COURT OF APPEALS
DECISION
DATED AND FILED

July 30, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2012AP2460

Cir. Ct. No. 2001CF26

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY DANIEL BURR,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Pepin County: JOHN A. DAMON, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Jeffrey Burr appeals an order denying his motion for postconviction relief. He argues the circuit court erroneously concluded he was not entitled to a new trial based on newly discovered evidence. He also contends the court erred by denying his postconviction motion without an

evidentiary hearing. Lastly, he argues WIS. STAT. § 938.183(2) (2001-02), the statute that allowed him to be charged as an adult, is unconstitutional.[1] We reject Burr's first two arguments on the merits, and we conclude his third argument is procedurally barred. We therefore affirm the order denying postconviction relief.

BACKGROUND[2]

¶2 On March 26, 2001, Burr was charged with first-degree intentional homicide, aggravated battery, and false imprisonment, each as a party to a crime, in connection with the death of Ronald Ross. Burr was fifteen years old at the time of Ross's death and was charged as an adult pursuant to WIS. STAT. § 938.183(2) (2001-02).

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[1] Burr's appellate briefs state he was charged as an adult under WIS. STAT. § 938.183(1)(am) (2001-02), and he therefore argues that statute is unconstitutional. However, the record reflects that Burr was actually charged as an adult under WIS. STAT. § 938.183(2) (2001-02). We assume for purposes of this appeal that Burr intends to argue § 938.183(2) (2001-02), is unconstitutional.

References to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted. We refer to the 2001-02 version of WIS. STAT. § 938.183(2) because that was the version in effect when the charged offenses took place.

[2] Burr's brief-in-chief does not contain any citations to the record. Instead, Burr cites only to his brief's appendix. WISCONSIN STAT. RULES 809.19(1)(d) and (e) require appropriate citations to the record on appeal, and references to a brief's appendix do not qualify. *See* ***United Rentals, Inc. v. City of Madison***, 2007 WI App 131, ¶1 n.2, 302 Wis. 2d 245, 733 N.W.2d 322.

Burr's failure to cite to the record is particularly disturbing, given that this court struck his original appellate brief for failing to include record citations. Our order striking Burr's original brief noted that a brief's statement of facts and argument must both include appropriate record citations. Burr's replacement brief did not heed this directive. What's more, although the State pointed out in its response brief that Burr's replacement brief lacked record citations, Burr also failed to cite the record in his reply brief. We admonish Burr's attorneys that future violations of the rules of appellate procedure may result in sanctions. *See* WIS. STAT. RULE 809.83(2).

¶3 At trial, the primary witness connecting Burr to Ross's murder was Paul Jackson, who testified pursuant to a grant of immunity. Jackson testified he went to a party at Noah White's house in Red Wing, Minnesota, with his then-girlfriend Stephanie Thompson in the early morning hours of March 9, 2001. Burr was present at the party, as were Noah White, Arlo White, and a number of other people.[3] Jackson and Thompson went into the house's furnished basement, where they encountered Ross. Jackson testified he had met Ross earlier that night at a casino, but aside from that brief encounter, he did not know Ross.

¶4 About two hours after he arrived at the party, Jackson got into an altercation with Ross in the basement. Jackson testified he bumped into Ross, and Ross "kind of got loud and raised his—like balled his fist up." Jackson then punched Ross in the chin, knocking him to the floor. Jackson testified he immediately went upstairs to "cool down."

¶5 Once upstairs, Jackson laid down on a couch in the living room with Thompson, who was watching a movie. At that point, many of the people in attendance started leaving the party. About forty-five minutes later, Burr and Noah asked Jackson to come to the garage. In the garage, Jackson saw a man lying unconscious or semi-conscious on the floor, covered by a blanket. When the blanket was removed, Jackson recognized the man as Ross. Ross's face was bloody, and he was not wearing a shirt or pants.

¶6 Jackson saw Burr kick Ross in the back. Arlo then backed his SUV into the garage, and Burr, Jackson, and Noah placed Ross in the vehicle's rear

[3] We refer to Noah White and Arlo White by their first names throughout the remainder of this opinion.

hatchback area. Burr and Jackson got into vehicle's backseat, Noah got into the front passenger seat, and Arlo drove. As they drove away from the house, Burr said, "We should kill him," and suggested they slice Ross's throat.

¶7 Jackson testified they drove over a large bridge into Wisconsin. Ross regained consciousness, so Burr grabbed a sheathed machete from the front seat and used it to beat Ross. Jackson took the machete from Burr after about five minutes because "[he] didn't feel that was right."

¶8 About forty-five to sixty minutes after they left Noah's house, Arlo backed the vehicle into a wooded area. Burr asked Jackson to "get out and help him." Jackson, Burr, and Noah got out of the vehicle, and Jackson and Burr unloaded Ross from the back. Jackson testified he knew Ross was still alive because Ross made an "augh" sound when they dropped him on the ground. Jackson got back into the vehicle, but Burr and Noah stayed outside and kicked Ross for several minutes. When Burr and Noah reentered the vehicle, Burr said, "We killed him." Arlo then drove Jackson, Burr, and Noah back to Noah's house, leaving Ross behind.

¶9 The medical examiner who performed Ross's autopsy testified Ross died as a result of multiple traumatic injuries associated with assault. She also testified "hypothermic conditions" may have contributed to his death.

¶10 Thompson also testified for the prosecution. She stated she was present in the basement at Noah's house when the initial altercation between Ross and Jackson took place, although she did not see the altercation. Immediately thereafter, she went upstairs to the living room. A few minutes later, Jackson came upstairs and sat next to her on a couch, and "everyone else came up and left." Thompson testified she fell asleep, and at some point Jackson left the house

with Burr, Noah, and Arlo. They returned at least two hours later. On cross-examination, Thompson admitted she was afraid of Jackson at the time of trial and had a restraining order against him.

¶11 The jury convicted Burr of all three charged counts. The court imposed the mandatory life sentence for the first-degree intentional homicide count, and it made Burr eligible for extended supervision in sixty years. Burr received a fifteen-year sentence on the aggravated battery count and a five-year sentence on the false imprisonment count, concurrent to each other and to his sentence on the first-degree intentional homicide count.

¶12 Burr moved for a new trial, arguing, among other things, prosecutorial misconduct, judicial bias, evidentiary errors, and newly discovered evidence. In the alternative, he asked the circuit court to modify his sentence. The court denied Burr's motions, and we affirmed his conviction on direct appeal. *See* ***State v. Burr***, No. 2002AP3250, unpublished slip op. ¶1 (WI App June 24, 2003). Our supreme court denied Burr's petition for review. Burr then filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Wisconsin, which was denied. *See* ***Burr v. Bertrand***, No. 04-C-992, 2007 WL 3228830 (E.D. Wis. Oct. 31, 2007). The United States Court of Appeals for the Seventh Circuit affirmed the district court's decision, and the United States Supreme Court denied Burr's petition for writ of certiorari. *See* ***Burr v. Pollard***, 546 F.3d 828 (7th Cir. 2008), *cert. denied*, 555 U.S. 1175 (2009).

¶13 On March 9, 2012, Burr moved for postconviction relief under WIS. STAT. § 974.06, seeking a new trial based on newly discovered evidence. He also argued WIS. STAT. § 938.183(2) (2001-02), was unconstitutional. In support of his newly discovered evidence argument, Burr offered an "investigative

memorandum" authored by private investigator William Gowin, which relayed statements Thompson allegedly made to Gowin on July 20, 2010.

¶14 According to Gowin's memorandum, Thompson stated Ross approached her at the March 9, 2001 party, "flashing a bunch of money, including several hundred dollar bills, inviting [her] to go to the casino to party." Thompson thought Ross was flirting with her, and she believed Jackson was jealous because Jackson was hovering around her. Jackson asked Thompson if Ross was bothering her, and she said he was not. Jackson also told her he was "going to get the drunk white guy [Ross] for his money[.]" Thompson took this to mean Jackson "wanted to beat up [Ross] and take his money[,]" but she did not believe he was serious.

¶15 Later on, Jackson "punched and knocked out [Ross] without any provocation." At that point, everyone in the basement went upstairs and people began to leave the party. Jackson went into the garage with Noah, Arlo, and Burr. Thompson began watching a movie, but she later went into the kitchen to "begin picking things up." At that point, Noah came back into the house from the garage carrying a large knife. Thompson tried to go into the garage, but Noah stopped her. After a while, Jackson came up from the basement[4] and told Thompson that he, Burr, Noah, and Arlo were leaving to drop Ross off at a nearby casino. Before they left, Noah told Thompson not to go into the back room in the basement. However, once they were gone, Thompson went into the back room "out of curiosity" and found "blood covering the walls and floor" of a walk-in closet.

[4] Gowin's affidavit states there is a "separate stairway from the basement into the garage."

¶16 Later that day, Jackson told Thompson that he and Noah went back into the basement after Jackson's initial altercation with Ross. Ross was getting up, so they dragged him into the closet in the back room and took turns beating him. Arlo then hit Ross "with the ball of [a] knife." Noah wanted Ross out of the house, so they put him in the back of Arlo's SUV. Although Jackson had told Thompson they were going to drop Ross off at a casino, Noah refused to take Ross there because Noah worked at the casino and was worried he would be recognized. Arlo suggested they leave Ross in the woods instead, so they started off for Wisconsin. When Ross woke up along the way, Arlo and Jackson hit him with a knife. Jackson told Thompson that Ross was alive when they dumped him in the woods. When Thompson stated Ross would freeze to death, Jackson responded "that was the plan." Jackson further stated Burr "didn't want anything to do with the whole situation."

¶17 A report authored by Randy Hanson, a forensic scientist, was also attached to Burr's postconviction motion. In the report, Hanson stated he tested the basement closet at Noah White's house for blood on October 18, 2010, using the chemical Bluestar Forensic. Hanson "observed a positive reaction" to the chemical in five places on the closet's floor and walls. However, he noted Bluestar Forensic is "categorized as a presumptive blood test because of its lack of absolute specificity to blood." He stated false positives can occur due to the presence of certain household detergents, chlorine, some paints, varnishes, and copper. Hanson took samples from the areas of the closet that exhibited positive reactions, and he sent them to a forensic laboratory in California. He stated further analysis of the samples could reveal whether blood was actually present, and, if so, the species of origin, the international blood group, and a DNA profile. Burr's

postconviction motion did not state whether further testing was ever performed on the samples.

¶18 The circuit court denied Burr's motion without a hearing. The court concluded Burr's newly discovered evidence claim failed because it was not reasonably probable a new trial would produce a different result. The court explained Thompson's purported statements to Gowin were hearsay and would not be admissible at a new trial. The court also determined Burr's argument about the constitutionality of WIS. STAT. § 938.183(2) (2001-02), was procedurally barred because Burr did not present a sufficient reason for failing to raise the argument in his previous postconviction motion. Burr now appeals the order denying postconviction relief.

DISCUSSION

I. Newly discovered evidence

¶19 The decision to grant or deny a motion for a new trial based on newly discovered evidence is committed to the circuit court's discretion. ***State v. Plude***, 2008 WI 58, ¶31, 310 Wis. 2d 28, 750 N.W.2d 42. To obtain a new trial, the defendant must prove: (1) the evidence was discovered after his or her conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. ***Id.***, ¶32. If the defendant satisfies these criteria, the circuit court must determine whether there is a reasonable probability that a different result would be reached in a new trial. ***Id.*** "A reasonable probability of a different outcome exists if 'there is a reasonable probability that a jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant's guilt.'" ***Id.***, ¶33 (quoting ***State v. Love***, 2005 WI 116, ¶44, 284

Wis. 2d 111, 700 N.W.2d 62) (brackets in ***Plude***). Whether there is a reasonable probability that a new trial would produce a different result is a question of law that we review independently. ***Id.***

¶20 For purposes of this appeal, the State concedes Burr's proffered evidence satisfies the third and fourth factors of the newly discovered evidence test because it is material to an issue in the case, that being Burr's culpability, and is not merely cumulative. *See* ***id.***, ¶32. However, the State argues Burr has not proven the evidence was discovered after his conviction or that he was not negligent in seeking the evidence. *See* ***id.*** We assume, without deciding, that Burr has satisfied these two criteria. We do so, in part, because the matter may be disposed of on other grounds and, in part, because the State's argument on these two grounds is based upon speculation. Nonetheless, we conclude Burr is not entitled to a new trial because it is not reasonably probable a new trial would produce a different result. *See* ***id.***; *see also* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (court of appeals need not address every issue raised when one is dispositive). We reach this conclusion because Burr's proffered evidence constitutes double hearsay and would not be admissible at a new trial. *See* ***State v. Bembenek***, 140 Wis. 2d 248, 256, 409 N.W.2d 432 (Ct. App. 1987) (holding that newly discovered evidence consisting of inadmissible hearsay statements "would not probably change the result at a new trial").

¶21 The circuit court concluded there was little likelihood Thompson would agree to testify at a new trial, given that she had refused to cooperate with the defense since speaking to Gowin in July 2010. Without Thompson's testimony at a new trial, Burr would be forced to rely on the statements attributed to her in Gowin's investigative memorandum. The court concluded those statements were hearsay and would therefore be inadmissible. On appeal, Burr

does not dispute that Thompson's statements in the investigative memorandum constitute hearsay. Instead, he argues they would be admissible at a new trial under the residual hearsay exception.[5]

¶22 The residual hearsay exception permits admission of hearsay evidence that is "not specifically covered" by any other hearsay exception but possesses "comparable circumstantial guarantees of trustworthiness." WIS. STAT. § 908.045(6). "While not contemplating unfettered judicial discretion," the residual exception "was intended to allow admission of evidence under new and unanticipated situations which demonstrate a trustworthiness consistent with that required under other specifically stated exceptions." ***State v. Sorenson***, 143 Wis. 2d 226, 243, 421 N.W.2d 77 (1988). Our supreme court has held that comparable circumstantial guarantees of trustworthiness are present:

> a. Where the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed;
>
> b. Where, even though a desire to falsify might present itself, other considerations such as the danger of easy

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[5] In a brief, alternative argument, Burr contends Thompson would be forced to testify at a new trial because "any new trial would include the power of subpoena for the defense." He asserts her testimony would "raise serious doubts about the guilt of Mr. Burr and would make it unlikely that the jury would convict him of first[-]degree murder on an aiding and abetting theory."

Burr seems to assume Thompson would testify consistently with the statements attributed to her in Gowin's investigative memorandum. However, that possibility seems unlikely, given that Thompson has refused to cooperate with the defense since speaking to Gowin in July 2010. Moreover, even if Thompson did testify consistently with Gowin's memorandum, any testimony about statements Jackson made to her would still be inadmissible hearsay, as we explain below. *See infra*, ¶¶30-35. Conversely, if Thompson testified inconsistently with Gowin's memorandum, the memorandum could theoretically be introduced as evidence of a prior inconsistent statement. *See* WIS. STAT. § 908.01(4)(a)1. Again, though, any statements in the memorandum about statements Jackson made to Thompson would remain inadmissible hearsay.

> detection or the fear of punishment would probably counteract its force;
>
> c. Where the statement was made under such conditions of publicity that an error, if it had occurred, would probably have been detected and corrected.

Id. at 243-44 (quoting 5 WIGMORE, EVIDENCE § 1423, at 254 (Chadbourn rev. 1974)); *see also* ***State v. Anderson***, 2005 WI 54, ¶59, 280 Wis. 2d 104, 695 N.W.2d 731.

¶23 Thompson's statements to Gowin do not exhibit sufficient circumstantial guarantees of trustworthiness to be admissible at a new trial under the residual hearsay exception. Burr argues Thompson's statements are sufficiently trustworthy because "there existed an easy way to detect if she was lying: testing the basement back closet for blood." Because it would have been easy to verify Thompson's story, Burr contends the "danger of easy detection" would have outweighed her motivation to lie. *See* ***Sorenson***, 143 Wis. 2d at 244. Burr's argument assumes that, when Thompson spoke to Gowin in July 2010, she believed it would be possible to test the closet for blood nine years after the events in question. He does not, however, point to any evidence that Thompson actually held that belief.

¶24 In addition, we reject Burr's premise that testing the closet for blood would have provided an easy way to test the veracity of Thompson's statements. If the closet were tested and no blood were found, that would not prove Thompson's statements to Gowin were false. It would show only that, for whatever reason, blood could not be detected in the closet. Thus, rather than proving Thompson was lying, a negative result would simply indicate her statements could not be confirmed. We therefore reject Burr's argument that the ability to test the closet for blood provided sufficient circumstantial guarantees of

trustworthiness to make Thompson's statements to Gowin admissible under the residual hearsay exception.

¶25 Burr further contends that "[t]he guarantees of trustworthiness in the instant case go farther by providing forensic evidence of blood that physically corroborates [Thompson's] statement." Burr asserts that forensic scientist Randy Hanson "discovered the presence of blood in the room where Jackson told [Thompson] that he and the Whites took turns beating [Ross]." He contends Hanson's discovery of blood strongly suggests Thompson told Gowin the truth about the events surrounding Ross's death.

¶26 Burr significantly overstates the strength of the forensic evidence. Hanson never stated he discovered blood in the basement closet. He merely stated he observed a positive reaction in the closet to a chemical that is categorized as a presumptive test for blood. He noted that substances other than blood can produce the same positive reaction, including household detergents, chlorine, paints, varnishes, and copper. Thus, contrary to Burr's assertion, Hanson's report did not conclusively establish that blood was present in the basement closet. Further, even assuming the substance Hanson found was blood, there is no evidence it was Ross's blood. Given the inconclusive nature of the forensic evidence, we conclude it does not render Thompson's statements sufficiently trustworthy to be admissible under the residual hearsay exception.

¶27 Moreover, Hanson's report stated he collected samples from the closet and sent them to a forensic laboratory in California. Presumably, the samples were sent to that laboratory with the intent that further testing would be performed. However, neither Burr's postconviction motion nor his appellate briefs state whether any additional testing was performed and, if so, what it

revealed. Burr does not provide any explanation for failing to have additional testing performed on the samples. One can only assume that, if additional testing had been performed and confirmed the presence of blood, Burr would have said so in his postconviction motion. One would also hope that, had additional testing been unable to confirm the presence of blood, Burr would have acknowledged that fact. We agree with the State that Burr's "abject silence on the fate of the samples … raises a concern whether he has been completely candid with the court."

¶28 Burr also contends Thompson's statements to Gowin are sufficiently reliable to be admissible under the residual hearsay exception because her fear of Jackson gave her a reason to falsify her original testimony, but she received "no benefit from contradicting her previous testimony" and had "no reason to falsify her new statement[.]" Burr essentially argues that a hearsay statement contradicting a witness's prior testimony must always be admissible under the residual exception if the witness had a motive to lie when making the first statement but had no reason to lie when making the second statement. He contends the absence of a reason to falsify the second statement provides a circumstantial guarantee that the statement is trustworthy. However, he does not cite any authority in support of that proposition. We decline to hold that the mere absence of a reason to lie, without more, renders a hearsay statement that is inconsistent with prior sworn testimony sufficiently reliable to be admitted under the residual exception.

¶29 Burr next argues that, even if Thompson's statements to Gowin are not admissible under the residual exception, prohibiting Burr from admitting the statements would "violate [his] constitutional right to present evidence in his own defense." Our supreme court has recognized that "[t]he hearsay rule may not be applied mechanistically where proffered testimony is critical to a defendant's

defense and bears persuasive assurances of trustworthiness." ***State v. Sharlow***, 110 Wis. 2d 226, 233, 327 N.W.2d 692 (1983). Presence of the following four factors provides adequate assurances of trustworthiness for a hearsay statement to be constitutionally admissible: (1) the statement was made spontaneously to a close acquaintance shortly after the crime; (2) it is corroborated by other evidence; (3) it was self-incriminatory and unquestionably against the declarant's interest; and (4) the declarant is available to testify. ***Bembenek***, 140 Wis. 2d at 255. Burr concedes Thompson's statements to Gowin were not made to a close acquaintance shortly after the crime and were not self-incriminatory. Consequently, the statements do not possess the adequate assurances of trustworthiness required to be constitutionally admissible.

¶30 Thompson's statements to Gowin are not sufficiently reliable to be admissible under the residual hearsay exception, nor are they constitutionally admissible under ***Sharlow*** and ***Bembenek***. Because the statements would not be admissible at a new trial, it is not reasonably probable a new trial would produce a different result.

¶31 However, even if Thompson's statements to Gowin would be admissible, the crucial portions of Thompson's statements are based not on Thompson's own knowledge of what occurred the night of Ross's death, but on statements Jackson allegedly made to Thompson later that day. Thus, Gowin's investigative memorandum actually contains two layers of hearsay: Thompson's statements to Gowin, and Jackson's statements to Thompson. "To be admissible, each prong of a double hearsay statement must conform with an individual exception to the hearsay rule." ***State v. Huntington***, 216 Wis. 2d 671, 691, 575 N.W.2d 268 (1998).

¶32 Accordingly, even if Burr could prove Thompson's statements to Gowin would be admissible at a new trial, he would also have to establish that Jackson's statements to Thompson would be admissible. Burr has not even attempted to make this showing on appeal. He does not respond to the State's argument that Jackson's statements to Thompson would be inadmissible. Unrefuted arguments are deemed conceded. ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶33 Moreover, we agree with the State that Jackson's statements to Thompson would not be admissible at a new trial. According to Gowin's memorandum, Jackson told Thompson he participated in a prolonged beating of Ross in the basement closet and hit Ross with a knife in the SUV. Although he has not done so, Burr could have argued these statements would be admissible at a new trial as statements against interest, pursuant to WIS. STAT. § 908.045(4). Alternatively, Burr could have argued these statements, along with Jackson's statement that Burr "didn't want anything to do with the whole situation[,]" would be constitutionally admissible. However, for Jackson's statements to be admissible on either of those grounds, Burr would have to show that they are corroborated by other evidence. *See* ***Bembenek***, 140 Wis. 2d at 254-55; *see also* ***State v. McCallum***, 208 Wis. 2d 463, 476, 561 N.W.2d 707 (1997) (Newly discovered evidence consisting of a witness's recantation must be corroborated by other newly discovered evidence.). Burr has not provided any evidence that corroborates Jackson's purported statements to Thompson.

¶34 On the record before us, the only evidence Burr could conceivably cite to corroborate Jackson's statements would be the forensic evidence indicating the possible presence of blood in the basement closet. However, as we have

already explained, that forensic evidence is vague and inconclusive. *See supra*, ¶¶26-27. Thus, it does not actually corroborate Jackson's statements.

¶35 Moreover, while conclusive evidence of blood in the closet might corroborate Jackson's statement that he participated in a prolonged beating of Ross in the closet, it would not corroborate Jackson's other, more important statements that it was he, not Burr, who beat Ross with a knife while driving to Wisconsin, and that Burr did not want anything to do with "the whole situation." These are the statements that potentially exculpate Burr, not Jackson's statement about beating Ross in the basement closet. Even if Jackson had beaten Ross in the closet, Burr could still be guilty of first-degree intentional homicide, as a party to a crime, if he participated in beating Ross in the SUV and then helped dump his unconscious and partially-clad body in the woods in early March. There is no evidence to corroborate Jackson's statement that he beat Ross in the SUV, nor is there evidence to corroborate his statement that Burr did not want to be involved. Thus, even if Burr had argued that Jackson's statements to Thompson would be constitutionally admissible at a new trial or admissible as statements against interest, we would nevertheless reject his argument.

¶36 Finally, Burr contends portions of Gowin's memorandum would be independently admissible at a new trial to provide context for the forensic evidence Hanson gathered. He states:

> To explain why [Hanson] was interested in the closet, a portion of [Thompson's] statement should be admitted to explain why he had it tested. The entire statement would not come in, but the details of who made the statement, what [Thompson] saw, and at what point in the night she saw it are all important pieces of foundation evidence. They would also all be admissible not for their truth, but to show the effect on [Gowin and Hanson].

Burr does not cite any legal authority in support of this argument, and we therefore need not consider it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). Furthermore, Burr's argument presupposes that he would be entitled to a new trial based solely on the evidence that Jackson beat Ross in the basement closet. As we explained above, that evidence, standing alone, does little more than question Jackson's credibility and does not actually exonerate Burr. It is not reasonably probable a new trial would result in a different outcome based solely on the evidence about the beating in the basement closet.

II. Denial of Burr's postconviction motion without a hearing

¶37 Burr next contends the circuit court erroneously denied his postconviction motion without a hearing. If a postconviction motion alleges sufficient material facts that, if true, would entitle the defendant to relief, the circuit court must hold an evidentiary hearing on the motion. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. However, the court has discretion to deny the motion without a hearing if "the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief[.]" ***Id.***

¶38 The circuit court properly exercised its discretion by denying Burr's postconviction motion without a hearing. The court concluded the facts alleged in Burr's motion did not entitle him to the relief requested because, even accepting the facts alleged in the motion as true, it was not reasonably probable a new trial would produce a different result. Burr complains that, in reaching this conclusion, the court stated Thompson's statements to Gowin were "not credible." He argues a court cannot make credibility determinations about newly discovered evidence without the benefit of live testimony at an evidentiary hearing. However, in

context, it is clear that when the court stated Thompson's statements were "not credible" it actually meant they were not supported by sufficient circumstantial guarantees of trustworthiness to be admissible under the residual hearsay exception.

¶39 Moreover, as explained above, even if the court had held an evidentiary hearing and Thompson had testified, she would not have been able to testify about the statements Jackson made to her. Without Jackson's statements, Thompson's testimony would not have given rise to a reasonable probability that a new trial would produce a different result. *See* ***Plude***, 310 Wis. 2d 28, ¶33. Consequently, on these facts, an evidentiary hearing would not have served any purpose.

III. Constitutionality of WIS. STAT. § 938.183(2) (2001-02)

¶40 Burr was fifteen years old at the time of Ross's murder. He was charged as an adult under WIS. STAT. § 938.183(2) (2001-02). He now contends that statute is unconstitutional. The circuit court rejected his constitutional claim, concluding it was procedurally barred by WIS. STAT. § 974.06(4).

¶41 On appeal, Burr completely ignores the circuit court's ruling. His appellate briefs do not even acknowledge that the court determined his constitutional claim was procedurally barred, much less develop an argument that the court erred. By ignoring the grounds upon which the circuit court ruled, Burr has conceded the validity of the court's ruling. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994).

¶42 In addition, we agree with the court's conclusion that Burr's constitutional claim is procedurally barred. A defendant must raise all grounds for

postconviction relief in his or her first postconviction motion. ***Escalona-Naranjo***, 185 Wis. 2d at 185-86. A defendant may not pursue claims in a subsequent postconviction motion that could have been raised in an earlier postconviction motion unless he or she provides a "'sufficient reason'" for failing to do so. ***Id.*** at 181-82 (quoting WIS. STAT. § 974.06(4)). Whether a defendant has provided a sufficient reason for failing to raise a claim is a question of law that we review independently. ***State v. Kletzien***, 2011 WI App 22, ¶16, 331 Wis. 2d 640, 794 N.W.2d 920.

¶43 Burr did not challenge the constitutionality of WIS. STAT. § 938.183(2) (2001-02), in his first postconviction motion. His most recent postconviction motion did not set forth any reason, let alone a sufficient reason, for his previous failure to raise the constitutional claim. However, in his reply brief in the circuit court, Burr contended he did not raise the constitutional issue earlier because he "was 15 years old and certainly not sophisticated in matters of [c]ourt or law." The circuit court found this was not a sufficient reason for failing to raise the constitutional claim because Burr was represented by "knowledgeable" counsel in the previous postconviction proceedings.

¶44 We agree with the circuit court's assessment. Burr was represented by counsel in his previous postconviction proceedings, and he does not explain why his youth and lack of sophistication prevented his attorney from raising the constitutional issue. Ineffective assistance of postconviction counsel may constitute a sufficient reason for failing to raise an argument, *see* ***State ex rel. Rothering v. McCaughtry***, 205 Wis. 2d 675, 682, 556 N.W.2d 136 (Ct. App. 1996), but Burr does not argue his previous postconviction attorney was ineffective. Because Burr has not provided a sufficient reason for failing to raise

his constitutional claim in his first postconviction motion, we agree with the circuit court that the claim is procedurally barred.

By the Court.—Order affirmed.

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