COURT OF APPEALS
DECISION
DATED AND FILED

October 20, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP872-CR **Cir. Ct. No. 2007CM193**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDWARD BECK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Juneau County: JOHN P. ROEMER, JR., Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

¶1 HIGGINBOTHAM, J.[1] Edward Beck appeals a judgment of conviction for disorderly conduct in violation of WIS. STAT. § 947.01,[2] as a repeater. Beck filed a motion for postconviction relief, however, the circuit court lost jurisdiction to hear Beck's motion. Beck contends that: (1) the circuit court erred by failing to request an extension to hear his postconviction motion, which caused the court to lose jurisdiction under WIS. STAT. § 809.30(2)(i) and violated his due process rights; (2) the circuit court erred by failing to strike for cause three potentially biased jurors, which forced Beck to use all three of his peremptory strikes under WIS. STAT. § 972.03 to remove these jurors and left other potentially biased jurors on the panel; and (3) the State withheld material evidence favorable to his case by failing to produce the victim's hospital records and a video recording of the incident or its immediate aftermath.

¶2 We conclude the court did not err in failing to request an extension to hear Beck's postconviction motion because the court had no duty to do so under WIS. STAT. § 809.30(2)(i). With regard to Beck having to use peremptory strikes to remove jurors who should have been struck for cause, we reject Beck's claims of court error and ineffective assistance of counsel, and conclude that, while one potential juror was objectively biased, and a second may have also been biased, the use of two of Beck's peremptory strikes to remove these potential jurors did not affect his substantial rights. With regard to Beck's allegations that the State

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-2010). All references to the Wisconsin Statutes are to the 2009-2010 version unless otherwise noted.

[2] "Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor." WIS. STAT. § 947.01.

withheld exculpatory evidence, we conclude that the claim that a video recording of the incident or its immediate aftermath was withheld warrants an evidentiary hearing. Similarly, we conclude that the claim that the State withheld the victim's medical records of the treatment she received at the hospital on the night of the incident also warrants an evidentiary hearing. Accordingly, we affirm in part, reverse in part and remand for an evidentiary hearing to determine whether a video recording of the incident or its immediate aftermath and the medical records exist and whether this evidence is exculpatory, and for additional proceedings as necessary.

BACKGROUND

¶3 In April 2006, an incident occurred at the New Lisbon Correctional Institution between Corrections Officer Renee Schultz and inmate Edward Beck. On this day, Officer Schultz entered Beck's cell and confiscated an altered television. Officer Schultz testified that Beck responded by becoming boisterous, profane, and violent, grabbing the television away from Officer Schultz. A criminal complaint was filed charging Beck with disorderly conduct as a repeat offender. The complaint alleged that Beck confronted Officer Schultz while she was removing the television from his cell, called her profane names and forcefully grabbed her and swung her around, causing her body to strike a railing and thereby causing her injuries. A jury found Beck guilty of the charged offense.

¶4 Beck filed a motion for postconviction relief on October 15, 2009. A hearing on the motion was scheduled for December 16, 2009, and rescheduled for January 6, 2010. At the hearing, the circuit court denied the postconviction motion for lack of jurisdiction under WIS. STAT. § 809.30(2)(i) because more than sixty days had lapsed since the filing of the motion. Sec. 809.30(2)(i). Beck

appealed to this court for a retroactive extension to give the circuit court jurisdiction to hear the motion. We denied his motion on the basis that he failed to provide an adequate explanation for his failure to request an extension in a timely manner. Additional facts are provided in the discussion section as necessary.

DISCUSSION

I. Failure to Request an Extension Under WIS. STAT. § 809.30(2)(i)

¶5 Beck argues that the circuit court erred under WIS. STAT. § 809.30(2)(i) in failing to either request an extension from this court to maintain its jurisdiction to hear his postconviction motion or to inform him of the need to request such an extension. Beck acknowledges that Wisconsin courts have previously interpreted the limitation periods in § 809.30(2) as avoiding the imposition of any affirmative duties on circuit courts. *See* ***State v. Scherreiks***, 153 Wis. 2d 510, 516, 451 N.W.2d 759 (Ct. App. 1989) (circuit court's failure to decide postconviction motion within time prescribed by statute "is not grounds for a remand, since the purpose of the time limit is to expedite the postconviction process"); *see also* ***State v. Deer***, 125 Wis. 2d 357, 368, 372 N.W.2d 176 (Ct. App. 1985). However, he maintains that, following a 2001 amendment to the statute, § 809.30(2) now requires circuit courts to request an extension from the court of appeals prior to the expiration of the limitation period or to timely inform the defendant that he or she must seek an extension from the court of appeals.

¶6 Beck reads too much into the 2001 amendment to WIS. STAT. § 809.30(2)(i). The amendment simply added language to § 809.30(2)(i) specifying the entities that may request an extension, namely, the circuit court and

the defendant.[3] Nothing in the new provision places an affirmative duty on the circuit court to request an extension or inform a party of the need for an extension. Thus, ***Scherreiks*** and ***Deer*** still control, and the circuit court's failure to decide the postconviction motion within the period prescribed by statute is not grounds for a remand. *See* ***Scherreiks***, 153 Wis. 2d at 516. Accordingly, we conclude Beck's due process rights were not violated when the trial court did not request an extension pursuant to § 809.30(2)(i).

II. Juror Bias Claims

¶7 Beck argues that the circuit court erred by failing to strike three potentially biased jurors for cause, contrary to WIS. STAT. § 805.08(1).[4] He claims that, because of these errors, he was forced to use all three of his peremptory challenges provided under WIS. STAT. § 972.03, and that these errors affected his substantial rights.

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[3] The changes to WIS. STAT. § 809.30(2)(i) are as follows:

> *Order determining postconviction motion.* ~~The trial~~ Unless an extension is requested by a party or the circuit court and granted by the court of appeals, the circuit court shall determine by an order the defendant's motion for postconviction relief within 60 days ~~of its~~ after the filing of the motion or the motion is considered to be denied and the clerk of ~~the trial~~ circuit court shall immediately enter an order denying the motion.

[4] WISCONSIN STAT. § 805.08(1) states:

> The court shall examine on oath each person who is called as a juror to discover whether the juror is related by blood, marriage or adoption to any party or to any attorney appearing in the case, or has any financial interest in the case, or has expressed or formed any opinion, or is aware of any bias or prejudice in the case. If a juror is not indifferent in the case, the juror shall be excused….

¶8 There are three types of bias for which a trial court may excuse a juror: subjective bias, objective bias and statutory bias.[5] ***State v. Lindell***, 2001 WI 108, ¶¶35-38, 245 Wis. 2d 689, 629 N.W.2d 223. This case involves allegations of subjective and objective bias. Subjective bias refers to the prospective juror's state of mind and is generally revealed through his or her words and demeanor. ***Id.***, ¶36. A trial court's determination that a potential juror is or is not subjectively biased is a factual finding, and must be upheld on review unless it is clearly erroneous. ***Id.***

¶9 Objective bias recognizes that potential prejudice may be detected from circumstances surrounding the juror's answers, even if the prospective juror pledges impartiality. ***Id.***, ¶38. Whether a prospective juror should be removed for objective bias "turns on whether a reasonable person in the prospective juror's position could set aside the opinion or prior knowledge." ***Id.*** (citation omitted). Reviewing this type of bias is a mixed question of fact and law. We will uphold the factual findings unless clearly erroneous. ***Id.***, ¶39. Whether those facts constitute objective bias is a question of law. ***Id.*** Although questions of law are ordinarily reviewed de novo, we give some weight to a trial court's conclusion that a juror is or is not biased because this conclusion is so intertwined with the court's factual findings. ***Id.*** Accordingly, we will reverse a trial court's determination on the issue of objective bias only if a reasonable judge could not have reached the same conclusion. ***Id.***

[5] "Statutory bias" occurs when a person is not allowed to serve on the jury under WIS. STAT. § 805.08(1) because he or she is "related by blood, marriage … to any party or to any attorney appearing in the case, or has any financial interest in the case."

¶10 A criminal defendant's right to receive a fair trial by a panel of impartial jurors is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution, as well as Article I, sections 5 and 7 of the Wisconsin Constitution. U.S. CONST. amend. VI; U.S. CONST. amend. XIV; WIS. CONST. art. I, §§ 5 and 7. In Wisconsin, the State and the defendant are each entitled to three peremptory challenges in misdemeanor cases. WIS. STAT. § 972.03. The right to peremptory challenges is not a constitutional right, but rather a "means to achieve the constitutionally required end of an impartial jury." ***United States v. Martinez-Salazar***, 528 U.S. 304, 307 (2000).

¶11 Claims of juror bias are subject to a harmless error analysis. ***Lindell***, 245 Wis. 2d 689, ¶111. The focus of this analysis is on whether the error has affected the substantial rights of the party. ***Id.*** This analysis is conducted only in situations, as here, where the defendant has *not* claimed a violation of the Sixth Amendment right to an impartial jury. ***Id.*** An error that results in a defendant using one of his or her peremptory strikes to remove a juror does not affect the defendant's substantial rights. ***Id.***, ¶113. However, at least one court has held that an erroneous ruling by the circuit court that obligates the defendant to exhaust all of his or her peremptory challenges is harmful. ***Id.***, ¶71 (*citing* ***Pool v. Milwaukee Mechanics Ins. Co.***, 94 Wis. 447, 453, 69 N.W. 65 (1896) (*discussing* ***People v. Casey***, 96 N.Y. 115, 2 N.Y. Crim.R. 194 (1884))).

A. **Consideration of Beck's Juror Bias Claims**

¶12 Beck claims the court erred in failing to remove two prospective jurors for objective bias and a third for subjective bias. He further states that by being forced to use all three of his peremptory strikes to remove the biased prospective jurors, he was unable to remove certain other jurors who sat on the

panel who were also biased. We address each alleged error in turn below, starting with the prospective jurors who were claimed to be objectively biased. Because Beck's counsel did not object at voir dire to the use of his strikes to eliminate biased jurors, we analyze the court's error in the context of ineffective assistance of counsel.

¶13 In order to succeed on his claim of ineffective assistance, a defendant must show that counsel's representation was deficient and that the deficiency prejudiced him. *See* ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). Proof of either the deficiency or the prejudice prong presents a question of law this court reviews without deference. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). If we conclude the defendant has not proved one prong, we need not address the other. *See* ***Strickland v. Washington***, 466 U.S. 668, 697 (1984). To prove deficient performance, the defendant must show that counsel's specific acts or omissions were "outside the wide range of professionally competent assistance." ***Id.*** at 690. In other words, the defendant must establish that counsel's conduct falls below an objective standard of reasonableness. ***Id.*** at 687-88. To show prejudice, the defendant must demonstrate a reasonable probability that, but for the error, the outcome of the proceeding would have been different. ***Id.*** at 694.

1. **Prospective Juror Newsome**

¶14 During voir dire, prospective juror Newsome indicated he served with the prosecutor, Juneau County District Attorney Scott Southworth, in Iraq. The prosecutor stated to the court that juror Newsome had been "under his command" in Iraq:

The Court: How do you know Mr. Southworth?

> Newsome: I served a year in Iraq with him.
>
> The Court: With respect to you and Mr. Southworth, you were both [in] service in Iraq?
>
> Newsome: Yes.
>
> The Court: Anything about that relationship that you believe you couldn't be fair to the State of Wisconsin or to Mr. Beck?
>
> Newsome: No, your honor.
>
> The Court: Could you listen to the evidence and decide this case solely based upon the facts that come into evidence and the instructions of law that the Court would give you?
>
> Newsome: Yes, your honor.
>
> The Court: Any hesitation in your mind?
>
> Newsome: No.
>
> The Court: Would you have any problems – let's assume that Mr. Beck was found not guilty by the jury, would [you] have any problem looking Mr. Southworth in the eye?
>
> Newsome: No.
>
> District Attorney Southworth: I would note for the record as well that Mr. Newsome is no longer in Iraq under my command.

¶15 We conclude, based on our reading of Newsome's voir dire, that counsel performed deficiently by not moving to strike this potential juror for cause. We note that the circuit court did not address the question of whether Newsome was objectively biased. Once the court was satisfied with the juror's assurances that he would be impartial and thereby determined that he was not subjectively biased, it ended the inquiry. We conclude that the only outcome a reasonable judge could reach is that this prospective juror was objectively biased. Although we have not found any cases of alleged juror bias where the prosecutor

had recently served as the juror's commanding officer in an armed conflict, we conclude that this relationship is among those that is "so fraught with the possibility of bias that we must find objective bias regardless of the surrounding facts and circumstances and the particular juror's assurances of impartiality." ***State v. Faucher***, 227 Wis. 2d 700, 724, 596 N.W.2d 770 (1999). The prospective juror may have formed a close bond with the district attorney in Iraq, and the fact that the prosecutor was the prospective juror's commanding officer raises serious concerns about whether he would be able to independently evaluate the evidence and not be unduly influenced, whether consciously or unconsciously, by his former commanding officer at trial.

2. **Prospective Juror Gross**

¶16 Beck asserts that prospective juror Gross was objectively biased because of his professional and social connections with District Attorney Southworth and Assistant District Attorney Stacy Smith. The voir dire of Gross established the following:

> The Court: Ms. Gross, do you know Mr. Southworth?
>
> Ms. Gross: Yes.
>
> The Court: How do you know Mr. Southworth?
>
> Ms. Gross: I've known him for several years.
>
> The Court: With respect to knowing Mr. Southworth, anything about knowing him that you believe you couldn't be fair and impartial to either the State of Wisconsin or Mr. Beck?
>
> Ms. Gross: No.
>
> The Court: Could you be fair and impartial?
>
> Ms. Gross: Yes.

Gross indicated that she knew Assistant District Attorney Smith "more or less on a social basis," but said she believed this relationship would not affect her ability to be impartial. Later, Gross volunteered the following additional information:

> Ms. Gross: I suppose I should say that I was Clerk of Court and with the District Attorney's office for 14 years.
>
> Mr. Southworth: Anything about your close working relationship with the DA's office before you retired that would prejudice you against the State?
>
> Ms. Gross: No.

Finally, Gross also explained she had come to know many police officers in her work as clerk of court:

> Ms. Gross: You asked if I knew any police officers. I know quite a few through my association as the Clerk of Court. I also observed the Mauston Police Department for several years.

¶17 As with prospective juror Newsome, the court only addressed the issue of subjective bias, accepting Gross's statement that she would be impartial. With regard to whether Gross was objectively biased, we note that, while Gross was formerly employed by the district attorney's office, employment with the district attorney's office does not automatically result in a determination of objective bias. *See* ***State v. Smith***, 2006 WI 74, ¶3, 291 Wis. 2d 569, 716 N.W.2d 482. Of greater concern, however, is that the court's voir dire was inadequate to determine the extent of Gross's relationship with the prosecutors and police officers. The record establishes only that Gross had known the district attorney "for several years," that she knew the assistant district attorney "more or less on a social basis," and that she knew police officers. We therefore cannot determine on this record whether Gross was objectively biased.

¶18 However, we conclude defense counsel was deficient in not seeking permission from the court to probe more deeply into the relationship between Gross and the prosecutors. For example, once it was learned that Gross had a social relationship with the assistant district attorney, a reasonable defense attorney would have probed the nature of that relationship to determine whether their relationship was such that it rendered Gross objectively biased.

3. **Prospective Juror Raese**

¶19 Beck argues that prospective juror Raese was subjectively biased because he failed to guarantee his impartiality during voir dire. Raese was concerned about the operation of his dairy farm, and hesitated when asked if he would be able to set aside these concerns and concentrate on the case:

> Mr. Raese: Well, I'm thinking about all the things I have to do at home, and that. I'm worried if we run late - -
>
> Mr. Klopp: Is there something you have to do this evening which is a pressing matter?
>
> Mr. Raese: Yea, I got cows to milk.
>
> Mr. Klopp: And you usually milk around 6:00?
>
> Mr. Raese: We start at 5:00.
>
> Mr. Klopp: Is there anyone who would help you?
>
> Mr. Raese: Yea, I got people who can help me, but there are things they don't know about, too, your Honor.
>
> Mr. Klopp: Have you made any arrangements for someone to come in and assist in case you're here a little bit late today?
>
> Mr. Raese: Yea, but I have to talk to them today about some new issues that came up this morning.
>
> Mr. Klopp: Is there any ability for you to contact that person during the break, so you can discuss those things with them?

Mr. Raese: It would have to be shortly, otherwise, I won't be able to get a hold of them.

Mr. Klopp: If this case would preclude prior to 5:00 o'clock, would you be able to sit here and listen to all of the evidence and concentrate on the evidence, and put that matter out of your mind and listen to what we're doing here today?

Mr. Raese: I could try, yeah.

Mr. Klopp: We need a yes or no answer. I'm sorry sir.

The Court: Mr. Raese, are you going to be worried about the girls? How many cows do you have?

Mr. Raese: 140.

The Court: With respect to making arrangements, at this time, would you like to make a telephone call at all at the break to make arrangements? Would that be suitable for you?

Mr. Raese: That would help, yeah.

The Court: And the bottom line, as Mr. Klopp indicates, it's a serious case.

Mr. Raese: Yeah, I know. The way it sounds, it's going to be a long time. I don't know.

The Court: I don't know either; no one knows, and the longer you do this, the less you seem to know.

My question to you is, if we allow you to make a telephone call, can you concentrate on this case?

Mr. Raese: Okay.

The Court: Not "okay."

Mr. Raese: Well, yeah, I'll - -

The Court: And not "yeah" either. I don't want you to feel like a drinking bird and give me the north/south nod. If you can, you should tell the court, so it's kind of like, speak up or forever hold your peace …. This is serious stuff, and so, my question to you is, if you want to step down, and you believe you can't be fair to the State or to

> Mr. Beck, you have to speak up, is what I'm trying to say to you.
>
> Can you be fair and won't be thinking about - -
>
> Mr. Raese: No, I can't - - yes.

At the conclusion of the voir dire, the Court followed up with Raese:

> The Court: Mr. Raese, have you had time to think about - - Can you sit here or would you like to be excused?
>
> Mr. Raese: It isn't that I don't want to serve, but I have things that I have going on, issues, you know.
>
> The Court: Do you understand that we all have issues going on?
>
> Mr. Raese: Yes, I know.
>
> The Court: Can you do your duty for one day?
>
> Mr. Raese: Well, yeah, I told you yes before.

¶20 As noted, we review a trial court's finding that a juror is not subjectively biased for clear error. Raese was plainly concerned about the operation of his dairy farm, and his response to the question of whether he would be fair and not thinking about the farm ("No, I can't—yes") is ambiguous, at least as it appears in the record without the benefit of the juror's non-verbal cues. However, Raese later assured the court that he could do his duty for the day ("Well, yeah, I told you yes before"), and the court was in a position to assess the farmer's non-verbal cues in satisfying itself that he would be fair and be able to focus his attention on the case. Moreover, "[i]t is not uncommon for prospective jurors to be annoyed at being summoned for jury service." ***State v. Guzman***, 2001 WI App 54, ¶17, 241 Wis. 2d 310, 624 N.W.2d 717. Because the court's determination that Raese was not subjectively biased is not clearly erroneous, we conclude counsel did not perform deficiently by not moving to strike Raese.

4. Summary of Prospective Juror Analysis

¶21 In sum, we conclude that counsel was deficient in failing to move to strike prospective juror Newsome for cause and for not questioning prospective juror Gross regarding the extent of her relationship with the assistant district attorney. However, we do not believe that counsel was deficient for not moving to strike prospective juror Raese for cause.

¶22 Although we conclude defense counsel was deficient, we cannot conclude that counsel's deficient performance was prejudicial because it did not result in Beck having to exhaust all of his peremptory challenges. *See* ***Lindell***, 245 Wis. 2d 689, ¶71. In any event, as we discuss below, the focus is on whether Beck's substantial rights were violated by having to use two of his peremptory strikes to set aside two incompetent jurors. To determine that, we must look to see whether a fair and impartial jury was impaneled. *See* ***State v. Traylor***, 170 Wis. 2d 393, 400, 489 N.W.2d 626 (Ct. App. 1992).

a. Prejudice—Consideration of the Impaneled Jurors

¶23 Having determined for purposes of this analysis that Beck was obligated to use two of his preemptory strikes to remove jurors who defense counsel should have moved the court to strike for cause, we consider whether counsel's performance was prejudicial. The focus of this analysis is on the impaneled jury, and seeks to determine whether Beck's loss of two peremptory strikes ultimately prevented him from striking other potentially biased jurors who sat on the case. *See* ***Thompson v. Altheimer & Gray***, 248 F.3d 621 (7th Cir. 2001); ***Oswald v. Bertrand***, 249 F. Supp. 2d 1078 (E.D. Wis. 2003); *see also* ***Lindell***, 245 Wis. 2d 689. Applying this analysis, we conclude that Beck's loss of

two peremptory challenges did not affect his substantial rights because none of the impaneled jurors over whom he has raised objections were objectively biased.

¶24 Beck argues that, had he not been obligated to use his peremptory strikes, he would have struck impaneled jurors Renner, Gesler, Magnuson, and Novy, suggesting that each of these jurors was potentially biased. As to each juror, we set forth the grounds for potential bias.

¶25 During voir dire, juror Renner indicated she recognized the district attorney from church:

> Ms. Renner: I know his face from church, and I don't really know him.
>
> The Court: It is a happy face. That's about all we can say about the face.
>
> Let me ask you, you go to the same church, correct?
>
> Ms. Renner: Yes.

Renner also disclosed that Officer Schultz (the victim) was a regular customer at the lumberyard where she worked:

> Ms. Renner: I met her at my work, I work at the lumberyard in Necedah. They have been customers.
>
> The Court: With respect to knowing her through your work, do you also socialize with her?
>
> Ms. Renner: No.

¶26 Juror Gesler indicated he had attended high school with the district attorney:

> Mr. Gesler: We went to high school together.
>
> The Court: Is it just during the high school?
>
> Mr. Gesler: Just during high school.

> The Court: Did you socialize with him outside of court?
>
> Mr. Gesler: Occasionally.
>
> The Court: What type of socializing did you do with Mr. Southworth?
>
> Mr. Gesler: Just say hello.
>
> The Court: You don't have dinner with him? You don't go to his house, do you?
>
> Mr. Gesler: No.

¶27 Juror Renner, as well as jurors Magnuson and Novy, all had relatives in law enforcement. Renner's sister was a former law enforcement officer; Magnuson's nephew was a deputy with the Juneau County Sheriff's Department; Novy's son-in-law was a police officer for the City of Hillsboro in Vernon County.

¶28 The court's consideration of juror bias with regard to the above jurors, as with the others, was limited to subjective bias. We conclude from a reading of the voir dire transcript that jurors Renner, Gesler, Magnuson and Novy were not objectively biased; that is, a reasonable person in the position of each of these jurors would be able to remain fair and impartial. Renner's relationships with the district attorney and the victim were not close enough to have biased a reasonable person; Renner recognized the district attorney from church but did not otherwise know him, and the victim was a regular customer at her place of employment but not a person with whom she socialized. Likewise, a reasonable person in Gesler's position would have been impartial. Although Gesler attended high school with the district attorney, they were not close; Gesler would say "hello" to his former classmate but did not have dinner with him or visit his home. Finally, with regard to jurors Renner, Magnuson and Novy, having a relative in

law enforcement does not constitute objective bias. Wisconsin courts have stated that a reasonable person holding the position of a law enforcement officer could remain impartial despite working in the same department as a state witness. *See* ***Faucher***, 227 Wis. 2d at 722.

¶29 Having determined that none of the impaneled jurors about whom Beck raises objections were objectively biased, we conclude that counsel's failure to move to strike one prospective juror for cause and to adequately question a second prospective juror did not affect Beck's substantial rights and therefore was not prejudicial.

III. Alleged *Brady* Violation

¶30 Beck argues that the State withheld the victim's medical records and portions of the prison's video recording of the incident in violation of his due process right to all material exculpatory and impeachment evidence. *See* ***Strickler v. Greene***, 527 U.S. 263, 280 (1999); ***Brady v. Maryland***, 373 U.S. 83, 87 (1963). The State counters that Beck has forfeited this argument by failing to raise it at trial, and, regardless, there is no support in the record that the evidence Beck seeks even exists. We address the forfeiture issue first.

¶31 The State is correct that Beck, after making a general request for discovery, failed to argue in the trial court that the State's disclosures were inadequate, and Beck has not provided any reason why he could not have raised this issue in the trial court. An issue not presented to the circuit court may be subject to forfeiture, also known as "waiver." *See* ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶15, 273 Wis. 2d 76, 681 N.W.2d 190. However, the forfeiture rule is one of judicial administration, and we may choose to disregard it and address the merits of an unpreserved issue. ***Id.***, ¶17. We choose to address

the merits here because the State does not contend that it was prejudiced by Beck's failure to raise the issue at trial, and the alleged failure to disclose exculpatory or impeaching evidence to the defendant is a matter of sufficient public interest to merit a decision.

¶32 "[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution," and when prejudice has ensued. ***Brady***, 373 U.S. at 87. The requirement of materiality under ***Brady*** encompasses prejudice: "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. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." ***United States v. Bagley***, 473 U.S. 667, 682 (1985). Evidence that is favorable to the accused includes both exculpatory and impeachment evidence. ***Strickler***, 527 U.S. at 281-82. However, "the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." ***Bagley***, 473 U.S. at 675. In Wisconsin, the duty of the district attorney to provide exculpatory evidence to the accused is codified in WIS. STAT. § 971.23(1)(h).[6]

¶33 Some additional background about the incident itself is necessary to assess Beck's alleged ***Brady*** violations. It is undisputed that Beck was sitting at a table in the cell-block courtyard on the ground floor near the officers' station

[6] WISCONSIN STAT. § 971.23(1) states the disclosures a district attorney must provide to a defendant, which include "any exculpatory evidence" under subsection (h).

cleaning his portable fan when he discovered that Officer Schultz was on an upper tier of the block removing the TV from his cell. It is also undisputed that Beck left the courtyard to climb the stairs and that he confronted Officer Schultz at the top of the stairs about the removal of the TV. Officer Schultz testified that she was carrying the TV from Beck's room when she saw Beck "charging up the stairs." Officer Schultz testified Beck "forcefully grabbed the TV, which was in my arms, jerked me, forcefully turned me like a 180 where I ran into the guard railing upper tier and grabbed the TV out of my arms." Officer Gregory, the only other witness presented by the State, testified he observed the following:

> Q: And you saw him take the TV out of her arms, correct?
>
> A: Yes.
>
> Q: Could you describe what you saw as far as him taking the TV out of her hands?
>
> A: Mr. Beck came up alongside the tier, come up to where she's coming out with this TV, reached down and grabbed it and pulled it up and over, took it out of her hands.
>
> Q: Did he throw her anywhere?
>
> A: I don't think he threw her, but she was kind of set back a bit.
>
> Q: Did he slam her against the railing or the wall?
>
> A: I think she—when he took that out of her hands, she fell back, yes.
>
> Q: But did she fall onto the ground?
>
> A: I don't think so.
>
> Q: And she had to step backwards when he took the TV out of her hands?
>
> A: Yes, sir.

> Q: You didn't hear her scream or holler or anything, did you?
>
> A: No, sir.
>
> ….
>
> Q: And did you hear either Officer Schultz or Mr. Beck swearing?
>
> A: No, sir.

¶34 Beck called one witness, Marvin Batton, an inmate who witnessed the incident between Beck and Officer Schultz. Batton offered the following testimony about the incident on direct examination:

> Q: Did [Officer Schultz] come out of the door [to Beck's cell] with a TV in her hand?
>
> A: … yes.
>
> Q: Then did she start walking towards the stairs?
>
> A: Yes. She would have been walking toward the stairs, but at that time, Beck met her, and she was coming out of the room. I guess the next cell, the room would be 119; something like that. That's about where he met her, got his TV, went in his cell, door closed. I looked and I said, "I'm out of here." I already knew that the [COs] were going to come, so I left and went outside.
>
> Q: And when Mr. Beck took the TV out of her hands, how did he take the TV out of her hands?
>
> A: Well, from my perspective, it wasn't in the aggressive manner, I guess with him just taking the TV, whatever you call, disrespect; something like that, but it wasn't in an aggressive manner, and I didn't hear anything that was being said.
>
> Q: When he took the TV out of her hands, did he push her or shove her in any way?
>
> A: No, not at that time.
>
> Q: Did he ever throw her against the railing or against the wall?

> A: No.
>
> ….
>
> Q: And did you see her bump either the wall or the railing?
>
> A: No, I didn't.
>
> ….
>
> Q: From where you were watching this happen, could you hear what was being said?
>
> A: If it was real loud, yes.
>
> Q: Did you hear any loud swearing by Mr. Beck?
>
> A: No.

On cross-examination, Batton testified as follows:

> Q: Now, you said, sir, that you knew that the COs were going to come the minute you saw Mr. Beck get the TV.
>
> A: Yes.
>
> Q: Why?
>
> Q: For one thing, you take anything out of the hands of a CO, they're going to assume that's an aggressive act, right, so if that happens, I don't want to be around nothing like that, so I left and went outside to the courtyard. I then saw what I saw, but I don't want to be here right now.

¶35 With this factual background in mind, we address Beck's charge that the State withheld, in violation of his due process rights, a video recording of the incident or its immediate aftermath. We note that a video recording from a cell-block security camera was disclosed to Beck, and this evidence was played to the jury. However, this video recording begins well after the incident occurred, and Beck argues that evidence in the record suggests that an additional video recording exists. On the video disclosed by the State, Beck has returned to the table in the

cell-block courtyard near the officers' station after the incident with Officer Schultz. However, the Department of Corrections' (DOC) conduct report issued to Beck for the incident indicates that a supervisor directed prison staff members to turn the security camera on Beck as the situation was unfolding. The report by Sergeant Means states that he "turned towards the officers' station to motion for the camera to be turned toward the incident."

¶36 Beck appears to argue that the sergeant's statement that he motioned for the camera to be turned toward the incident as the situation was developing suggests that a video of the incident itself, or its immediate aftermath, exists. Beck argues that this video will be favorable to his case, maintaining that he did not slam Officer Schultz against the railing or even touch her.

¶37 We cannot tell with certainty on this record whether additional video evidence exists, much less whether such evidence would be exculpatory. We note, however, that the very beginning of the video recording provided to Beck starts well after the incident occurred, and is not indicative of the sudden movement one would expect if the camera had just been turned toward the incident by a staff person as directed by Sergeant Means. It is also reasonable to infer from the report that an officer at the officers' station would have obeyed the sergeant's order to turn the video camera onto the incident as the events unfolded.

¶38 We note, moreover, that three very different versions of what occurred between Officer Schultz and Beck were offered at trial. If video evidence of the incident exists, and if such evidence is consistent with either Officer Gregory's testimony or Batton's testimony, it would be material, and it

would be exculpatory and impeaching.[7] That is, it would undermine both Officer Schultz's testimony about the existence of a violent altercation with Beck and her credibility as a witness, and it would otherwise raise a reasonable probability that the jury would not have concluded that Beck engaged in conduct constituting disorderly conduct under WIS. STAT. § 947.01. We note that neither Officer Gregory nor Batton testified that they heard Beck swear at Officer Schultz. We also note that Batton testified Beck did not take the TV from the officer in an aggressive manner and that Officer Gregory testified that Schultz simply fell back after Beck took the TV from her. Under these circumstances, we conclude that Beck's allegation that additional video evidence exists is sufficient to warrant a remand for an evidentiary hearing to determine whether such evidence exists and whether it is exculpatory.

¶39 We consider next Officer Schultz's medical records. At trial, Officer Schultz testified that, as a result of Beck taking the TV out of her arms, her right shoulder was "pulled … out of [its] socket" and she sustained bruising. Beck immediately objected to the testimony, and the court directed the jury to disregard the officer's testimony that her shoulder had been pulled out of its socket. The court then called a recess and heard argument on the objection in chambers. There, Beck noted that he had not been charged with battery and argued that the prejudicial effect of such testimony outweighed its probative value. Beck also observed that the State had not provided him with access to Officer Schultz's medical records to verify her stated injuries. Beck also noted that the officer appeared in court with her right arm in a sling, which compounded the prejudicial

[7] We also note that the State does not assert that such evidence does not exist, only that there is no evidence in the record to show that it does exist.

effect of her testimony about the injuries. The district attorney argued that such evidence was probative as to whether Beck had engaged in "violent" and "abusive" acts constituting disorderly conduct under WIS. STAT. § 947.01, but suggested that the officer's testimony could be limited to say that she sustained bruising. The court accepted the district attorney's suggested ruling, and further directed the district attorney not to ask the officer questions about why her arm was in a sling. The court discussed its ruling with Officer Schultz, who in turn told the court that her shoulder injury was caused by the incident and that she went to the hospital to have it treated. When the trial resumed, the officer testified again that she sustained bruising as a result of the incident.

¶40 Beck appears to argue that the officer's medical records would have shown that she sustained no injuries as a result of the incident, and would have thereby undermined her testimony about the allegedly violent nature of the incident and about having sustained bruising. Beck argues that the DOC decision on the inmate disciplinary action taken against him—in which Beck was found not guilty of assaulting Officer Schultz—supports his contention that she did not sustain injuries. In the DOC decision, the hearing officer found that the evidence did not support the allegation that Beck had "grabb[ed] [Officer Schultz's] arm," noting that Officer Schultz "never report[ed] an injury at that time; nor report[ed] anything to a supervisor at that time. Nor did staff communicate an emergency existing for aid or assistance."

¶41 We conclude, based on Officer Schultz's statement to the court that she went to the hospital on the night of the incident because of her shoulder problems, that it is highly probable that medical records exist concerning injuries Officer Schultz allegedly sustained during the incident. If the medical records exist and if the records support Beck's testimony that he did not throw Officer

Schultz against the railing, they would be material, exculpatory, and impeaching. That is, as with the video evidence, the records would undermine Officer Schultz's testimony that Beck acted violently, and would negatively affect her credibility as a witness. In short, assuming the medical records support Beck's version of what happened during the incident, there is a reasonable probability that the jury would not have concluded that Beck engaged in disorderly conduct. Thus, Beck's allegation that medical records exist is sufficient to warrant an evidentiary hearing to determine whether they exist and, if so, whether the records are exculpatory.

CONCLUSION

¶42 In sum, we reject all of Beck's challenges to his conviction except the allegation that his due process rights were violated when the State withheld an alleged video recording of the incident and medical records of Officer Schultz's visit to the hospital for treatment related to the incident. We therefore affirm in part and reverse in part and remand for an evidentiary hearing to determine whether such evidence exists and whether it is exculpatory, and for additional proceedings as necessary.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.