**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**June 24, 2014**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2013AP447-CR** **Cir. Ct. No. 2010CF5195**

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

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**WILLIAM E. AKINS,**

**DEFENDANT-APPELLANT.**

APPEAL from a judgment of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. William E. Akins appeals a judgment of conviction entered after a jury found him guilty of first-degree reckless homicide by use of a dangerous weapon. He contends that the circuit court erred by: (1) limiting his

cross-examination of a witness; and (2) barring admission of a text message as evidence on hearsay grounds. We affirm.

## BACKGROUND

¶2 On October 8, 2010, Patric Harris was shot and killed in front of his home. His fiancée, Carmen Perry, and his friend, Gabriel Velazquez, spoke to police at the scene immediately after the shooting and identified Akins as the gunman. The State charged Akins with first-degree intentional homicide. Akins demanded a jury trial.

¶3 Pretrial proceedings suggested that Harris, Akins, and some of their acquaintances were involved in various simmering disputes during the time leading up to the shooting. The State's theory of the case was that Akins shot Harris to retaliate after a violent confrontation between them earlier in the day. Akins contended that he was misidentified or falsely accused.

¶4 In this appeal, Akins challenges two evidentiary rulings that limited the testimony and evidence he sought to present at trial. We summarize here only those portions of the proceedings necessary for an understanding of the appellate issues.

¶5 The State showed that Officer Erin Mejias arrived at the scene of the shooting and found Harris bleeding in the street, cradled in Perry's arms. Velazquez stood nearby. When Mejias approached Harris, Perry said "Kilo" shot Harris. Additional testimony showed that "Kilo" is Akins's nickname.

¶6 During Akins's cross-examination of Mejias, she acknowledged that a citizen at the scene, Jemika Allen, displayed a cell phone with a text message that she showed to Mejias.[1] Next, Akins asked Mejias whether the message said that his cousin had shot Harris. The State objected and the circuit court sustained the objection, instructed the jury to disregard the question, and prevented further inquiry about the text message.

¶7 Officer Joseph Esqueda testified that, on October 8, 2010, he responded to the scene of the homicide and interviewed Velazquez in a squad car. When Akins's picture appeared on the car's computer screen, Velazquez said "that's Kilo[. T]hat's the guy who shot my friend."

¶8 The State also presented testimony from Velazquez. He said that on October 8, 2010, he was walking with Harris. As they neared Harris's home, Velazquez saw Akins get out of a car and shoot Harris. On cross-examination, Akins questioned Velazquez about inconsistencies between his statement to police at the scene of the homicide and his statement to another officer, Detective Keith Kopcha, two days later. These inconsistencies included differences in Velazquez's descriptions of the gun used to commit the crime and the clothing that the gunman wore.

¶9 Akins additionally elicited an acknowledgement from Velazquez that he was himself under investigation for another matter when he spoke to

[1] Mejias testified that she believed the citizen with a cell phone was named "Jemika Allen," and Akins refers to the citizen as "Jemika Allen" in his appellate brief. We do so as well, even though at one point in the trial proceedings, Akins's trial counsel referred to the citizen by a different first name. The discrepancy has no impact on the issues before us, and we address it no further.

Kopcha on October 10, 2010. Pursuant to a pretrial ruling, however, Akins did not show that Velazquez was in custody during his interview with Kopcha or present any evidence that Velazquez faced a charge of misdemeanor battery at that time.

¶10 The jury rejected the charge of first-degree intentional homicide and returned a guilty verdict on the lesser-included charge of first-degree reckless homicide. Akins now appeals, challenging the circuit court rulings that limited his cross-examination of Velazquez and that barred testimony about the text message.

## DISCUSSION

¶11 Akins contends that the circuit court erroneously excluded relevant evidence. Evidence is relevant if it tends "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." WIS. STAT. § 904.01 (2011-12).[2] "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." WIS. STAT. § 904.03.

¶12 A circuit court has "'broad discretion to admit or exclude evidence.'" ***State v. Nelis***, 2007 WI 58, ¶26, 300 Wis. 2d 415, 733 N.W.2d 619 (citation omitted). We will not disturb a circuit court's evidentiary ruling if the circuit court "'examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a reasonable judge

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

could reach."' *See* ***State v. Abbott Labs.***, 2013 WI App 31, ¶31, 346 Wis. 2d 565, 829 N.W.2d 753 (citation omitted). Our standard of review is "'highly deferential.'" *See* ***State v. Shomberg***, 2006 WI 9, ¶11, 288 Wis. 2d 1, 709 N.W.2d 370 (citation omitted).

¶13 Akins first argues that the circuit court wrongly barred evidence that Velazquez was in custody and charged with a battery when he spoke to Kopcha on October 10, 2010, about Harris's death. "[E]vidence 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." WIS. STAT. § 904.04(2)(a).[3] The statute, however, "does not exclude the evidence when offered for other purposes[.]" ***Id.*** The admissibility of such evidence is governed by a three-step inquiry: (1) whether the evidence is offered for a permissible purpose, as required by WIS. STAT. § 904.04(2)(a); (2) whether the evidence is relevant within the meaning of WIS. STAT. § 904.01; and (3) whether the probative value of the evidence is substantially outweighed by the concerns enumerated in WIS. STAT. § 904.03. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998).

¶14 Akins believes that evidence of the battery charge pending against Velazquez and his custodial status when he spoke to Kopcha would have showed that Velazquez had a motive to lie when he gave his second statement about the shooting. *See* ***State v. Missouri***, 2006 WI App 74, ¶22, 291 Wis. 2d 466, 714 N.W.2d 595 (reflecting that extrinsic evidence may be used to prove witness has a motive to give false testimony). Thus, Akins argued to the circuit court:

[3] The legislature recently amended WIS. STAT. § 904.04(2). *See* 2013 Wis. Act 362, §§ 20-22, 38. The amendments do not affect our analysis.

"Velazquez kn[ew] that his participation in [] Akins's case can only help [Velazquez's] own case.... [I]t's relevant to his bias and his level of cooperation, and especially the different information that he gives." Akins acknowledged that the battery charge against Velazquez did not involve Akins and had no connection to Harris's homicide. Akins also agreed that the State did not offer Velazquez anything in exchange for his testimony about the homicide, and Akins did not dispute that the State ultimately dismissed the battery charge against Velazquez because the alleged victim did not want to prosecute. Akins contended, however, that "the issue isn't why the [S]tate dismissed [the battery charge, but] what is in Mr. Velazquez's mind at the time that he talks to the police."

¶15 The State offered various objections to the proposed evidence about Velazquez and the battery charge he faced when he spoke to Kopcha. The core of the State's position, however, was that the evidence would lead the jury to draw unwarranted inferences about Velazquez's character and to speculate about the disposition of the battery allegation. Thus, in the State's view, the evidence would necessitate presentation of additional testimony about the weakness of the battery charge and the alleged battery victim's unwillingness to prosecute. The State argued that, instead of inviting such a "mini trial," the circuit court should exclude testimony about the battery and Velazquez's arrest. *See* WIS. STAT. § 904.03.

¶16 The circuit court determined that "the relevance [of the proposed evidence] is the investigation," and agreed with Akins that a person under investigation might "give the police officers information to help them so that somehow it reflects well on [the person]." The circuit court therefore allowed evidence that Velazquez was under investigation when he spoke to Kopcha. The scope of the ruling permitted Akins to show why Velazquez might believe that his statements about the homicide could have a positive effect on his own legal

predicament. Thus, the circuit court admitted testimony that police told Velazquez that "[Harris's] homicide was more important than the other stuff" involving Velazquez, and "[Harris] dying was the most important thing." The circuit court found, however, that the proposed details of the battery and Velazquez's arrest for that crime would necessitate a mini trial about the strength of the battery charge and the reasons for dismissing it, matters that had nothing to do with the homicide case against Akins. The circuit court further found that details about an ancillary matter were unnecessary to demonstrate that Velazquez had a motive to curry favor with law enforcement. The circuit court therefore did not permit testimony about the battery or about Velazquez's arrest.

¶17 When we review a circuit court's discretionary decision, our inquiry is whether the circuit court exercised discretion, not whether another judge might have exercised discretion differently. ***State v. Prineas***, 2009 WI App 28, ¶34, 316 Wis. 2d 414, 766 N.W.2d 206. Here, the record reflects that the circuit court considered relevant factors and reached a conclusion that a reasonable judge could reach. *See* ***Abbott Labs***, 346 Wis. 2d 565, ¶31. We are satisfied that the circuit court properly exercised its discretion in excluding evidence of the battery charge pending against Velazquez on October 10, 2010, and his custodial status when he spoke to police on that date. Accordingly, we will not disturb the circuit court's decision.

¶18 Next, Akins complains that the circuit court improperly excluded evidence of the text message stating that Akins's cousin shot Harris.[4] In seeking to admit evidence of the message, Akins acknowledged that its subject was a rumor that originated with an unnamed person, and he further conceded:

> [t]he police get this [text message] from … Allen…. She got her text from her sister..... [The sister] said that text came to [her] from [her] boyfriend.... The police talk to [the boyfriend]. He said the people at the scene told [him] this, but he doesn't tell me who they are.[5]

The circuit court concluded the text message was inadmissible hearsay.

¶19 Pursuant to WIS. STAT. § 908.01(3), "'[h]earsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is generally inadmissible except as provided by the rules of evidence or other law. *See* WIS. STAT. § 908.02. The rule excluding hearsay is inapplicable, however, to an out-of-court statement if the statement is not offered to prove the truth of the matter asserted. *See* ***State v. Britt***, 203 Wis. 2d 25, 38, 553 N.W.2d 528 (Ct. App. 1996).

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[4] In support of the claim that the circuit court wrongly excluded the text message, Akins cites an unpublished *per curiam* opinion released by this court in 2011. Although an unpublished authored court of appeals opinion released after July 1, 2009, may be cited for persuasive value, a *per curiam* opinion is not an authored opinion for purposes of the Rule. *See* WIS. STAT. RULE 809.23(3)(a)-(b). An unpublished *per curiam* opinion therefore may not be cited "except to support a claim of claim preclusion, issue preclusion, or the law of the case." *See* ***id.*** RULE 809.23(3) has been in effect in its current form for nearly five years. *See* S. Ct. Order 08-02, 2009 WI 2, 311 Wis. 2d xxv (eff. July 1, 2009). We remind counsel that we expect compliance with the rules of appellate procedure. *Cf.* ***Tamminen v. Aetna Cas. & Sur. Co.***, 109 Wis. 2d 536, 563-64, 327 N.W.2d 55 (1982) (imposing a $50 penalty for improperly citing an unpublished court of appeals opinion in violation of WIS. STAT. RULE 809.23 (1977-78)).

[5] The parties agree that the meaning of the text message at issue is that Akins's cousin shot Harris. The actual text of the message was: "C and Gabbie jumped Keylo and Keylo cousin came and shot Project n da stomach. Yall, whole block taped off."

¶20 Akins explicitly disavowed any intent to offer the text message as proof that his cousin shot Harris. Instead, Akins asserted that the text message was relevant to show that the police failed to conduct a thorough investigation because the officers did not "find out who this cousin was and talk to them [sic]." The circuit court rejected the argument and barred the evidence.

¶21 The decision to admit or exclude evidence in the face of a hearsay objection rests in the circuit court's reasoned discretion. *See* ***id.*** Here, the circuit court determined that the text message was inadmissible because it demonstrated little "aside from the truth of the matter asserted." The circuit court acknowledged Akins's argument that the evidence "[is] not being offered for its truth" but concluded that "[w]hatever else it's being offered for ... is minimal."

¶22 We are satisfied that the circuit court reasonably exercised its discretion. Although Akins argued that he offered the message as proof of poor police work, a rumor about a suspect's identity does not reveal anything about the actions of the police. The circuit court therefore properly concluded that the text message was not relevant for the purpose that Akins proposed. Further, Akins explicitly acknowledged that the text was inadmissible to prove that his cousin shot Harris. *See* WIS. STAT. § 908.02. Because Akins conceded that the evidence was inadmissible if offered for its truth, and because Akins failed to offer a viable alternative reason that the text message had any probative value, the circuit correctly excluded the evidence. *See* § 908.02.

¶23 Akins last asserts that the text message was admissible pursuant to WIS. STAT. § 908.045(2). We must reject this contention. Section 908.045(2) permits certain hearsay statements of recent perception. *See* ***id.*** Akins, however, did not ask the circuit court to admit the text message under this provision. To the

contrary, he expressly agreed that the text message was inadmissible to prove its truth pursuant to the hearsay rule. Therefore, he cannot argue on appeal that the text message should have been admitted to prove its truth pursuant to a hearsay exception. A party who seeks admission of evidence in the face of a hearsay objection must "articulate each of [the party's] theories to the [circuit] court to preserve [the party's] right to appeal." *See* ***State v. Rogers***, 196 Wis. 2d 817, 824, 826-20, 539 N.W.2d 897 (Ct. App. 1995).

¶24 Moreover, the text message does not fall within the ambit of WIS. STAT. § 908.045(2). Section 908.045 permits the admission of some hearsay statements "if the declarant is unavailable as a witness." Akins argues that "Allen's statement could have been admitted under § 908.045(2) as a statement of recent perception.... The text message was recently perceived because Ms. Allen made a statement to the police shortly after receiving the text message." Akins concedes, however, that "Allen could have also been called as a witness to testify about her statement to the police and the text message." Because Akins's theory of admissibility turns on the testimony of an available declarant, § 908.045(2) is inapplicable.

¶25 Before concluding, we note that Akins presents his evidentiary challenges on appeal under the heading: "the circuit court improperly limited Akins's constitutional right to present a defense." Akins, however, does not develop any argument that he suffered a violation of his constitutional rights, and he does not demonstrate that he presented a constitutional challenge in the circuit court. Accordingly, we do not consider whether Akins suffered any violation of his constitutional rights. *See* ***State v. Marquardt***, 2001 WI App 219, ¶39, 247 Wis. 2d 765, 635 N.W.2d 188 (we do not consider arguments inadequately briefed or raised for the first time on appeal). Nonetheless, we observe that "[t]here is no

abridgement on the accused's right to present a defense, so long as the rules of evidence used to exclude the evidence offered are not arbitrary or disproportionate to the purposes for which they are designed." *See* ***State v. Muckerheide***, 2007 WI 5, ¶41, 298 Wis. 2d 553, 725 N.W.2d 930. As our discussion shows, the circuit court did not arbitrarily or disproportionately limit Akins's presentation of evidence; rather, the circuit court considered the relevant factors to reach a reasonable conclusion as to each evidentiary issue raised.

*By the Court.*—Judgment affirmed.

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