

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 29, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

Appeal No. 2009AP341-CR

Cir. Ct. No. 2007CF122

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL L. HAYDON,

DEFENDANT-APPELLANT.

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

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

¶1 PER CURIAM. Michael Haydon appeals a judgment of conviction for first-degree sexual assault by use of a dangerous weapon, false imprisonment, threat to injure or accuse of a crime, burglary, and five counts of intercepting a wire communication. Haydon argues the circuit court's refusal of his request to

play a tape recording of the victim at trial violated his constitutional right to present a defense. Haydon alternatively argues the refusal constituted a prejudicial evidentiary error. We reject Haydon's arguments and affirm.

BACKGROUND

¶2 Susan Thompson was Haydon's landlord at a duplex where she resided. The two eventually entered into a sexual relationship. Haydon later moved out. Haydon subsequently entered Thompson's home, took her dogs, and left a note telling her to come to his house. When Thompson went to Haydon's home, he threatened her with a gun and engaged in nonconsensual intercourse with her.¹

¶3 At trial, Haydon sought to play audiotape messages that Thompson had left for him and that had already been received in evidence. The State objected, asserting that the messages constituted hearsay. Haydon responded that the messages were not hearsay because they were not offered for the truth of the matter asserted, but to show Haydon's state of mind at the time of the alleged offenses, based upon the tone of the messages. The court concluded the taped messages were hearsay and did not allow them to be played for the jury. Following conviction on nine of ten charges, Haydon now appeals.

¹ The facts are taken from the parties' briefs, both of which cite to the criminal complaint rather than the trial transcripts. The first two sentences comprise the entirety of the facts set forth in Haydon's brief. The remainder of Haydon's statement of facts consists of procedural history.

DISCUSSION

¶4 Haydon argues the court’s denial of his request to play the audiotape messages deprived him of his constitutional right to present a defense because the messages were not hearsay and were necessary to provide context regarding Thompson’s relationship with him. He asserts the messages were important because they would “soften the harshness and abusiveness of Haydon on the recordings that the jury did hear at trial.”

¶5 The State does not attempt to justify the circuit court’s characterization of the audiotape messages as hearsay. Instead, it argues Haydon forfeited his constitutional argument because he never presented it to the circuit court. The State further argues the court’s ruling was harmless error. We agree with both arguments.

¶6 At trial, Haydon simply argued the evidence was not hearsay. Haydon did not file a postconviction motion prior to filing this appeal. A defendant “shall file a motion for postconviction ... relief before a notice of appeal is filed unless the grounds for seeking relief are sufficiency of the evidence or issues previously raised.” WIS. STAT. RULE 809.30(2)(h). “Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal.” *State v. Huebner*, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. In his reply brief, Haydon concedes forfeiture of the constitutional argument and asks us to exercise our discretion to consider the issue. We decline the invitation.

¶7 Alternatively, in his reply brief, Haydon asks us to review the circuit court’s refusal to play the messages as an evidentiary error. As noted, the State argues the refusal was harmless error. An evidentiary error is not harmless if there

is a reasonable possibility of a different outcome absent the error. *Martindale v. Ripp*, 2001 WI 113, ¶¶30-32, 246 Wis. 2d 67, 629 N.W.2d 698. A reasonable possibility is one sufficient to undermine confidence in the outcome. *Id.* A reviewing court’s confidence in the outcome may be less easily undermined where the erroneously excluded evidence was peripheral or the outcome was strongly supported by evidence untainted by error. *Id.*

¶8 Without citation to the record, Haydon asserts: “A review of the trial transcripts shows that a substantial part of Mr. Haydon’s defense was showing the jury that the alleged victim and the defendant were involved in a volatile, often verbally abusive (on both sides) relationship” Haydon does not, however, explain how further evidence of the volatile relationship with Thompson would have influenced the jury’s verdict.² Evidence tending to make the victim “look bad” is only peripheral and does not bear strongly on the issue of credibility.

¶9 Further, taking Haydon’s assertion at face value, the audiotape evidence would merely be cumulative. As the State observes, Thompson admitted on cross-examination that she and Haydon argued and raised their voices with one another, “even in the good times.” Additionally, Haydon testified he and Thompson argued and engaged in phone games.

¶10 Finally, while the audiotape messages might have been tangentially relevant to the sexual assault and false imprisonment counts, the evidence was irrelevant to the burglary, threat to accuse, and wiretapping charges. In any event,

² We would have no difficulty in rejecting Haydon’s appeal based on his minimal citation to the record, inadequate explication of the facts, and undeveloped arguments. *See State v. Flynn*, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994).

the evidence on the other charges was overwhelming, including Haydon's admissions that he taped Thompson's phone calls and that he entered her home and left a message threatening to expose her and her friends.

¶11 In light of the foregoing, the circuit court's refusal to play the audiotape messages does not undermine our confidence in the outcome at trial. We therefore conclude the error was harmless.

By the Court.—Judgment affirmed.

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

