COURT OF APPEALS
DECISION
DATED AND FILED

August 27, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1936-CR **Cir. Ct. No. 2008CF113**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID R. YATES,

DEFENDANT-APPELLANT.

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

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. David R. Yates challenges multiple warrantless searches of his home, the destruction of potentially exculpatory evidence, various evidentiary rulings at trial, and the effectiveness of his trial counsel. This appeal arises from Yates' conviction of two counts of first-degree intentional homicide

for the deaths of his five-week-old twins, and the circuit court's denial of his motion for postconviction relief. For the reasons that follow, we reject each of Yates' arguments. Accordingly, we affirm the circuit court.

BACKGROUND

¶2 Yates was charged by a criminal complaint of two counts of first degree intentional homicide for the deaths of twin five-week-old infants parented by Yates and Susan Winbun. Yates was found guilty by a jury of committing both offenses. Prior to trial, Yates moved to suppress evidence, including the bodies of the twins, obtained in the course of conducting a warrantless search of Yates' residence, on the ground that the search violated his Fourth Amendment right to be free from unreasonable searches and seizures. The court denied the motion on the ground that the challenged searches were conducted pursuant to the community caretaker doctrine.

¶3 Prior to trial, Yates moved to dismiss the criminal complaint on the ground of the destruction of, what Yates characterizes as, potentially exculpatory fingerprint evidence. The court denied this motion.

¶4 During the trial, the trial court made various evidentiary rulings against Yates, which Yates argued in his post-conviction motion were an improper exercise of the court's discretion.

¶5 Following the jury trial, Yates filed a postconviction motion challenging the court's denial of Yates' motions to suppress evidence and to dismiss the charges on the ground of destruction of potentially exculpatory evidence. In the same motion, Yates challenged various evidentiary rulings made by the trial court during trial, and alleged his defense counsel failed to provide

effective assistance in various ways. The court denied Yates' postconviction motion in its entirety. Yates appeals and raises the same challenges he made in the circuit court.

¶6 We discuss additional pertinent facts in conjunction with our discussion of each of Yates' issues on appeal.

DISCUSSION

¶7 On appeal, Yates makes the same arguments that he did in his post-conviction motion in the circuit court, and therefore we do not repeat them here. *See supra* ¶5. We first consider whether the warrantless searches of Yates home fall within the community caretaker doctrine. We then consider whether the destruction of evidence violated Yates' Due Process rights. Finally, we consider various evidentiary rulings made by the trial court and Yates' ability to present a third-party defense. We consider ineffective counsel claims within these discussions. We reject each of Yates' arguments for the reasons we explain below.

I. Warrantless Searches of Yates' Home

A. Background

¶8 David Yates and Susan Winbun were the parents of twin five-week-old children. Yates and Winbun had an informal visitation agreement for the children. Yates was watching the children on the weekend of April 11-13, 2008, and Winbun was to get them back on Sunday, April 13. Winbun attempted to reach Yates by telephone beginning at 11:01 a.m. on Sunday, but was unable to do so. Telephone records show twenty-seven missed calls from Winbun's phone to Yates' phone between 11:41 a.m. and 8:08 p.m. on Sunday, April 13.

¶9 Winbun went to Yates' residence around 3:45 p.m. and rang the doorbell, but no one answered. She had a key to the door from the garage into the home; she entered the garage and observed that the door handle into the residence had been pounded off. At 4:15 p.m. Winbun called the courthouse, but did not ask for police assistance at that time. At 8:05 p.m. Winbun called the police for assistance. She told the police that she was concerned about their children because Yates passed out a few months before because he has Serotonin Syndrome.

¶10 City of Baraboo police officer Michael Pichler arrived at Yates' residence at 8:22 p.m. on a "check welfare complaint." He was in full police uniform. He rang the doorbell, but no one responded. Officer Pichler observed that the fireplace and the television were on in the home. It was dark outside and as he walked around the outside of the residence, he could also see that a light was on inside. At the rear of the residence, Officer Pichler used his flashlight to look into a bedroom window, but he did not see anyone.

¶11 Shortly thereafter, Winbun arrived. Winbun told Officer Pichler that she was concerned about her children and that Yates should be at home with them. She told Officer Pichler that she had tried to contact Yates hours before, that she had rang the doorbell and tried to telephone Yates, but had received no response to either effort. She also told Officer Pichler that the fireplace and the same television station had been on earlier in the day when she tried to pick up the children.

¶12 Officer Pichler and Winbun went to the back of the residence together and Officer Pichler used his flashlight to look into the bedroom window a second time. This time he could see an adult's leg on a bed. Officer Pichler knocked on the window and Winbun returned to the front of the residence to ring

the doorbell and knock again. Officer Pichler observed that the leg moved away from view, but no one answered the door.

¶13 Officer Pichler and Winbun entered the garage, which is attached to the residence. Once inside the garage, Officer Pichler observed that the door knob on the door to the residence was badly damaged. Officer Pichler also observed an SUV in the garage. Winbun told Officer Pichler that her only key to the residence was to this door. Winbun thought she had the key in her van but upon checking discovered that she did not. In the rear of the residence, Officer Pichler observed that a sliding glass door on the deck was open approximately an inch.

¶14 Officer Pichler contacted his sergeant, explained that he could not make contact with anyone, and that he was concerned about the children's welfare. The sergeant advised that he should enter the residence in his function as a community caretaker.

¶15 Officer Pichler hoisted himself up and over the deck railing and entered the home through the partially open sliding glass door. He announced his presence in the home several times and received no response. He observed that the temperature of the home was extremely warm and he also observed two infant car seats in the dining room and another set of infant car seats near the front door.

¶16 Officer Pichler entered the bedroom where he believed Yates might be, announced himself, and pointed his flashlight at Yates who was lying on the bed. After approximately thirty seconds, Yates awoke and mumbled something unintelligible. Yates appeared to be lethargic, unsteady, and under the influence of something. Officer Pichler identified himself as a police officer and explained to Yates that he was there to check on the welfare of the twins. Yates made a second unintelligible response. Officer Pichler requested that Yates get up and he

observed Yates fall back into bed. Officer Pichler asked Yates to get dressed and observed that Yates did so slowly and continued to be unsteady on his feet. Officer Pichler asked Yates the names and birthdates of the children and Yates provided the correct names but gave different birthdates for the twins.

¶17 Officer Pichler asked again where the children were, and Yates stated that he dropped them off with a friend, Dan Forestwood. When asked why the children's car seats were in the home, Yates then indicated that Forestwood had used his own car seats to pick up the children. Yates did not have Forestwood's phone number.

¶18 Based on prior contacts with Yates, the officer knew that Yates was on probation and a condition of that probation was no drinking. Yates denied drinking but stated that he might be a 0.6 if given a preliminary breath test (PBT). Officer Pichler asked Yates to go to his squad car for a PBT. At this point there were no restraints being used and Yates walked to the front house door with Officer Pichler.

¶19 As Yates exited the residence, he tried to close and lock the front door. Officer Pichler prohibited Yates from doing so. Yates stated that he had forgotten something and he and the officer reentered the residence. They proceeded to the kitchen area where Yates picked up some gum and a scissors. Officer Pichler directed Yates to put the scissors down for the officer's own safety and proceeded to place Yates in handcuffs. After being handcuffed, Yates was escorted to Officer Pichler's squad car where he refused a PBT. Yates was then secured in the squad car.

¶20 Officer Pichler and Winbun returned to Yates' home to look for the children. Once inside, Officer Pichler returned to the bedroom where Yates was

found sleeping, and Winbun went downstairs. While in the bedroom Officer Pichler found the bodies of both infants under Yates' bed.

¶21 Yates contends, as he did in the circuit court, that six unlawful searches occurred:

(1) The first window search;

(2) The second window search;

(3) The garage search;

(4) Initial entry into the residence;

(5) The first reentry into the residence; and

(6) The second reentry into the residence.

¶22 Yates asserts that the circuit court erred when it denied his motion to suppress evidence, including the discovery of the infant victims, obtained as a result of the six warrantless searches of his home. Yates argues that none of the searches were permissible under the community caretaker exception; therefore, any evidence obtained as a result of these warrantless searches must be suppressed. The State asserts that the community caretaker exception applies to each search because Officer Pichler's conduct as a bona fide community caretaker was reasonable under the circumstances. We agree with the State.

¶23 "In reviewing the denial of a motion to suppress evidence, we will uphold a circuit court's findings of historical fact unless they are clearly erroneous." ***State v. Pinkard***, 2010 WI 81, ¶12, 327 Wis. 2d 346, 785 N.W.2d 592. We then review the circuit court's application of constitutional principles to

those facts independently. ***Id.*** Here, Yates does not challenge the circuit court's factual findings. Therefore, we independently review whether Officer Pichler's conduct falls within the community caretaker exception to the warrant requirement. *See* ***id.*** Although Yates discusses the searches as six separate incidences, we analyze all six searches as one event.

B. Community Caretaker Function

¶24 Under certain circumstances, "a police officer serving as a community caretaker to protect persons and property may be constitutionally permitted to perform warrantless searches and seizures." ***Id.***, ¶14. We apply a three-step test to determine whether the community caretaker exception applies. ***Id.***, ¶29; ***State v. Kramer***, 2009 WI 14, ¶21, 315 Wis. 2d 414, 759 N.W.2d 598 (adopting the test from ***State v. Anderson***, 142 Wis. 2d 162, 169, 417 N.W.2d 411 (Ct. App. 1987) (***Anderson I***). The Wisconsin Supreme Court has explained the three steps in the context of a warrantless entry and search of a home:

> When a community caretaker function is asserted as the basis for a home entry, the circuit court must determine: (1) whether a search or seizure within the meaning of the Fourth Amendment has occurred; (2) if so, whether the police were exercising a bona fide community caretaker function; and (3) if so, whether the public interest outweighs the intrusion upon the privacy of the individual such that the community caretaker function was reasonably exercised within the context of a home. The State bears the burden of proof.

Pinkard, 327 Wis. 2d 346, ¶29 (citation and footnote omitted).

C. Application of the Three-Step Test

1. Search

¶25 Here, there is no dispute that the first step has been met. The parties agree that each of the six incidents constituted a search within the meaning of the Fourth Amendment and that they occurred without a warrant.[1]

2. Bona Fide Community Caretaker

¶26 In order to determine whether an officer was acting as a bona fide community caretaker, we look to the totality of the circumstances. ***Kramer***, 315 Wis. 2d 414, ¶30. In doing so, we consider "whether there is an 'objectively reasonable basis' to believe there is 'a member of the public who is in need of assistance.'" ***State v. Ultsch***, 2011 WI App 17, ¶15, 331 Wis. 2d 242, 793 N.W.2d 505 (quoting ***Kramer***, 315 Wis. 2d 414, ¶¶30, 32). Stated another way, if we "conclude[] that the officer has articulated an objectively reasonable basis under the totality of the circumstances for the community caretaker function, he [or she] has met the standard of acting as a bona fide community caretaker, whose

[1] Because the State agrees that searches occurred when Officer Pichler peered into Yates' bedroom window on two separate occasions, we need not address Yates' argument that this conduct is considered a search under the Fourth Amendment because Officer Pichler invaded the curtilage of Yates' home.

Furthermore, we note that Yates asserts that the community caretaker exception does not apply to searches of homes. He acknowledges that ***State v. Pinkard***, 2010 WI 81, 327 Wis. 2d 346, 785 N.W.2d 592, reached the opposite conclusion; however, he asserts the argument nonetheless to preserve the issue for future review.

community caretaker function is totally divorced from law enforcement functions."[2] ***Kramer***, 315 Wis. 2d 414, ¶36.

¶27 Yates argues first that Officer Pichler was not acting as a bona fide community caretaker when the searches occurred because the officer did not have sufficient information to form a reasonable belief that the children were inside the home or that anyone inside the home was in need of assistance. We reject Yates' argument because the undisputed facts show that each step Officer Pichler took was based on his concern for the welfare of the children, whose whereabouts and welfare remained unknown until Officer Pichler's final reentry of Yates' home. As such, Officer Pichler was acting in a bona fide community caretaker function.

¶28 In ***Pinkard***, the supreme court found that officers' actions as community caretakers were bona fide when police entered a residence acting on an anonymous tip that two people inside appeared to be sleeping in a room with drugs and paraphernalia. *See* ***Pinkard***, 327 Wis. 2d 346, ¶1. In ***State v. Gracia***, the supreme court found that officers' entry into a residence was bona fide when the brother of an automobile driver involved in an accident appeared concerned for the victim's safety. *See* ***State v. Gracia***, 2013 WI 15, ¶22, 345 Wis. 2d 488, 826 N.W.2d 87. In ***Gracia***, the victim had entered a residence and locked himself in the bedroom. Officers followed the brother into the residence and bedroom after the victim yelled at officers to "'go away.'" ***Id.***, ¶8. The supreme court concluded that the officer's actions were bona fide even *after* the victim yelled at the officers, indicating that the victim may not have been in need of immediate assistance.

[2] It is undisputed that Officer Pichler was not acting within the ambit of his law enforcement functions.

¶29 In this case, Officer Pichler had greater reason to be concerned than the officers in ***Pinkard*** and ***Gracia***. From the initial call, Officer Pichler knew that the mother of five-week-old twins was concerned about their welfare and that she had contacted the police. He observed indicators that someone might be home,—lights, fireplace, and television were all turned on—but no one answered the door. He also testified that he was aware of the fact that infants need constant care.

¶30 As the search progressed, Officer Pichler continued to acquire information that heightened his concern for the welfare of the children. Once Winbun arrived at the residence, Officer Pichler learned that Winbun had tried to contact Yates "hours before," and that Yates was supposed to be at home with the children. Upon looking in the window, Officer Pichler observed an adult male leg, at which point he knew someone was in the residence and not responding to repeated attempts to rouse him. At that time, Officer Pichler had reason to be concerned for the welfare of the children *and* the adult he observed through the window.

¶31 Officer Pichler's observations in the garage—the parked car and the badly damaged door knob—further supported his belief that something was wrong and that someone inside might be in need of assistance. Once inside the residence, Officer Pichler encountered a visibly impaired Yates, who gave inconsistent responses regarding the children. Yates' suspicious behavior and his inability to account for the children heightened Officer Pichler's concern for the twins' welfare. Once Officer Pichler located the children under the bed, he exited the residence and called for assistance, further supporting our conclusion that he was acting in a bona fide community caretaker function.

¶32 Based on the information Officer Pichler observed and the particular vulnerability of the children due to their very young age, we conclude that Officer Pichler had an "objectively reasonable basis" to believe that the children and Yates were in the home and in need of assistance. Based on the above facts, we conclude that Officer Pichler was serving in a bona fide community caretaker function from the time he arrived at the Yates residence and through his discovery of the children.

3. Balance of Interests

¶33 The final step requires us to determine whether the officer's actions as a bona fide community caretaker were reasonable. ***Pinkard***, 327 Wis. 2d 346, ¶41. This requires us to balance the public interest being served against the privacy interest being intruded. ***Id.*** The Wisconsin Supreme Court has observed that "[t]he stronger the public need and the more minimal the intrusion upon an individual's liberty, the more likely the police conduct will be held to be reasonable." ***Kramer***, 315 Wis. 2d 414, ¶41. We consider four factors when conducting this balancing of interests:

> (1) the degree of the public interest and the exigency of the situation; (2) the attendant circumstances surrounding the [search], including time, location, the degree of overt authority and force displayed; (3) whether an automobile is involved; and (4) the availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished.

Pinkard, 327 Wis. 2d 346, ¶42 (quoting another source; footnote omitted).

¶34 The first factor is the extent of the public's interest. In ***Pinkard***, the court found this factor was met because officers entered Pinkard's home out of concern for the safety of Pinkard and his companion. ***Id.***, ¶46. In this case,

Officer Pichler knew of Winbun's concern for the safety of her children, her inability to contact Yates for hours, and her stated belief that Yates should be caring for the children in his home. This information, coupled with the extreme vulnerability of five-week-old infants, provides support to Officer Pichler's belief that they may have been in danger. The public interest in protecting very young children, some of the most vulnerable members of our society, is exceedingly high.

¶35 Officer Pichler's primary concern was determining the welfare of infant children, a significantly exigent situation. He observed through the window that someone was lying in bed but not responding to the door, indicating that an adult inside the home may also need assistance. Before he made his initial entry into the home, Office Pichler had observed additional indications that Yates was home and that something was amiss, including the badly damaged door in the garage that prevented access to the home. Based on erratic and evasive behavior of Yates once Officer Pichler was inside the home, it was reasonable for Officer Pichler to believe that the children were in danger and that they needed to be located immediately. The first factor favors the conclusion that Officer Pichler's community caretaking function was reasonably exercised.

¶36 In considering the second reasonableness factor, the attendant circumstances, we look at the "time, location, the degree of overt authority and force displayed." ***Id.***, ¶49 (quoting another source). We first note that multiple and varied attempts were made to have contact with any occupants inside Yates' residence before entry. Officer Pichler rang the doorbell multiple times, knocked on the door, and attempted entry via the garage when he thought that Winbun had a key to the garage door. It was only after these repeated unsuccessful attempts that Officer Pichler entered the residence via the sliding glass door.

¶37 Wisconsin courts have recognized that the amount of time that passes prior to entry can be significant. *See* ***id.*** (waiting thirty to forty-five seconds prior to entering); ***Shane Ferguson***, 2001 WI App 102, ¶5, 244 Wis. 2d 17, 629 N.W.2d 788 (waiting about thirty minutes prior to entering). Here, Officer Pichler knew that Winbun had first tried to contact Yates "hours before" Officer Pichler's entry into the residence.[3]

¶38 We agree with Yates that entering a person's bedroom involves a considerable degree of overt authority. *See* ***Ultsch***, 331 Wis. 2d 242, ¶26. In ***Ultsch***, officers entered a residence to investigate a motor vehicle collision. The officers encountered the homeowner in the driveway prior to entering the residence, and the homeowner had indicated to the officers that the driver, his girlfriend, "was up at the house 'possibly in bed or asleep.'" ***Id.***, ¶3. We find this case distinguishable from ***Ultsch***, since Officer Pichler entered Yates' bedroom in an attempt to determine the unknown welfare of five-week-old infants. Unlike ***Ultsch***, Officer Pichler received no information about the status of the children or anyone else inside Yates' residence. We therefore conclude that the second factor weighs in favor of concluding that Officer Pichler's exercise of the community caretaker function was reasonable. Finally, we note that Officer Pichler did not employ any force or draw his weapon. *See* ***Pinkard***, 327 Wis. 2d 346, ¶55.

¶39 Under the third factor, we consider whether an automobile was involved in the exercise of the community caretaker function. This is not relevant

[3] We cannot tell by the record the amount of time that passed between Officer Pichler's arrival at Yates' residence and his entry via the sliding glass door. What we do know is that Officer Pichler made repeated attempts to contact Yates before engaging in an overt invasion of Yates' constitutionally protected privacy.

to Yates' case other than to recognize that "one has a heightened privacy interest in preventing intrusions into one's home." ***Id.***, ¶56.

¶40 The final factor asks us to consider the feasibility and availability of alternatives. Yates argues that Officer Pichler had numerous alternative options such as trying to contact Yates by phone, checking with neighbors, or waiting to see if Yates returned Winbun's calls. The record shows that Officer Pichler knew that Winbun had been trying to contact Yates by phone for hours. Throughout the entire incident the whereabouts and status of the children remained unknown. Checking with Yates' neighbors to determine whether they had seen anything suspicious was not a feasible option in light of the exigency perceived by Officer Pichler.

¶41 "Principles of reasonableness demand that we ask ourselves whether 'the officers would have been derelict in their duty had they acted otherwise.'" ***Id.***, ¶59 (quoting another source). Here, it would have been unreasonable for Officer Pichler to leave Yates' residence until he determined the welfare of the children. Considering these factors, we conclude that the high degree of public interest in determining the welfare of five-week-old infants when their primary caregiver has been out of communication for several hours outweighs the intrusion on Yates' privacy. The alternatives proposed by Yates are not sufficient considering the public interest at issue.

¶42 For the above reasons, we conclude that, under a totality of the circumstances, the State established that the community caretaker exception to the warrant requirement was met in regard to Officer Pichler's searches. Accordingly we affirm the circuit court's decision denying Yates' motion to suppress evidence obtained from the warrantless searches of his residence.

II. Destruction of Potentially Exculpatory Evidence

¶43 Detective Chris Nielsen examined Yates' cell phone, which was lawfully seized during the search of Yates' home and after his arrest. He observed what appeared to be blood smears and a possible partial fingerprint in one of the apparent blood smears on the phone. The detective collected DNA samples from the phone and then cleaned and sanitized the phone, which destroyed any potential fingerprints. Yates filed a motion to dismiss based on the destruction of evidence, which the circuit court denied. Yates argues that the detective's decision to destroy the "potentially exculpatory fingerprint evidence" after he had been charged with the homicides violated his due process rights.

¶44 We will uphold the circuit court's factual findings unless they are clearly erroneous. ***State v. Luedtke***, 2015 WI 42, ¶37, 362 Wis. 2d 1, 863 N.W.2d 592. However, we independently review the question of whether state action has violated an individual's due process rights. ***Id.***

¶45 Yates' primary argument is that, in the post-charging destruction of evidence context, the due process clause in the Wisconsin Constitution affords greater protection than the due process clause found in the federal constitution. Yates relies on ***State v. Dubose***, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582. However, after the parties submitted their briefs, the Wisconsin Supreme Court considered and rejected this argument. *See* ***Luedtke***, 362 Wis. 2d 1, ¶7. In doing so, the court specifically considered ***Dubose*** and held that "in the context of evidence preservation and destruction, the Wisconsin Constitution does not provide greater due process protection ... than the United States Constitution under either the Fifth or Fourteenth Amendments." ***Id.***, ¶¶7, 47-51 (footnotes omitted). As a result, Yates' argument that the due process clause in the Wisconsin

Constitution affords him greater protection must fail. Therefore, we apply the destruction of evidence test in ***Arizona v. Youngblood***, 488 U.S. 51 (1988), as adopted by ***State v. Greenwold***, 181 Wis. 2d 881, 512 N.W.2d 237 (Ct. App. 1994) (***Greenwold I***) to the facts of this case.

¶46 The destruction of evidence violates a defendant's due process rights "if the police: (1) failed to preserve the evidence that is apparently exculpatory; or (2) acted in bad faith by failing to preserve evidence which is potentially exculpatory." ***State v. Greenwold***, 189 Wis. 2d 59, 67, 525 N.W.2d 294 (Ct. App. 1994) (***Greenwold II***). Here, the parties agree that the destroyed fingerprint evidence was potentially useful or potentially exculpatory evidence rather than "apparently exculpatory," therefore, to prevail under the above test, Yates must show that Detective Nielsen acted in bad faith when he cleaned the blood smears off of Yates' cell phone.

¶47 In order to establish this bad faith requirement, Yates must show that Detective Nielsen was both (1) "aware of the potentially exculpatory value or usefulness of the evidence" and that he (2) "acted with official animus or made a conscious effort to suppress exculpatory evidence." ***Id.*** at 69.

¶48 Yates' burden of proving bad faith fails at the first requirement because Yates has not established that Detective Nielsen knew that the partial fingerprint on Yates' phone was potentially useful or potentially exculpatory. In fact, the circuit court found that Detective Nielsen did not believe that the partial print had the amount of ridge detail necessary for identification purposes. By

failing to meet the first bad faith requirement, Yates' motion to dismiss due to the destruction of evidence must fail.[4]

¶49 Our conclusion that the destruction of the potential fingerprint evidence does not violate Yates' due process rights also disposes of his related arguments that the jury should have received a lost evidence instruction, that trial counsel was ineffective, and that a new trial in the interests of justice is warranted. Accordingly, we affirm the circuit court.

III. Evidentiary Rulings and the Right to Present a Defense

¶50 The circuit court found that Yates met the test under ***State v. Denny***, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984), to present third party suspect evidence to support the defense's theory that Winbun drugged him, killed the children, and framed him for the murders. However, Yates argues that various evidentiary rulings by the court denied him the constitutional right to fully present this defense. For the reasons that follow, we disagree.

¶51 "We review a circuit court's decision to admit or exclude evidence under an erroneous exercise of discretion standard." ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. However, we independently determine whether the circuit court's rulings prohibited Yates from exercising his

[4] Although our conclusion that Yates failed to meet the first bad faith requirement is dispositive of this issue, we note that Yates has also failed to meet the second bad faith requirement. Detective Nielsen's decision to clean and sanitize the phone was based on what appears to be the incorrect belief that the phone needed to be sterilized prior to sending it to the Wisconsin Department of Justice (DOJ) for forensic computer analysis. The fact that Detective Nielsen first testified that someone at the DOJ instructed him to sterilize the phone and then later admitted that he did not receive that instruction, does not indicate that he made a conscious effort to destroy potential evidence.

constitutional right to present a defense. *See* ***State v. Shomberg***, 2006 WI 9, ¶26, 288 Wis. 2d 1, 709 N.W.2d 370.

A. Leading Questions

¶52 At Yates' trial, the State did not call Winbun as a witness. Instead, Yates called Winbun and sought the blanket use of leading questions in his direct examination of her. The circuit court denied this request at trial and in its postconviction decision.

¶53 Yates' primary argument on appeal is that, as the identified third-party suspect, Winbun's interests were adverse to Yates' interests as a matter of law; therefore, the circuit court should have permitted him to use leading questions in his direct examination of her. He also argues that he should have been able to treat Winbun as an adverse witness due to her overall evasiveness. Yates argues that without the use of leading questions, his counsel was unable to explore numerous areas of importance to his defense. We disagree.

1. Discretionary Decision

¶54 Under WIS. STAT. § 906.11(3) (2013-14),[5] the use of leading questions in criminal cases on direct examination is typically not allowed. Section 906.11(3) provides, in part, "Leading questions should not be used on the direct examination of a witness *except as may be necessary to develop the witness's testimony*." (Emphasis added.) However, leading questions may be appropriate in certain circumstances, including: "when the witness is immature, timid or

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

frightened; when the testimony relates to introductory or undisputed matter; when the witness's recollection is exhausted; when the witness is in such a physical or mental condition that he or she ought to be spared the effort of responding in extended answers; or when the witness is called to disprove prior testimony of another witness." ***State v. Barnes***, 203 Wis. 2d 132, 138-39, 552 N.W.2d 857 (Ct. App. 1996). The circuit court has broad discretion to determine whether leading questions should be allowed during the direct examination of a witness. *See* ***Jordan v. State***, 93 Wis. 2d 449, 471, 287 N.W.2d 509 (1980).

¶55 At trial, Yates' counsel asserted that under WIS. STAT. § 972.09,[6] leading questions were permitted if Winbun was unable to recall something or if she made inconsistent statements. The circuit court ruled it would determine whether leading questions were allowed on a case-by-case basis, and the record shows that the court kept its promise.

¶56 The record is replete with objections to defense counsel's use of leading questions. In some instances, the circuit court allowed leading questions. In other cases, the circuit court sustained the State's objection and counsel was permitted to rephrase the question or present documentary evidence to refresh Winbun's memory. Although Winbun's interests were obviously adverse to Yates', the court still retained discretion to allow leading questions when it

[6] WISCONSIN STAT. § 972.09 provides, in part:

> Where testimony of a witness at any preliminary examination, hearing or trial in a criminal action is inconsistent with a statement previously made by the witness, the witness may be regarded as a hostile witness and examined as an adverse witness, and the party producing the witness may impeach the witness by evidence of such prior contradictory statement.

deemed such questions necessary. We conclude that the court did not erroneously exercise its discretion when it decided to handle each objection to leading questions separately, rather than allow Yates the blanket use of leadings questions. Furthermore, the court did not erroneously exercise its discretion in its handling of each specific objection.

2. Constitutional Right to Present a Defense

¶57 Furthermore, we reject Yates' reliance on ***Chambers v. Mississippi***, 410 U.S. 284 (1973), and his argument that without blanket use of leading questions his defense was prejudiced. Therefore, we conclude that Yates' constitutional right to present a defense was not infringed by the circuit court's decision to allow leading questions on a case-by-case basis.

¶58 In ***Chambers***, the defendant, Leon Chambers, was prohibited from adversely examining Gable McDonald who had confessed to being the true perpetrator to multiple witnesses on separate occasions. *See* ***Chambers***, 410 U.S. at 291-92. As a result of Mississippi's voucher rule, that prohibited a party from impeaching his or her own witness, combined with the exclusion of the witnesses who heard McDonald's confessions based on hearsay objections, the Supreme Court held that McDonald was denied a fair trial. ***Id.*** at 298, 302-303. As the Court explained, "we hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial." ***Id.*** at 303.

¶59 The circumstances present in ***Chambers*** are not comparable to this case. Evidentiary rulings in ***Chambers*** prevented the jury from hearing the full story surrounding McDonald's confessions, which included that he had confessed to being the perpetrator on several occasions to different witnesses. Here, Yates

lists numerous topics that his counsel was unable to explore without the use of leading questions. Examples of these topics include Winbun's drug use and her desire to see Yates prosecuted for the homicides. However, the record demonstrates that Yates' counsel was able to explore many of these topics with Winbun during her testimony. In addition, even if we assume that counsel was unable to explore certain topics without the use of leading questions, Yates has not demonstrated that this resulted in an unfair trial as was the case in ***Chambers***.

3. Ineffective Assistance of Counsel

¶60 Finally, Yates appears to assert that his attorney was ineffective because he confused the use of leading questions with the process used to impeach a witness. Yates asserts that Winbun's testimony should have been impeached when she testified that she could not recall a conversation with a friend in which she allegedly stated that she saw the face of one of her twin infants after the homicides and when she stated she could not recall talking with an investigator about Yates' finances. Even if we assume, without deciding, that counsel was deficient, there is no indication that counsel's failure to impeach Winbun on these two occasions would present a reasonable probability of a different outcome. *See* ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). As a result, counsel was not ineffective for his failure to impeach Winbun on these two occasions.

B. Hearsay Statements

¶61 Yates asserts that his constitutional right to present a defense was infringed because the circuit court sustained hearsay objections that prevented him from establishing that Winbun had both specific knowledge of the crime scene and specific knowledge of Yates' condition. We assume without deciding that the

circuit court erred when it excluded the statements at issue; however, we conclude that such exclusion was harmless error.

1. Winbun's Knowledge of the Crime Scene

¶62 As indicated, at trial, the State did not call Winbun as a witness. However, during the State's case, Officer Pichler testified on direct examination that Winbun did not enter Yates' bedroom on the night that the officer discovered the victims. During the cross-examination of a different officer, Detective George Bonham, defense counsel attempted to introduce statements Winbun made to Detective Bonham suggesting she knew something about the condition of the bedroom that she would not have known unless she entered the bedroom before the police entered. Defense counsel attempted to elicit testimony that Winbun described items being out of place in Yates' bedroom on the night the victims were found. Counsel stated:

> Now, previously in this trial Officer Pichler testified that ... at no time did Susan Winbun ever enter Mr. Yates'[] bedroom. He's already testified to that under oath. Given that fact, are you aware of specific information that Ms. Winbun provided you in your interviews that would be inconsistent with that fact?

The court sustained the State's hearsay objection to the introduction of Winbun's statements.

¶63 Yates argues that defense counsel offered these statements to demonstrate Winbun's knowledge of the crime scene, not to prove the truth of the matter asserted; therefore, they are not hearsay and should not have been excluded. He also asserts that had counsel been able to introduce Winbun's statement through Detective Bonham to show her knowledge of the crime scene then the

State would have had to call Winbun as a witness and his counsel would not have been forced to call her. The State asserts that any error was harmless.

¶64 Harmless error analysis requires us to determine whether the alleged error affected the jury's verdict. ***State v. Weed***, 2003 WI 85, ¶29, 263 Wis. 2d 434, 666 N.W.2d 485. "Therefore, we ask, '[i]s it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?'" ***State v. Rocha-Mayo***, 2014 WI 57, ¶23, 355 Wis. 2d 85, 848 N.W.2d 832 (quoting another source).

¶65 Assuming without deciding that the circuit court erred, we conclude that defense counsel's inability to question Detective Bonham about Winbun's statement that items in Yates' bedroom were out of place on the night the victims were found was harmless error. The jury heard from Officer Pichler who testified that Winbun never entered Yates' bedroom on the night in question. The jury also heard from Winbun who testified that she did enter the bedroom while looking for her children. The jury heard this conflicting testimony and could decide whether it called Winbun's credibility into question or whether it indicated that she obtained knowledge of the crime scene from some time before Officer Pichler arrived. In other words, introduction of Winbun's statements to Detective Bonham would have been duplicative of information before the jury.

¶66 Furthermore, the fact that Winbun's counsel testified that he was forced to call Winbun as a witness as a result of not being able to introduce her statements about Yates' bedroom through Detective Bonham does not change our conclusion. We perceive no reason why it matters whether the State or Yates called Winbun as a witness.

2. *Winbun's Knowledge of Yates' Condition*

¶67 At trial, the defense's theory was that Winbun drugged Yates by lacing his food or beverages with the drug Cymbalta before killing the children herself. Yates sought to introduce an audio recording of Winbun's call to police in which she stated that Yates' had suffered from Serotonin Syndrome in the past to establish that Winbun had prior knowledge of Yates' condition at the time she called police. The court sustained the State's hearsay objection. Yates argues that he sought introduction of the call for a non-hearsay basis and that its exclusion violated his constitutional right to present a defense. The State asserts that any error was harmless. We agree with the State.

¶68 Although Yates was prevented from introducing the recording of Winbun's call to the police, his counsel questioned Winbun about the call. She testified that she called police and told them that she was concerned about the children because Yates had passed out due to Serotonin Syndrome in recent months. The jury heard about the contents of Winbun's call to police; therefore, introduction of the recording that contained the same information would not have changed the outcome of the trial.

C. Exclusion of Motive Evidence

¶69 The circuit court ruled that Winbun's 2007 bankruptcy and a text message inviting Winbun to smoke methamphetamine was not relevant evidence. It concluded that the fact that Winbun was on probation was relevant, but that the nature of the underlying drug-related conviction was not relevant. Yates argues that exclusion of these three pieces of evidence denied him the right to present a defense because the evidence was essential to establishing Winbun's motive to kill the children and frame Yates.

¶70 We conclude that the excluded evidence did not deprive Yates of his constitutional right to present a defense. The excluded evidence pertained to Winbun's financial problems, her drug use, and Yates' disapproval of her drug use; however, though we decline to take the time here to detail the evidence, the jury heard other testimony that Winbun both used drugs and had financial difficulties.[7]

D. Restriction on Expert Testimony

¶71 Yates complains about limitations on the testimony of Dr. George Toliver. Dr. Toliver testified that, in his medical opinion, Yates was suffering from a type of drug induced delirium called Serotonin Syndrome at the time Officer Pichler encountered him. However, he did not render any opinion as to whether Yates was suffering from Serotonin Syndrome at the time the victims were likely killed due to the circuit court's pretrial ruling that such testimony would be too speculative. Yates asserts that Dr. Toliver should have been able to testify to the "range of medical possibilities with regard to Yates' condition during the 24 hours prior to his arrest." We are not persuaded.

¶72 Relevant evidence is defined as "evidence having 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." WIS. STAT. § 904.01. "The criterion of relevancy is whether the evidence sought

[7] In a related argument, Yates asserts that exclusion of the "meth text" resulted in his counsel providing ineffective assistance. However, Yates fails to fully develop this argument; therefore, we do not consider it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not consider inadequately developed arguments).

to be introduced would shed any light on the subject of inquiry." ***Rogers v. State***, 93 Wis. 2d 682, 688, 287 N.W.2d 774 (1980).

¶73 Here, Dr. Toliver's pre-trial report indicated that "Mr. Yates could have been suffering from [Serotonin Syndrome] hours to days before his police interview and hospitalization." In addition, Yates concedes that Dr. Toliver could not testify to a reasonable degree of medical certainty as to whether Yates was suffering from Serotonin Syndrome during the time the victims were likely killed. As we understand it, allowing Dr. Toliver to testify to the "range of possibilities" of Yates' condition prior to his arrest would have included testimony that he may or may not have been suffering from Serotonin Syndrome. Yates does not explain how this type of testimony would have shed any light on the issue of whether Yates was in fact suffering from Serotonin Syndrome at the time when the victims were likely killed. As a result, the circuit court did not err when it excluded this testimony and its decision did not deprive Yates of a fair trial.

IV. Ineffective Assistance of Counsel: Cymbalta Levels

¶74 Yates argues that his counsel was ineffective for failure to elicit testimony that (1) his blood contained elevated levels of duloxetine, the active ingredient in Cymbalta, and (2) Cymbalta capsules contain a water soluble powder that could be used to lace food and beverages. He asserts that this testimony was critical to the defense's theory that Winbun used Cymbalta to drug Yates.

¶75 To succeed on his ineffective assistance of counsel claim, Yates must show both (1) that his counsel's performance was deficient and (2) that this deficiency prejudiced him. *See* ***Strickland***, 466 U.S. at 694. If Yates fails to establish prejudice, we need not address deficient performance. *See* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

¶76 We conclude that Yates has failed to establish that he suffered prejudice from his counsel's failure to elicit testimony about Yates' duloxetine levels or the solubility of Cymbalta capsules. This is because the jury heard testimony from Dr. Toliver that Yates was suffering from Serotonin Syndrome at the time he was arrested and that the types of drugs that Yates was prescribed, including Cymbalta, can cause Serotonin Syndrome. If Yates' counsel would have elicited testimony from Dr. Toliver about the level of duloxetine in Yates' blood, that information would not have indicated how the drug got into Yates' system; therefore, it would not have furthered his theory that Winbun drugged him. Furthermore, counsel's failure to elicit testimony that it would have been relatively easy to dissolve Cymbalta in food or beverages was not prejudicial considering that there was no evidence that suggested that Cymbalta is difficult to dissolve or that any of the food or beverages in Yates' home contained Cymbalta. As a result, Yates was not prejudiced by counsel's failure to elicit testimony about duloxetine levels or the solubility of Cymbalta.

CONCLUSION

¶77 Based on the foregoing reasons, we affirm the circuit court's judgment convicting Yates of two counts of first-degree intentional homicide and its denial of his postconviction motion for relief.[8]

By the Court.—Judgment and order affirmed.

[8] To the extent we have failed to address any of Yates' numerous sub-arguments, those arguments are rejected as too undeveloped or meritless to warrant discussion. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not consider inadequately developed arguments).

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