes this as "other act evidence" and that therefore § 904.04(2), STATS., does not apply. In the tape, Monfils offers various opinions about the character and reputation of Kutska including his appearance ("biker type") and his propensity for violence; this is not

---

> (a) *Character of accused.* Evidence of a pertinent trait of the accused's character offered by an accused, or by the prosecution to rebut the same;
>
> (b) *Character of victim.* Except as provided in s. 972.11(2), evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
>
> (c) *Character of witness.* Evidence of the character of a witness, as provided in ss. 906.07, 906.08 and 906.09.
>
> **(2)** OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

evidence of a prior "bad act" of Kutska.[16] The record supports the court's denial of Kutska's motion on grounds of "other act" evidence.

Monfils' opinions about Kutska's character and reputation trigger § 904.04(1)(a), STATS., because the character of the accused is at issue.[17] Only

[16] As contained in his main brief, Kutska's entire argument for the inadmissibility of the character evidence is as follows: "Evidence aimed at a defendant's character and propensity is inadmissible in this state under § 904.04(2), Wis. Stats., and under clear precedent. State v. Sullivan, S.Ct. No. 96-2244-CR (March 25, 1998)." Even assuming that § 904.04(2) applied to the character statements that Kutska seeks to exclude, he does not specifically argue how the court erred by admitting it, and he offers no analysis for its admission. The issue is inadequately briefed, and this court would have no obligation to consider it. ***State v. Pettit***, 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992).

[17] Even considering the relevancy arguments the State advanced for the state of mind and excited utterance exceptions to the hearsay rule, the character evidence is relevant only to show Kutska's propensity for violence and that he acted in conformity therewith. Relevant evidence is evidence that has "any tendency to make the existence of any fact that is *of consequence* to the determination of the action more probable or less probable than it would be without the evidence." Section 904.01, STATS. (emphasis added). "Evidence which is not relevant is not admissible." Section 904.02, STATS. None of the State's relevancy arguments have merit.

First, suicide was not an issue at trial, so the character evidence is not relevant to show that Monfils was not suicidal. Citing ***State v. Wallerman***, 203 Wis.2d 158, 552 N.W.2d 128 (Ct. App. 1996), the State argues that Kutska's "declination" to contest an aspect of the State's case does not make the evidence less relevant. We reject this argument. First, if this blanket statement were true, in every case, regardless of its facts, all evidence would be relevant. Second, the State likely espoused the "declination" argument to counter Kutska's assertion in his brief that he offered to stipulate that he would not argue suicide at trial. Our review of the record, including the portion of the record to which Kutska cites, reflects no offer to stipulate. ***Wallerman*** dealt with an offer to concede an element of a crime by stipulation. Because our review of the record reveals no offer to stipulate, we reject the State's first relevancy argument.

The State's second relevancy argument, closely connected with the first, is that Monfils feared Kutska. The State argues that Monfils' fear shows that Monfils "feared that his life might be taken, not that he was thinking about taking it." Again, suicide was not an issue at trial, so proof that Monfils feared Kutska was not "of consequence" to the action as § 904.01, STATS., requires.

(continued)

Kutska's reply brief cites § 904.04(1)(a) to support the argument that the tape was inadmissible character evidence.[18] Although we are not required to address an issue a party raises for the first time in its reply brief, ***Hogan v. Musolf***, 157 Wis.2d 362, 381 n.16, 459 N.W.2d 865, 873 n.16 (Ct. App. 1990), we elect to address the argument in this case.

Section § 904.04(1)(a) permits the accused, here Kutska, to offer evidence of a pertinent trait of his character. If the defendant does offer such character evidence, the "State's introduction of character evidence is limited to that which rebuts the character trait being established." ***State v. Brecht***, 143 Wis.2d 297, 323, 421 N.W.2d 96, 106 (1988). Here, Kutska expressly objected to the admission of Monfils' opinions regarding his character and reputation; he did not introduce these statements. Wisconsin courts have recognized a defendant's character for non-violence as a pertinent character trait in a prosecution for first-degree murder, but the *defendant* must first introduce such evidence before the State is allowed to "rebut the same." *See* ***id***. at 322, 421 N.W.2d at 106. We conclude, therefore, that the trial court's admission of the character and reputation evidence was an erroneous exercise of its discretion**.**

Third, the State argues that the description of the following events on the tape are relevant to show the atmosphere at James River in the days before Monfils' death: Monfils' report of the theft; the thief's five-day suspension; the thief's attempts to get a copy of the November 10 tape; and Monfils' fear that the thief would recognize his voice. As noted in the text, however, Kutska objected only to the character statements in the tape. Without the character statements regarding Kutska's propensity for violence, the remaining portions of the tape describe each event the State lists, just absent the forbidden propensity inference.

Fourth, the State offers motive as a basis for the character statements' admission. Our review of the voluminous record shows that the State never argued motive at the trial court level; therefore, the trial court never exercised its discretion regarding that argument. Pursuant to ***Vollmer v. Luety***, 156 Wis.2d 1, 10-11, 456 N.W.2d 797, 802 (1990), we decline to address it.

[18] In his *main* brief, Kutska cites § 904.04(2), STATS.

D. Harmless Error

The State further argues that even if it was error to admit the statement, it was harmless. We agree. The test for harmless error is "whether there is a reasonable possibility that the error contributed to the conviction," ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985), and the beneficiary of the error has the burden to establish that the test has been met. ***Sullivan***, 216 Wis.2d at 792, 576 N.W.2d at 41. In this case, the State is the beneficiary of the error and therefore carries this burden. *See* ***Sullivan***, 216 Wis.2d at 792, 576 N.W.2d at 41. In applying the harmless error test, the "reviewing court must set aside the verdict unless it is sure that the error did not influence the jury." ***Dyess***, 124 Wis.2d at 541-42, 370 N.W.2d at 231.

In determining if harmless error exists, the court should focus on whether "the error undermines the court's confidence" in the case's outcome. ***State v. Grant***, 139 Wis.2d 45, 53, 406 N.W.2d 744, 747 (1987) (citing ***Dyess***, 124 Wis.2d at 545, 370 N.W.2d at 232). A reviewing court must consider the error in the "context of the entire trial" and consider the strength of untainted evidence. *See* ***id***. at 53, 406 N.W.2d at 748 (citation omitted). Based on this standard of review, we conclude that the admission of the November 17 tape recording did not undermine this case's outcome.

First, the statement was cumulative to Monfils' comments in his November 10 call to police which was admitted without objection. In the November 10 call, Monfils said, speaking about Kutska, that "he's known to be violent" and may "fly off the handle." Second, this was one person's isolated opinion. The statement did not include a description of specific bad acts and was but one piece of evidence introduced over the course of a twenty-eight-day trial.

Eighty-one witnesses testified, and there was ample evidence for the jury to conclude that Kutska played a vital role in Monfils' assault and death. Looking at the context of the entire trial, and considering the strength of the untainted evidence, ***id***., we conclude that the admission of Monfils' opinion of Kutska did not contribute to the conviction. In our opinion, the verdict would have been the same if this evidence had not been introduced. We are confident that the error was harmless.

5. Newly Discovered Evidence

Kutska contends he is entitled to a new trial based on three items of newly discovered evidence: (1) Kellner's testimony was false, coerced, and unreliable; (2) Wiener was the person who committed Monfils' homicide; and (3) Wiener's testimony was false and given in expectation of a reduction in his current sentence for an unrelated crime. We reject these arguments.

A motion for a new trial based on newly discovered evidence is submitted to the trial court's sound discretion. ***State v. Terrance J.W.***, 202 Wis.2d 496, 500, 550 N.W.2d 445, 447 (Ct. App. 1996). "We will affirm the trial court's exercise of discretion as long as 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, a party must establish the following by clear and convincing evidence:

> (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 the evidence that was introduced at trial; and (5) it is reasonably probable that a different result would be reached at a new trial.

Id. at 500, 550 N.W.2d at 447; *see also* ***State v. McCallum***, 208 Wis.2d 463, 473, 561 N.W.2d 707, 710-11 (1997). 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. ***Terrance J.W.***, 202 Wis.2d at 500-01, 550 N.W.2d at 447.

We first address Brian Kellner's recantation. 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 near the bubbler outside the No. 7 coop. In contrast, after trial, Kellner testified that Kutska's identification to him was of individuals present in the No. 9 coop when the tape was being played. Contrary to his trial testimony, Kellner stated that Kutska's description of the confrontation did not involve the names of any individuals, that the total conversation occurred in the context of "what if," and that Kutska never told him any individuals' names in relation to any events that occurred after the tape was played in the No. 9 coop.

Kellner testified that he gave untruthful answers at trial because the police threatened him with the loss of his children and job. At the time of his post-trial testimony, however, Kellner indicated that he was no longer afraid of those threats because he planned to obtain legal counsel if indeed any repercussions arose regarding his employment. His trial testimony was that he felt police badgered him and that he did not agree with everything sergeant Randy Winkler, the investigating officer, had put in the statement. Kellner also testified that although he had testified untruthfully at trial about naming individuals present at the confrontation, his answers concerning Hirn's involvement were truthful.[19] At

[19] At the postconviction motion, Kellner testified:

(continued)

the post-trial hearing, Kellner also testified that he had experienced difficulties at his job since the trial because he had testified against fellow union members. His post-trial testimony was that Kutska and Piaskowski were very close friends of his, and he felt he had been forced into a situation of testifying against them.

A motion for a new trial based on a witness' recantation is entertained with great caution. ***Terrance J.W.***, 202 Wis.2d at 500, 550 N.W.2d at 447. The five requirements we set forth in ***Terrance J.W.***, as well as the requirement of corroboration, must be met. Under the fifth requirement, the standard 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. ***McCallum***, 208 Wis.2d at 473-74, 561 N.W.2d at 711. 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. A trial court's finding that the recantation is *less credible* does not lead to the same conclusion, however. ***Id***.

Here, the trial court found that the first three requirements were met. In addressing the fourth and fifth requirements, the trial court found Kellner's reasons for his recantation cumulative to evidence the jury heard at trial and further found that the recantation was not credible. It therefore concluded that

---

> Q. … Do you recall Mr. Boyle, on cross-examination of you, asking you the following question and you giving the following answer, sir? Question at line 7 of page 118 of the Day 9, jury transcript: You knew that Mr. Hirn was involved according to what Mr. Kutska talked about? Answer: Yes, sir. Do you recall being asked that question and giving that answer?
>
> A. Yes.
>
> Q. Was that answer truthful that Mr. Kutska told you that?
>
> A. Yes, sir.

there was no reasonable probability of a different outcome at a new trial. In its postconviction decision and order, the trial court determined that the recantation was not credible[20] and that even if the recantation was credible, there was no reasonable probability of a different result.[21] It is the circuit 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. ***McCallum***, 208 Wis.2d at 487, 561 N.W.2d at 716. Here, after the trial court observed Kellner's demeanor and heard his testimony both at trial and at post-trial hearings, it found Kellner's reasons for changing his testimony unworthy of belief--not credible. We fail to see how the trial court's rejection of Kellner's recantation as credible was clearly erroneous; therefore, we affirm.

Kutska next argues that newly discovered evidence shows that David Wiener murdered Monfils. Specifically, he contends that Wiener admitted killing Monfils to three fellow prison inmates, Harrison Marcum, Edwin Wnek, and Michael Grunkowski. Wnek 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

---

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

[21] The court stated: "However, 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 this statement. As set forth in the accompanying text, ***McCallum*** directly rejects that logic. S***tate v. McCallum***, 208 Wis.2d 463, 475-76, 561 N.W.2d 707, 711 (1997). 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.

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?" and then stood up and added, "Boy, they'd really be surprised if they found out I'm the one that did it." 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." In addition, Marcum, another inmate, likewise testified that Wiener said to him, "What do you think they would do to me now if they found out I killed him?"

To bolster his claim, Kutska points to affidavits of Charlene Gawryleski and Lawrence Hansford. Gawryleski claims that Wiener killed his brother, Tim, to prevent him from revealing Wiener's role in the murder. Hansford, also a fellow inmate of Wiener's, claims that Wiener told him such things as "he and the black guy [Moore] killed Monfils," "the five white guys were innocent," and "[w]hat would they do if they found out that I killed him?"

In its postconviction decision and order,[22] the court applied the five requirements set forth in ***Terrance J.W.*** and ***McCallum*** and concluded that newly discovered evidence regarding Wiener did not warrant a new trial. While the trial court found that the evidence met the first four requirements, the trial court concluded 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

[22] In its postconviction decision of September 23, 1997, the trial court incorporated its previous decisions regarding this issue from cases No. 95-CF-239 (Piaskowski), No. 95-CF-240 (Moore), and No. 95-CF-242 (Basten).

> 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 incredible, 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 Grunkowski testify and had the opportunity to observe their demeanors. During postconviction motions, these three witnesses explained 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." Under ***McCallum***, the court's finding that the witnesses' testimony was not credible leads us to conclude that the impeachment evidence would not change the result at a new trial. ***Id***. at 474-75, 561 N.W.2d at 711. The trial court's findings regarding the credibility of these three inmates was not clearly erroneous.

Based on our review of the voluminous record, it does not appear that Gawryleski and Hansford gave live testimony at the postconviction hearings. The trial court did not have an opportunity to pass on the credibility of these witnesses except as through their affidavits. We will affirm the trial court's findings regarding incredibility of the affidavits if the inference of incredibility

may be reasonably drawn from those affidavits. *See, e.g.,* ***Eau Claire Press Co. v. Gordon***, 176 Wis.2d 154, 160-62, 499 N.W.2d 918, 920-21 (Ct. App. 1993).[23]

Here, the trial court could reasonably find this evidence incredible. In his affidavit, Hansford echoes the testimony of Wnek and Marcum. Hansford contends that in Wiener's many admissions to killing Monfils, he gave details about the beating and murder. According to Hansford, Wiener "did talk a lot about his dislike for snitches." Hansford adds that due to Wiener's dislike for snitches, he [Hansford] had "second thoughts about giving a statement of these facts." Moreover, Wiener told him that he "could end up like Tom Monfils" if he "snitched" on him. Hansford is also the type of witness to have a "suspect agenda" and give gratuitous information. There is no reasonable probability that a jury considering Hansford's testimony at a new trial would have a reasonable doubt as to the defendant's guilt. *See* ***McCallum***, 208 Wis.2d at 475, 561 N.W.2d at 711.

Likewise, the trial court could reasonably find Gawryleski's affidavit not credible. Gawryleski was living with Tim Wiener at the time David Wiener killed Tim. In her affidavit, she states that she overheard Tim tell David that "he was going to narc on him." She further states that she has always believed Tim was referring to some involvement of David's in the Monfils case and that in her

[23] Although there is some dispute as to 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 twenty-eight-day trial and was in a superior position to draw reasonable inferences from the affidavits. In our opinion, the documentary evidence exception to the clearly erroneous rule "turns our appellate courts into fact-finding tribunals, wastes judicial resources, and lengthens the already arduous road to judicial finality." *See* ***id***. at 476.

opinion, "that is the reason or part of the reason that David shot him." She 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 for Tim's murder. Further, given that she offers pure speculation that the potential "narc" dealt with Monfils' murder, 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 Kutska's guilt. Accordingly, we affirm the trial court's denial of a new trial based on evidence to impeach David Wiener.

Kutska's third and final argument for a new trial based on newly discovered evidence is that Wiener gave false testimony in expectation of receiving a reduction in the sentence he was already serving for homicide. We apply the same five-part test under ***McCallum***. As discussed previously, the trial court found information that Wiener testified falsely at trial met the first four requirements under ***McCallum***, but concluded that the fifth requirement had not been met. We agree.

There is no reasonable probability that introduction of this evidence would lead to a different result at a new trial. First, as discussed earlier, the trial court found Wiener's testimony and the affidavits submitted in support of that testimony to be incredible. Second, the trial court concluded that there was "absolutely no evidence to suggest any negotiations for a 'deal' with regard to Wiener." Third, it makes no sense that an expectation of a reduction in sentence motivated Wiener's testimony given that Wiener gave police his version of the events long before Wiener was convicted of an unrelated homicide. We therefore reject Kutska's argument and hold that the trial court did not err.

6. Disclosure of Exculpatory and Material Evidence

Kutska next contends the prosecution's failure to disclose exculpatory evidence deprived him of due process. He presents five items of evidence that he asserts should have been disclosed to him before trial: (1) a detail sheet memorializing a phone call to a police department operator; (2) information that Kellner's preliminary hearing testimony was incorrect; (3) Connie Jones's change in testimony; (4) Randy Winkler's investigative techniques; and (5) Wiener's attempt to negotiate a "deal" in return for his testimony. Citing ***Brady v. Maryland***, 373 U.S. 83 (1963), and ***Nelson v. State***, 59 Wis.2d 474, 208 N.W.2d 410 (1973), Kutska contends that the State's failure to fulfill its obligation to disclose this information requires reversal of his conviction. We disagree.

At his postconviction hearing, Kutska argued that the State had never supplied him with a November 23, 1992, Green Bay Police Department detail sheet. In the detail sheet, Marlene Borowitz notes that between 9 a.m. and 11 a.m., on November 21, 1992, she received a phone call from a polite-sounding male who claimed that he had previously reported a theft at the James River Corporation. The caller stated that he "was concerned because the person he was calling about said that he recognized his voice on the tape."[24] Kutska argues that the content of the detail sheet suggests that Monfils made the call. If Monfils did make this call, he reasons, the State's timeline is incorrect, thus establishing that

[24] The State argues that this detail sheet is not part of the appellate record and that therefore Kutska may not rely on it. The transcripts of the postconviction motion hearings are part of the record, however, and the detail sheet was discussed and referred to in the postconviction motion hearings. We believe that such reference is sufficient. Further, the court and Kutska's counsel refer to the detail sheet as "Exhibit 1."

Kutska and the others could not have murdered Monfils. In its postconviction decision and order, the trial court stated:

> The exculpatory nature [of the detail sheet] is that it would suggest that Mr. Monfils was alive after 9:00 a.m. on the date indicated. However, there were other discovery materials furnished which caused the defense to investigate whether Mr. Monfils was indeed alive after 8:00 p.m. The Court is satisfied that even if there was an inadvertent failure to furnish [the detail sheet] to the defense counsel prior to trial, the failure was not prejudicial in any way as the issue was raised, considered and investigated prior to trial.

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***. We agree with the trial court that although the detail sheet is favorable to Kutska, it is not material. Monfils' time of death was explored both before and during the trial, and the other discovery materials the defense received caused them to investigate Monfils' time of death.

Further, the information Monfils allegedly provided in the detail sheet suggests that the caller was not Monfils. First, Monfils already knew from his November 17 phone call that he was to contact captain Nelson or Nancy from the communications department directly, so he would have asked for one of them. The caller did not. Second, as the State points out, if the caller had been Monfils, he would not have asked if the tape had already been released because Monfils

would already have heard it by that time. Third, in the detail sheet, the caller seems to mention only one previous call and notes that during the previous call, the police had told him that the theft at James River "was not a police matter" and "should be handled internally." By contrast, during both phone calls, the Green Bay Police Department offered to help. During the November 10 call, the department told Monfils that they would look into it."[25] On November 17, lieutenant LaTour gave Monfils the name of a detective, detective Servais, whom he could contact the next day. Because there is no reasonable probability that disclosure would have changed the result at trial, the detail sheet is not exculpatory.

Kutska next argues the State failed to disclose it had information that Kellner's testimony at the preliminary hearing was false. At postconviction hearings, Kellner testified that he told an investigator he had concerns about the accuracy of 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 disseminated a copy of the statement to all defendants. While we agree that the new statement is favorable to Kutska, we conclude that it was not material. In our analysis of Kellner's recantation, we determined that there was no possibility that the recantation would bring a different result at a new trial. Under a ***Brady***[26]

[25] Kutska seems to rely on the cross-examination testimony of Michelle Wickman, the person at the Green Bay Police Department who took the November 10 call. On cross-examination at trial, Wickman agreed, in response to counsel's direct question, that while she called James River to report the possible theft, she did not call dispatch because she "decided that it would be handled by James River." The November 21, 1992, caller could not have known the reason Wickman gave on cross examination for not calling dispatch.

[26] ***Brady v. Maryland***, 373 U.S. 83 (1963).

materiality analysis pursuant to ***Ray***, we likewise conclude that there is no reasonable probability that disclosure would have changed the result of the trial. Significantly, Kellner did not recant his testimony about Kutska's participation in the confrontation and playing of the tape. Further, after the court observed Kellner's demeanor and heard his testimony, it found his recantation incredible. Based on the trial court's finding, we are confident that a jury, like the trial court, would find the inconsistent statements reflected in the recantation not worthy of belief. The inconsistencies in Kellner's second statement are not sufficient to undermine our confidence that the outcome would change.

Kutska's third contention is that he was denied due process of law when he learned on the day of Connie Jones's trial testimony that Jones had changed her original testimony. During the investigation, Jones said that she saw Monfils performing a turnover on the No. 7 machine on November 21, 1992. Indeed, the plant records indicated a turnover was performed there at 7:34 a.m. Approximately one week before trial, the State met with Jones and asked her whether she was certain the procedure she had observed was a turnover. Jones expressed uncertainty and decided to view both procedures at the James River plant. After observing both procedures, she concluded that she could have observed Monfils performing a paper break, a function that, according to plant records, was performed at 7:15 a.m. At trial, Jones testified that when she saw Monfils working on the No. 7 machine, she believed he was engaged in a paper break procedure. Further, she acknowledged that her testimony's timeline was based on that conclusion. This testimony, Kutska argues, "expanded by 15 minutes the time in which the defendants could have carried out the crime."

Kutska argues that Jones's recharacterization of her statement and its effect on the timeline of events was both favorable and material evidence. We

disagree and conclude that Jones's second statement is not exculpatory. Both Kutska and Moore testified that they were together from the time Moore entered the No. 7 machine area until after the time the State claims Monfils' murder occurred. This is significant because it enlarged the amount of time for Moore's involvement in the tape-playing incident and confrontation. It follows that if Moore and Kutska were together during that entire time, it likewise enlarges the time for Kutska's involvement. Thus, Jones's change in testimony was actually more damaging evidence against Moore and, therefore, also against Kutska.

Kutska also mentions, without meaningful analysis and citation to authority, that disclosure was required because the change in Jones's account was evidence material to Jones's credibility. We are not persuaded. When the jury is presented with testimony that a witness's present account differs from previous statements, it evaluates the versions and decides which testimony to believe, or it may decide to disbelieve the witness altogether. *See* ***Meurer v. ITT Gen'l Controls***, 90 Wis.2d 438, 450, 280 N.W.2d 156, 162 (1979). Here, the defense had at its disposal, and did employ, all of Jones's prior inconsistent statements to impeach her present account and attack her credibility before the jury.

Even if the information had been favorable to Kutska, we cannot say it is material. Under the ***Brady*** materiality test, there is no reasonable probability that a different result would have occurred had the State given the information to Kutska. Jones still would have been subject to cross-examination using the same methods defense counsel actually employed, and the ultimate determination of believability would still have remained with the jury. *See* ***Meurer,*** 90 Wis.2d at 450, 280 N.W.2d at 162. Additionally, the State is not under a constitutional obligation to provide the defense with discovery of helpful but nonexculpatory evidence. ***Denny***, 120 Wis.2d at 628, 357 N.W.2d at 19.

Kutska next argues that the State should have disclosed evidence that Randy Winkler, a State investigator, had engaged in "questionable investigative techniques with various numerous State witnesses." The State replies that because Kutska fails to explain why such evidence was exculpatory, we should decline to consider this argument. We agree. We first note that Kutska mischaracterizes the record when he asserts in his brief that the State "realized" that Winkler's investigative techniques were questionable. To support this assertion, Kutska cites the following testimony from postconviction motion hearings:[27]

> Q. And in the course of those complaints, and addition to witnesses who allegedly twisted their words around, there were more witnesses than just Kellner who also accused him of deceits in his investigation with them; correct?
>
> A. Yes.
>
> Q. And the nature of the deceit was not simply tied to a report that he had a tape recording of the so-called encounter; correct?
>
> A. There were some that claimed, and I think it was even clear. I think that parts of Winkler's tactics were, at times, to lead people to believe he had evidence he didn't have.
>
> Q. *Did you have a problem, as a prosecutor, with those approaches?*
>
> *A. No.* (Emphasis added.)

Contrary to Kutska's assertions, the prosecutor who testified at the postconviction hearing stated that he did *not* have a problem with Winkler's approaches.

Moreover, Kutska simply lists the tactics he believes were improper, but gives no argument as to why this court should find these tactics exculpatory under ***Brady*** or ***Nelson***. Section 809.19(1)(e), STATS., requires that an appellant's

[27] This passage reflects Basten's cross-examination of one of the prosecutors in this case.

brief contain reasons to support the appellant's contention. We will not consider an argument that is undeveloped and inadequately briefed. ***State v. Flynn***, 190 Wis.2d 31, 39 n.2, 58, 527 N.W.2d 343, 346 n.2, 354 (Ct. App. 1994). In conclusion, Kutska failed to apply the law to the facts he claims support his contention. It is not this court's responsibility to make Kutska's ***Brady*** argument for him. *See* ***Waste Management***, 81 Wis.2d at 564, 261 N.W.2d at 151.

Finally, Kutska argues that evidence that Wiener attempted to negotiate a "deal" with the State in return for his testimony case is exculpatory because evidence of Wiener's negotiations with the State "provided him with a motive to present false testimony." We conclude that such evidence is not material because there is no reasonable probability that disclosure would have resulted in a different outcome. ***Ray***, 166 Wis.2d at 870, 481 N.W.2d at 294. First, as the State correctly notes in its brief, Wiener told police what he knew about this case in May of 1993, long before he was convicted. This refutes the assertion that his motive for testifying was to "get a deal." Second, the trial court found no evidence of any negotiations for a "deal," and no evidence of a deal is a sufficient basis for nondisclosure. We reject Kutska's argument that the evidence was material.

7. Discovery of Investigative and Personnel Files

Kutska claims the trial court erred by refusing his request to order discovery of: (1) reports that James River generated during its internal investigation; and (2) Sergeant Randy Winkler's personnel files. Kutska asserts he

was entitled to discovery of these materials or, at a minimum, that he was entitled to an in-camera inspection of the reports.[28]

There is no general right to discovery[29] in criminal cases except as statutory law provides. ***State v. O'Brien***, 214 Wis.2d 327, 340, 572 N.W.2d 870, 876 (Ct. App. 1997), *rev. granted*, 217 Wis.2d 517 (1998). If a statute protects inspection of information or if the information is not in the State's possession, courts have allowed defendants to *seek* an in-camera inspection.[30] *See* ***O'Brien***, 214 Wis.2d at 340, 572 N.W.2d at 876. To obtain an in-camera hearing, a defendant must make a preliminary showing that the evidence sought is relevant and material, that is, "necessary to a fair determination of guilt or innocence." ***State v. Shiffra***, 175 Wis.2d 600, 608, 499 N.W.2d 719, 723 (Ct. App. 1993). In this context, we review the trial court's findings of fact regarding materiality under the clearly erroneous standard. *See* ***id***. at 605, 499 N.W.2d at 721.

---

[28] The State argues that Kutska never requested that the trial court provide him with these materials and therefore "has no standing to complain that discovery was denied." On June 29, 1995, Kutska moved to join in the discovery demands of all defendants. Johnson's counsel made a motion for discovery of the James River records and argued the motion on July 14, 1995. From the record, it appears that Kutska withdrew his discovery motion on July 13, 1995: "Your honor, I would at this time withdraw a couple of the motions I had earlier filed. That would be--I've had a chance to go through enough of the discovery material." The record, however, is unclear. Even if Kutska withdrew his motion, our analysis of the substantive issue is dispositive.

[29] Discovery is distinct from mandated disclosure of exculpatory evidence. ***Britton v. State***, 44 Wis.2d 109, 117-18, 170 N.W.2d 785, 789 (1969).

[30] Kutska spends one long paragraph in his brief setting forth the applicable facts and listing reasons that the court should have ordered discovery. He cites no legal authority until the last sentence of the paragraph which states: "At the very least, the court should have conducted an in-camera inspection of the investigative file to determine its materiality. State v. Shiffra, 175 Wis.2d 600, 499 N.W.2d 719 (Ct. App. 1993)." Moreover, Kutska cites no authority to support his argument that "the court should have ordered that the investigative material *be sent* to the defendants." (Emphasis added.) Because he cites no authority to support this argument, we will consider only that argument containing proper citation to authority - the argument that the trial court should have reviewed the records in-camera. ***State v. Shaffer***, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980).

Johnson's counsel did ask the trial court to compel discovery[31] of the James River records, and the trial court denied the motion. Our review of the record, however, does not reveal that Johnson's counsel or any other defendant requested an in-camera hearing. Kutska does not cite to the record to demonstrate otherwise. This issue was not raised in the trial court, and we will not consider an issue raised for the first time on appeal. ***Anderson v. Nelson***, 38 Wis.2d 509, 514, 157 N.W.2d 655, 658 (1968).

We now turn to Randy Winkler's personnel file. At Piaskowski's postconviction hearing, the trial court conducted an in-camera review of the file and determined that it was irrelevant. Kutska argues that if the file establishes that Winkler engaged in misconduct or questionable investigative tactics, the personnel file would be material and discoverable. Kutska asks this court to review the personnel file "in light of the criteria recently set forth in State v. O'Brien, 214 Wis.2d 327, 572 N.W.2d 870 (Ct. App. 1997)."

In denying to turn the file over to the defense, the trial court noted that the file does not demonstrate any complaints or concerns about Winkler's investigation of the Monfils murder, but instead concerns personnel matters (including work absences) that are not relevant to his credibility as a witness in this case. Further, the trial court also found that Winkler's credibility was repeatedly attacked during trial. Under ***O'Brien,*** the party filing the postconviction request must convince the trial court, among other things, that the anticipated results of the postconviction discovery would be relevant. ***Id***. at 342, 572 N.W.2d at 877. We review the trial court's relevancy finding for misuse of discretion. ***Id***.

[31] Johnson's trial record is not part of the appeal record in this case. We infer this based on the transcripts of the motion hearings that are part of the record in this appeal.

at 343, 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 the evidence is irrelevant. Accordingly, we affirm the trial court's denial of Piaskowski's request for postconviction discovery.

8. Jury Instruction on Other Acts/Character Evidence

Kutska contends the trial court's failure to instruct the jury on the limited purpose of other act evidence was error. According to Kutska, the court admitted evidence of two bad acts that warranted a limiting instruction: (1) the theft of the electrical cord from James River and Kutska's subsequent denial of it; and (2) the November 17 tape recording.[32] Under Kutska's analysis of ***State v. Spraggin***, 77 Wis.2d 89, 252 N.W.2d 94 (1977), a trial court commits reversible error when it fails to give a limiting instruction regarding other act evidence, even when no request is made for such an instruction. We reject this argument.

Wisconsin statutory law is clear that a party must request a limiting instruction. Section 972.10(5), STATS., provides that at the conclusion of the evidence and close of testimony, "if either party desires special instructions to be given to the jury, the instructions shall be reduced to writing, signed by the party or his or her attorney and filed with the clerk, unless the court otherwise directs." Section 805.13(3), STATS., similarly provides that failure to object at the jury instruction conference "constitutes a waiver of any error in the proposed instructions or verdict." Wisconsin's case law echoes its statutory law. Without a timely and specific request before the jury convenes, it is not error if a trial court does not give a particular instruction. ***State v. Feela***, 101 Wis.2d 249, 272, 304

[32] For reasons discussed previously, this tape recording is not other act evidence.

N.W.2d 152, 163 (Ct. App. 1981), *rev'd on other grounds,* ***Pharr***, 115 Wis.2d at 345 n.8, 340 N.W.2d at 503 n.8. If a party fails to request a jury instruction, that party waives its right to later claim that the trial court's failure to give such an instruction was error. *See* ***id***.

Kutska cites ***Spraggin*** in support of his assertion that no request was necessary and that the admission of other act evidence *mandates* a court to issue a cautionary instruction. ***Id.*** at 100-01, 252 N.W.2d at 99. In ***Spraggin***, the court stated:

> Even if we were willing to hold the admission of the evidence was proper and that the judge could admit evidence under sec. 904.03, there was no admonition or curative or limiting instruction cautioning the jury that the evidence was not proof of guilt but proof of intentionally aiding or abetting the crime or proof of a plan or design.

Id. We disagree with Kutska's interpretation of ***Spraggin***. When the court made the quoted statement, it was conducting the balancing test of § 904.03, STATS., a test required for admission of "other act" evidence; it was weighing potential prejudice to the defendant against the evidence's probative value. *See* ***Spraggin***, 77 Wis.2d at 99-100, 252 N.W.2d at 99. The court did not hold that a trial court *must* give a cautionary instruction whenever other act evidence is introduced at trial. *See* ***id***. An accurate reading of ***Spraggin*** is that the lack of a cautionary instruction regarding the limited admissibility of other act evidence is a factor a court should consider in balancing prejudice against probative value under

§ 904.03.[33] Because Kutska did not request a cautionary instruction regarding the limited admissibility of other act evidence, the trial court did not err by failing to give one to the jury.

9. Exclusion of Defense Evidence

Kutska asserts that the trial court misused its discretion by excluding a computer-generated simulation tape, expert testimony on repressed memory, and inquiry into a witness's criminal history. This exclusion of evidence, he argues, violated his Sixth Amendment right to present a defense. We do not agree.

At trial, the defendants offered expert testimony regarding repressed memory to attack Wiener's account of his sudden and unexplained recollection of his observations six months after they occurred.[34] In addition, they sought admission of a computed-generated animated video showing Wiener's line of sight to impugn his account of what he could have seen from his position as he described it. The trial court excluded the expert testimony on grounds that it

[33] The comments to WIS J I-CRIMINAL 275, note that: [W]henever evidence has been admitted for a limited purpose, § 901.06 provides that a cautionary instruction must be given upon request." Section 901.06, STATS., provides: "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, *the judge, upon request*, shall restrict the evidence to its proper scope and instruct the jury accordingly." (Emphasis added.)

[34] Recall that Wiener offered trial testimony that at approximately 7:40 a.m. on November 21, 1992, he saw Basten and Johnson, facing each other, hunched over and carrying something heavy toward the vat where Monfils' body was later found. Wiener was seated when he made this observation. Because his view was partially obstructed, Wiener could only see the tops of their bodies and could not see what they were carrying.

would not assist the jury. Specifically, the court excluded the video based on insufficient foundation and the likelihood it would confuse or mislead the jury.[35]

Evidentiary rulings are committed to the trial court's sound discretion. ***Pharr***, 115 Wis.2d at 342, 340 N.W.2d at 501. We review a trial court's exclusion of evidence under the erroneous exercise of discretion standard. *See* ***id***. As we have said throughout this opinion, if the trial court applies the proper law to the facts, we will not find a misuse of discretion if there is any reasonable basis for the trial court's ruling. *See* ***id***.; *see also* ***Village of Shorewood v. Steinberg***, 174 Wis.2d 191, 204, 496 N.W.2d 57, 62 (1993).

To refute Wiener's claimed observations, the defense presented a computer-generated animated videotape simulation. The simulation demonstrated what Wiener could and could not have seen from the position he claimed to be in when he observed Basten and Johnson carrying "something" toward the vat. In evaluating the admissibility of the video reconstruction, the court stated: "Now, there's no question that ordinarily exhibits and demonstrations, motion pictures, videotapes, are admissible under certain conditions; and, likewise, I have no problem with finding that a computer reproduction would be admissible under the same conditions." Additionally, the trial court acknowledged that the reconstruction was created with scientifically accepted software. The court found, however, that the most important factor in the computer generation, Wiener's

[35] The State argues that Kutska waived his right to argue error regarding the computer simulation and repressed memory testimony because he did not "join in offering" them. We do not address these arguments because they are unnecessary to decide this issue. *See* ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983). Further, when the trial court told the jury that "the witnesses called by the respective defendants are called on their behalf and their behalf alone," the court was advising the jury that the sequence of testimony and the order of the defendants' proof had no significance.

position at the table when he made his observations, was actually a variable based on the testimony of Wiener[36] and another witness, David Webster, a James River employee, who testified as to the position of the table.

The trial court believed the video would add little to the evidence, and was concerned that it would mislead the jury:

> primarily because of the fact that the location and position of Mr. Wiener which I view as the most important factor in the reconstruction and the video or computer animation is really not that precise, and I think it would be confusing and mislead the jury to allow it, so I'm going to … refuse to allow that into evidence.

The record demonstrates that the court properly exercised its discretion; it examined the facts of the record, applied the proper law, and reached a reasonable conclusion that the basis for the measurements and calculations in the video was insufficient to provide the foundation necessary to admit the evidence. Moreover, the trial court again properly exercised its discretion in concluding the danger of confusing or misleading the jury outweighed whatever minimal

[36] Wiener was asked about the position of the table in the diagram.

> Q. As best you recall, is that table in the same spot on that diagram or that chart as it was in on November 21, 1992?
>
> A: I don't remember where it was exactly.

probative value the evidence might arguably have. Because the trial court properly exercised its discretion, we affirm.[37]

The defendants also offered the testimony of Dr. Edward Geiselman, a nationally-recognized expert in human memory and cognitive function. They claimed that the expert testimony would be helpful to the jury because it would: (1) clarify the common misconceptions about repressed memory; and (2) assist them in making informed decisions about the credibility of Wiener's claim of suddenly remembering the events of November 21, some six months after the fact. After carefully considering the proffered testimony of Geiselman and legal precedent, the trial court concluded that Geiselman could testify about matters affecting eyewitness identification and factors affecting memory, but could not testify about repressed memory, suggestive interrogation techniques, or application of those principles to Wiener's claim.

The trial court identified two problems with Geiselman's testimony. First, the court expressed concern that Geiselman would become a "super juror" in the courtroom. The court added that the testimony would establish the "mythic infallibility" of Geiselman; in other words, the expert testifies that if certain events occur, the witness should not be considered reliable, amounting to "review-board credibility of witnesses which invades the province of the jury." Second, the court also found that unlimited presentation of Geiselman's testimony would likely

[37] Kutska also argues that the trial court's error "was compounded" by the fact that the State was permitted to show the jury a videotape of the area at James River where Wiener claimed to have seen Basten and Johnson on November 21. The defense objected to the introduction of the video for lack of foundation. The court ruled that as long the State could lay a foundation, as it did, it could show the video. Moreover, none of the defendants, including Kutska, argued that the tape was misleading and prejudicial under § 904.03, STATS. Therefore, Kutska waived his right to object on grounds of unfair prejudice. *See* ***State v. Hartman,*** 145 Wis.2d 1, 9, 426 N.W.2d 320, 323 (1988).

overwhelm and confuse the jury. Further, it reasoned that the expert's testimony on repressed memory and suggestive interrogation techniques were matters about which most jurors have some opinion based on common sense. Put another way, the court determined that the testimony would not be helpful to the trier to fact.

We review a trial court's decision regarding admission of proffered expert testimony for misuse of discretion. ***State v. Friedrich***, 135 Wis.2d 1, 15, 398 N.W.2d 763, 769 (1987). Based on our review of the record, we conclude that the trial court did not misuse its discretion. The record reflects that the trial court carefully considered this issue. It examined the relevant facts, applied the proper law, and reached reasonable determinations. *See* ***State v. Mordica***, 168 Wis.2d 593, 602, 484 N.W.2d 352, 356 (Ct. App. 1992).

In finding that Geiselman's testimony on repressed memory or suggestive interrogation would not assist the jurors in any appreciable way, the trial court apparently invoked § 907.02, STATS. Section 907.02 provides that a qualified witness may testify "in the form of an opinion or otherwise" if the "scientific, technical, or other specialized knowledge *will assist the trier of fact to understand the evidence or to determine a fact in issue*."[38] (Emphasis added.) Further, the trial court invoked § 904.03, STATS., and weighed the probative value of the evidence against the danger that the jury would be misled, that is, that the jury would accept the expert's opinion on credibility. It is the jury's province to

[38] "The *sine qua non* of the admissibility of an expert opinion is whether it will be helpful to the jury in deciding the issue to which it is addressed." ***Lievrouw v. Roth***, 157 Wis.2d 332, 357, 459 N.W.2d 850, 859 (Ct. App. 1990). Kutska correctly points out that expert testimony is necessary if the issue the jury will decide is beyond their general knowledge and experience. Here, the trial court decided that the jury's common sense was enough in regard to the testimony the court excluded. Before a court even reaches the analysis of scientific evidence, it must first determine that the information is helpful to the trier of fact. Section 907.02, STATS.

consider the facts presented, judge the credibility of witnesses, and determine the weight given their testimony, ***Meurer***, 90 Wis.2d at 450, 280 N.W.2d at 162, and not the expert's. The record reflects that the trial court aptly exercised its discretion. We therefore affirm the trial court's exclusion of Geiselman's expert testimony.

Kutska also argues that the trial court improperly denied his request to cross-examine David Wiener regarding: (1) the "nature" of his previous conviction; and (2) and "his expectation of favorable treatment." At the time of trial, Wiener was serving a sentence for an unrelated homicide conviction. Kutska claims cross-examination was necessary to impeach Wiener by showing motive and bias. We disagree.

After hearing arguments outside the jury's presence, the court set the following parameters. 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 that the State made him no promises in exchange for his testimony, and he confirmed that on cross examination. 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.

We first address Kutska's argument regarding cross-examination of the "nature" of his previous conviction. Section 906.09, STATS., allows a party to present proof of prior criminal convictions to attack a witness's character for truthfulness. *See* ***Nicholas v. State***, 49 Wis.2d 683 688, 183 N.W.2d 11, 14

(1971). "The fact of prior convictions and the number thereof is relevant evidence because the law in Wisconsin presumes that one who has been convicted of a crime is less likely to be a truthful witness than one who has not been convicted." ***Id***. The number of prior convictions is also relevant to credibility because Wisconsin also presumes that the more convictions one has, the less truthful one will be. ***Id***. In Wisconsin, the only information the jury can hear about prior convictions is that the witness has been convicted of a crime and the number of convictions. ***Id***. at 689, 183 N.W.2d at 14. If the witness testifies truthfully, then the examining party can make no further inquiry. ***Id***. Here, the trial court allowed Kutska to inquire about the fact and number of Wiener's prior criminal conviction. That is all Wisconsin law requires.

We next turn to whether the trial court erred by limiting Wiener's cross-examination about an alleged "deal" with the State. Kutska argues that he was entitled to cross examine Wiener about his record to show bias. 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, 35-36, 549 N.W.2d 418, 420-21 (1996). While a defendant's right to confront witnesses against him is central to the criminal trial's truthfinding function, a defendant's constitutional right to confrontation does not include the right to present irrelevant, immaterial, or prejudicial evidence. *See* ***id***. at 43-44, 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").[39] In this case, Wiener's testimony that he had no deal with the State provides a reasonable basis for the trial court's decision.[40] The trial court properly prohibited further inquiry into this alleged, but unproven agreement. *See* ***id***.

10. Right to Unanimous Verdict

Kutska next argues that the State's theory of the case deprived him of his right to a unanimous verdict. Kutska acknowledges he was aware that he was charged with first-degree intentional homicide, party to a crime, under § 939.05(2), STATS.,[41] but claims the State's failure to specify the subsection on which it relied violated his right to procedural due process. According to Kutska, the "prosecutor's case against Keith Kutska was, in fact, based on an unarticulated theory of solicitation." Although Kutska did not object to the proposed jury instructions,[42] he argues the jury received inadequate direction. We see no merit to this argument.

---

[39] *See also* ***State v. Balistreri***, 106 Wis.2d 741, 754, 317 N.W.2d 493, 499 (1982); ***Scott v. State***, 64 Wis.2d 54, 61, 218 N.W.2d 350, 354 (1974).

[40] To support his argument, Kutska relies on ***Davis v. Alaska***, 415 U.S. 308 (1974). This case does not support his argument. In ***Davis***, unlike here, the excluded evidence was clearly relevant to the witness's credibility. *See* ***Rogers v. State***, 93 Wis.2d 682, 693, 287 N.W.2d 774, 778 (1980) (discussing case).

[41] On April 12, 1995, Kutska was charged with first-degree intentional homicide, party to a crime, under §§ 940.01(1) and 939.05, STATS.

[42] At the jury instruction conference, the court informed counsel that in addition to other instructions, it would give the jury the substantive instructions regarding first-degree intentional homicide, "party to crime aid and abet," and "party to crime conspiracy." In reply to the court's question, Kutska's counsel stated that he had "no objection to the instructions as proposed." Kutska's counsel did, however, ask for a missing witness instruction.

In Wisconsin, the State is neither required to charge a defendant as a principal under § 939.05, STATS., "nor [to] specify that a defendant is charged under a particular subsection of the section." ***State v. Zelenka***, 130 Wis.2d 34, 47, 387 N.W.2d 55, 60-61 (1986) (citing ***State v. Shears***, 68 Wis.2d 217, 239-40, 229 N.W.2d 103, 114-15 (1975)).[43] Moreover, the State is not required to select its theory of participation under § 939.05 before the court submits the case to the jury. ***Jackson v. State***, 92 Wis.3d 1, 10, 284 N.W.2d 685, 689 (Ct. App. 1979). We agree with Kutska that procedural due process requires that defendants have notice of the specific charge so that, at trial, they can address the specific issues the charges raise. Under Wisconsin law, however, the criminal complaint's reference to § 939.05 constitutes specific and sufficient notice. *See* ***Zelenka***, 130 Wis.2d at 47, 387 N.W.2d at 60-61.

Reviewing the portions of the record to which Kutska cites, we also reject his argument that the State "argued a solicitation case" with which Kutska was not charged and about which the jury was not properly instructed. Kutska's own brief refutes his "unarticulated solicitation theory." Kutska himself states that the State's theory was that he "*advised* and *counseled* the five other co-defendants to commit the crime of first-degree intentional homicide." (Emphasis added.) He then lists examples from the record to show how Kutska "advised and counseled" the codefendants. Section 939.05(2)(c), STATS., states, in part, that a "person is concerned in the commission of the crime if the person [i]s a party to a conspiracy

[43] *Accord* ***State v. Cydzik***, 60 Wis.2d 683, 687-88, 211 N.W.2d 421, 425-26 (1973) (noting that because "reference to the party-to-a-crime section is not mandatory, we see no reason to hold referring to a particular subsection to be required"); ***Holland v. State,*** 91 Wis.2d 134, 142, 280 N.W.2d 288, 292 (1979); ***Jackson v. State***, 92 Wis.2d 1, 10, 284 N.W.2d 685, 689 (Ct. App. 1979) (stating that when "a defendant is charged as a party to a crime, the specific subsection of sec. 939.05, STATS., (manner of participation) need not be specified"); ***Hardison v. State***, 61 Wis.2d 262, 270-72, 212 N.W.2d 103, 107-08 (1973).

with another to commit it or *advises*, hires, *counsels* or otherwise procures another to commit it." (Emphasis added.) Section 939.30, STATS., the solicitation statute, only uses the word "advises," not "counsels."

Further, the jury never received a solicitation instruction. Rather, the jury received instructions on party to a crime, and the verdict form asked the jury to find Kutska guilty or innocent "of the offense of First Degree Intentional Homicide, Party to the Crime." Jurors are presumed to follow the court's instructions, and we presume the jurors did just that in this case. ***State v. Pitsch***, 124 Wis.2d 628, 645 n.8, 369 N.W.2d 711, 720 n.8 (1985). Our review of the record reveals no "unarticulated theory of solicitation."

Kutska apparently contends that jury unanimity was required as to the manner in which § 935.05(2) was violated. We likewise reject this argument as applied to the facts of this case. A jury may convict a defendant as a party to a crime without unanimously agreeing on whether the defendant directly committed the defense, aided and abetted in its commission, or conspired with another to commit the offense. ***Zelenka***, 130 Wis.2d at 47-48, 387 N.W.2d at 61.

11. Perjured Testimony

Kutska's eleventh argument is that perjured testimony tainted his trial. At a preliminary hearing, Dodie May VerStrate was one of three witnesses the State called to establish probable cause. She claimed that Kutska implicated himself at least ten times during the many conversations she had with Kutska. In addition, VerStrate wore a wire and recorded many of these conversations. Kutska's argument seems to be that using VerStrate's perjured testimony to establish probable cause at the preliminary hearing entitles him to a reversal of conviction. We disagree.

In ***State v. Webb***, 160 Wis.2d 622, 628, 467 N.W.2d 108, 110 (1991), the supreme court held that "a conviction resulting from a fair and errorless trial in effect cures any error at the preliminary hearing." If a defendant believes that there was an error at his preliminary hearing, he must seek relief before trial.[44] *See* ***id***. Following ***Webb***, Kutska is not entitled to a reversal of his conviction based on alleged perjury at the preliminary hearing.

12. Ineffective Assistance of Counsel

In his reply brief, Kutska argues ineffective assistance of counsel under ***Strickland v. Washington***, 466 U.S. 668 (1984). The State argues that Kutska's counsel waived errors because he failed to object and did not offer to join in defense of evidence. Following Kutska's reasoning, if this court accepts the State's waiver argument, we should engage in a ***Strickland*** analysis. We reject his reasoning for two reasons.

First, to preserve a claim for ineffective assistance of counsel, the defendant must raise the issue in a postconviction motion, and if appropriate, hold a ***Machner*** hearing so that the trial court can determine if the trial attorney's actions resulted from incompetence or a deliberate choice of trial strategy. *See* ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908-09 (Ct. App. 1979). In his reply brief, Kutska states that he requested a new trial on the grounds of ineffective assistance of counsel as "one of his postconviction motions," but he gives this court no cite to the record. We conclude from our review of the record that Kutska indeed moved for an order granting ineffective assistance of counsel

[44] On June 5, 1995, Kutska did file a motion to dismiss based on grounds that his preliminary hearing was insufficient. The court denied the motion.

"to the extent the court finds that any of the issues raised in this motion were waived at trial." The record does not reflect, however, that Kutska raised his ineffective assistance of counsel claim at the postconviction hearing or that he preserved his trial counsel's testimony regarding the reasons for his choice of tactics at trial. He claims, however, that the State did not raise the issue of waiver at the postconviction motion hearings and that the court did not address the issue in denying the motions. Apparently, Kutska's argument is that he did not preserve his trial counsel's testimony because he was unsure if he had waived any of his argument on appeal.

In ***Machner***, the court held that it is a "prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel." ***Id***. at 804, 285 N.W.2d at 908. This court reviewed each postconviction motion for the testimony of Kutska's trial counsel regarding an ineffective assistance of counsel claim. Our search was unsuccessful, and Kutska offers no cite to this voluminous record to assist us.[45] The trial court's postconviction decision and order does mention that Kutska was "ably represented by experienced trial counsel" and that the court was "satisfied that any errors which may have been made by either the Court in its rulings or by counsel with respect to trial tactics were not prejudicial." However, without the testimony of Kutska's trial counsel on the record for this court to review, Kutska has failed to fulfill the necessary prerequisite to have this claim decided on appeal. *See* ***Machner***, 92 Wis.2d at 804, 285 N.W.2d at 908. Without this testimony, we have nothing upon which to

[45] We do note, however, that Kutska's trial counsel did testify on August 21, 1997, regarding the detail sheet and VerStrate's conversations with Kutska. After testifying regarding those matters, however, the court granted Kutska's trial counsel's request to leave the postconviction hearing.

judge whether Kutska's trial counsel's performance was deficient and prejudicial under ***Strickland***. Nonetheless, even if a ***Machner*** hearing occurred, Kutska failed to address this argument in his main brief. We therefore decline to address it. *See* ***Hogan***, 157 Wis.2d at 381 n.16, 459 N.W.2d at 873 n.16.

13. Plain Error and Discretionary Reversal

Kutska argues that if his failure to make proper objections or join in offering defense evidence thereby waived his objections to errors at trial, we should review for plain error or exercise our powers of discretionary reversal. We decline both requests.

In his reply brief, Kutska asks this court to reverse his conviction under § 752.35, STATS. Section 752.35 grants our court the authority to reverse a judgment or order if "the real controversy has not been fully tried, or that it is probable that justice for any reason has been miscarried." A party's failure to make the proper motion or objection on the record does not prevent this court from exercising this discretionary power. *See* ***id***. Kutska also argues for the first time in his reply brief that this court invoke the plain-error rule pursuant to ***Virgil v. State***, 84 Wis.2d 166, 267 N.W.2d 852 (1978). If an appellant fails to discuss alleged error in its main brief, it may not do so in its reply brief. ***Hogan***, 157 Wis.2d at 381 n.16, 459 N.W.2d at 873 n.16. We therefore decline to engage in a plain-error analysis or exercise our powers of discretionary reversal.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.