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

**November 19, 2026**

**Samuel A. Christensen**
**Clerk of Court of Appeals**

**NOTICE**

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**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. 2025AP1276-CR** **Cir. Ct. No. 2021CF505**

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

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**CHRISTOPHER D. BAUER,**

**DEFENDANT-APPELLANT.**

APPEAL from a judgment of the circuit court for Dane County: NICHOLAS J. McNAMARA, Judge. *Affirmed*.

Before Graham, P.J., Kloppenburg, Nashold, JJ.

**Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

¶1 PER CURIAM. A jury convicted Christopher Bauer of operating a motor vehicle while under the influence of a controlled substance and operating a

motor vehicle with a detectable amount of a restricted controlled substance in his blood. On appeal, Bauer argues that there was insufficient evidence that he operated a motor vehicle, which is an element of both convictions. He also argues that the admission of a lab analyst's testimony regarding tests that the lab analyst did not personally conduct, which the parties agree was error, was not harmless error. Bauer further argues that the circuit court erroneously exercised its discretion when it denied his motion under WIS. STAT. § 906.12 (2023-24)[1] to strike a witness's testimony based on the State's failure to produce a report that Bauer argues the witness used to refresh his memory for the purpose of testifying. Finally, Bauer contends that the prosecutor's failure to produce that same report violated ***Brady v. Maryland***, 373 U.S. 83 (1963). We reject Bauer's arguments and affirm.

## BACKGROUND

¶2 Bauer was charged with one count of operating a motor vehicle while under the influence of a controlled substance and one count of operating a motor vehicle with a detectable amount of a restricted controlled substance in his blood, each as a fifth offense. The following facts are derived from the undisputed evidence introduced at trial.

¶3 An individual called 911 after seeing Bauer hunched over and drooling in the driver's seat of a parked vehicle. The vehicle was in a parking lot between a fast-food restaurant and a gas station, and was parked but running. The individual, who was parked next to Bauer's vehicle, waited a few minutes and

[1] All references to the Wisconsin Statutes are to the 2023-24 version.

honked the horn of his vehicle several times, but Bauer did not move. At that point the individual called 911.

¶4 The fire department was the first to respond to the call. One of the firefighters, Lawrence Grab, opened the driver's side door and reached across Bauer in order to turn off the vehicle and remove the key from the ignition. As he was doing so, Bauer woke up and tried to stop Grab by grabbing Grab's arm. Grab was able to turn off the vehicle but was initially not able to remove the key from the ignition because the vehicle was in gear and because Bauer was preventing him from putting the vehicle in park. With the assistance of another firefighter, Grab was able to put the vehicle in park and remove the key from the ignition.

¶5 After the vehicle was turned off and Bauer was outside of the vehicle, police arrived. Police observed that Bauer "appeared to be somewhat confused," was slurring his speech, and appeared to be "unsteady on his feet." Police also observed syringes in Bauer's vehicle, a bottle containing what police believed to be marijuana in the vehicle, and a spoon either in the vehicle or on the ground outside the vehicle that police testified "looked like it had been used for cooking illicit drugs." Police asked Bauer to perform field sobriety tests. Bauer performed poorly on the tests used to detect drug impairment, and police placed Bauer under arrest.

¶6 Bauer was transported to the hospital where he had his blood drawn. His blood was sent to the Wisconsin State Laboratory of Hygiene ("the State Laboratory") and tested positive for delta-9-tetrahydrocannabinol ("delta-9-THC"), which a laboratory analyst from the State Laboratory described as the

"main active ingredient in marijuana"; benzoylecgonine, a metabolite of cocaine; and methamphetamine.

¶7 At trial, the lab analyst testified, and Bauer objected to her testimony about the results of tests that she did not personally perform. The lab analyst personally tested Bauer's blood for delta-9-THC. But the tests for the cocaine metabolite and methamphetamine were conducted by a different lab analyst, one who did not testify because that analyst no longer worked at the State Laboratory. The lab analyst who did testify peer reviewed the tests conducted by the absent analyst, and testified regarding the results of those tests.[2] Before trial, Bauer moved to limit the admission of the lab analyst's testimony to the tests that she personally performed, arguing that the analyst's testimony regarding tests that she did not perform would be inadmissible hearsay. The circuit court, relying on Wisconsin case law, denied that motion.

¶8 Grab also testified, and Bauer moved to strike Grab's testimony or, alternatively, for a mistrial. Based on Grab's testimony, Bauer argued that, in order to refresh his memory for purposes of testifying, Grab had used a report that he wrote but that the prosecutor had not produced that report. Bauer argued that, as a result, under WIS. STAT. § 906.12, the circuit court was required to strike Grab's testimony. The court denied that motion, finding that Grab did not testify that he had reviewed the report for the purpose of testifying.

[2] The lab analyst testified that in peer reviewing the tests, she "reviewed essentially all of the analysis data from each one of those tests," "looked at the calibration," "looked at the quality controls," "looked at the actual chromatography[,] which is the printout for the sample for each of the analyses done on the sample for each one of the drugs"; "looked at the results"; "made sure [the results] were transcribed properly"; and "determined[,] based on all of that[,] that the results reported were accurate test results for the sample."

¶9 Bauer's theory of the case was that the State failed to prove beyond a reasonable doubt that Bauer operated the vehicle, which was an element of both charged crimes. For example, in closing, defense counsel argued, "[t]he element which this case hinges on is operation." The jury found Bauer guilty of both charges.

¶10 Bauer filed two separate motions for a new trial. One motion relied on a U.S. Supreme Court decision that was decided 15 days after Bauer was convicted, ***Smith v. Arizona***, 602 U.S. 779 (2024). Under ***Smith***, Bauer argued that the lab analyst's testimony regarding the tests that she did not personally conduct—which we will refer to as the "surrogate testimony"[3]—violated Bauer's right under the Sixth Amendment to confront the witnesses used against him. In the other motion, Bauer again moved for a mistrial based on his argument that Grab's testimony should have been stricken under WIS. STAT. § 906.12.

¶11 At two separate hearings, the circuit court denied each of Bauer's motions. Regarding the surrogate testimony, the court concluded that under ***Smith***, the admission of the lab analyst's surrogate testimony violated Bauer's right to confrontation. The court also concluded, however, that the error was harmless. Regarding Grab's testimony, the court rejected Bauer's argument and found, based on Grab's testimony at trial, that Grab did not use the report to refresh his memory for the purpose of testifying.

[3] *See* ***Smith v. Arizona***, 602 U.S. 779, 802-03 (2024) (stating that a prosecutor may not introduce "the testimonial out-of-court statements of a forensic analyst at trial" "through a surrogate analyst who did not participate in their creation"); *see also* ***Bullcoming v. New Mexico***, 564 U.S. 647 (2011) (referring, in this context, to a scientist's testimony about a test that the scientist did not perform as "surrogate testimony").

¶12 Bauer appeals.[4]

## DISCUSSION

¶13 Bauer raises three primary arguments on appeal. First, he argues that there was insufficient evidence to support the convictions, specifically, that he "operated" a motor vehicle. Second, he contends that the admission of the lab analyst's surrogate testimony was not harmless error. Third, Bauer contends that the circuit court erroneously exercised its discretion when it denied his motion to strike Grab's testimony, pursuant to WIS. STAT. § 906.12, on the basis that the State did not produce a report that Grab wrote. Finally, Bauer argues that the prosecutor's failure to produce Grab's report violated ***Brady***. We address, and reject, these arguments in turn.

### *I. Sufficiency of the evidence*

¶14 Bauer argues that there was insufficient evidence to support the convictions. When reviewing a challenge to the sufficiency of the evidence, we accord great deference to the factfinder. ***State v. Poellinger***, 153 Wis. 2d 493, 506-07, 451 N.W.2d 752 (1990). "It is the function of the trier of fact, and not of an appellate court, to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." ***Id.*** at 506. We "may not substitute [our] judgment for that of the trier of fact

[4] Bauer's briefs do not comply with WIS. STAT. RULE 809.19(8)(bm), which addresses the pagination of appellate briefs. *See* RULE 809.19(8)(bm) (providing that, when paginating briefs, parties should use "Arabic numerals with sequential numbering starting at '1' on the cover"). As our supreme court explained when it amended the rule, the pagination requirement ensures that the numbers on each page of the brief "will match … the page header applied by the eFiling system, avoiding the confusion of having two different page numbers" on every page of a brief. S. Ct. Order 20-07 cmt. at x1.

unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***Id.*** at 507. "If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it." ***Id.*** "A conviction may be supported solely by circumstantial evidence[.]" ***State v. Mertes***, 2008 WI App 179, ¶11, 315 Wis. 2d 756, 762 N.W.2d 813.

¶15 We independently review whether the evidence is sufficient to sustain a jury verdict. ***State v. Booker***, 2006 WI 79, ¶12, 292 Wis. 2d 43, 717 N.W.2d 676. Our standard of review is the same whether the conviction rests on direct or circumstantial evidence. ***Mertes***, 315 Wis. 2d 756, ¶11.

¶16 Bauer specifically challenges the sufficiency of the evidence as to whether he "operated" a motor vehicle, which is an element of both offenses. *See* WIS. STAT. § 346.63(1)(a)-(am). "Operate" is defined by the relevant statute and jury instructions as "the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion." Sec. 346.63(3)(b); WIS JI—CRIMINAL 2600, 2663, 2664B. Bauer appears to contend that because no testimony was presented that anyone observed Bauer actually operate the vehicle, the evidence was not only circumstantial but insufficient.

¶17 A jury may infer that a defendant operated a motor vehicle based on circumstantial evidence, and "in some cases, circumstantial evidence may be stronger and more satisfactory than direct evidence." ***Mertes***, 315 Wis. 2d 756, ¶11. For example, in ***Mertes***, the reviewing court concluded that there was

sufficient evidence that the defendant had operated the vehicle given that the defendant was asleep in the driver's seat of the vehicle at a gas pump with the key in the ignition, and the defendant told police where he was coming from and where he was going. ***Id.***, ¶¶14, 17. And in ***Milwaukee County v. Proegler***, 95 Wis. 2d 614, 291 N.W.2d 608 (Ct. App. 1980), the reviewing court concluded that there was sufficient evidence that the defendant operated a vehicle when the defendant was found asleep behind the wheel with the motor running and testified that he had driven to that location. ***Id.*** at 624-29.

¶18 Here, the evidence that Bauer operated a motor vehicle was circumstantial but sufficient. The undisputed evidence showed that Bauer, the sole occupant of his vehicle, was in the driver's seat of the vehicle in a parking lot between a gas station and a fast-food restaurant while the vehicle was running and in gear. This evidence was sufficient to support an inference that it was Bauer who started the vehicle and put it in gear, and thus that he operated the vehicle. We reject Bauer's arguments to the contrary.

¶19 In arguing that there was insufficient evidence to support a finding that he operated the vehicle, Bauer relies on ***Village of Cross Plains v. Haanstad***, 2006 WI 16, 288 Wis. 2d 573, 709 N.W.2d 447. There, our supreme court concluded that the undisputed facts showed that Haanstad did not operate a motor vehicle. ***Id.***, ¶¶16, 25. Haanstad was in the driver's seat of a parked vehicle that was running and had its lights on. ***Id.***, ¶¶3-5. However, it was undisputed in that case that somebody else drove Haanstad to where the vehicle was parked, and that Haanstad slid from the passenger seat to the driver's seat only after the vehicle was parked. ***Id.***, ¶¶3-4; *see also* ***id.***, ¶16 ("[Haanstad] did not turn on or turn off the ignition of the car. [Haanstad] did not touch the ignition key, the gas pedal, the brake, or any other controls of the vehicle.").

¶20 Bauer's argument based on ***Haanstad*** is unavailing. That is because in ***Haanstad***, it was undisputed that Haanstad did not start the vehicle or otherwise operate it. ***Id.***, ¶21. On that basis, the ***Haanstad*** court distinguished the facts there from those in ***Proegler***, discussed above. ***Id.***, ¶¶20, 21. In contrast to ***Haanstad***, here, there was no evidence, much less undisputed evidence, showing that somebody else started Bauer's vehicle, and the jury could therefore reasonably infer that it was Bauer who had started the vehicle.

¶21 Bauer also attempts to distinguish the facts here from those in ***Mertes*** by arguing that the vehicle in ***Mertes*** was at a gas station pump, whereas Bauer was parked in between a gas station and a fast-food restaurant. This distinction, however, is not a meaningful one. As explained above, there was sufficient evidence from which the jury could find that Bauer operated the vehicle, and where the vehicle was parked does not diminish the strength of that evidence.

¶22 Accordingly, we conclude that there was sufficient evidence to support the convictions.

*II. The lab analyst's surrogate testimony*

¶23 As stated, the circuit court concluded, consistent with ***Smith***, that admission of the lab analyst's surrogate testimony violated Bauer's Sixth Amendment right to confrontation. Neither the State nor Bauer challenges this conclusion on appeal. Instead, Bauer argues that, contrary to what the circuit court additionally concluded, admission of the lab analysist's surrogate testimony was not harmless error and he is entitled to a new trial.

¶24 We independently review whether an error is harmless. ***State v. Nelson***, 2014 WI 70, ¶18, 355 Wis. 2d 722, 849 N.W.2d 317. An error is

harmless if it is "'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" ***State v. Harvey***, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189 (quoting ***Neder v. United States***, 527 U.S. 1, 18 (1999)). When reviewing for harmless error, the factors to be considered include "the importance of the witness's testimony, whether the testimony was cumulative, whether other evidence corroborated or contradicted the witness's testimony, the extent of the cross-examination allowed, and the overall strength of the prosecution's case against the defendant." ***State v. Rhodes***, 2011 WI 73, ¶33, 336 Wis. 2d 64, 799 N.W.2d 850. The burden lies with the beneficiary of the error—here, the State—to show that the error was harmless. *See* ***State v. Deadwiller***, 2013 WI 75, ¶41, 350 Wis. 2d 138, 167, 834 N.W.2d 362.

¶25 We conclude that the admission of the lab analyst's surrogate testimony was harmless error. The surrogate testimony showed that Bauer's blood tested positive for a metabolite of cocaine and for methamphetamine, and was thus relevant to proving an element of both charged offenses: that Bauer was under the influence of a controlled substance and that he had a detectable amount of a restricted controlled substance in his blood. *See* WIS. STAT. § 346.63(1)(a)-(am). However, the surrogate testimony was cumulative in that additional admissible evidence also established that Bauer was under the influence of a different controlled substance and that he had a different restricted controlled substance—delta-9-THC—in his blood. This evidence includes the lab analyst's testimony regarding the test for delta-9-THC that the analyst personally performed; the analyst's testimony that ingestion of marijuana can cause drowsiness and poor balance and coordination; police testimony that Bauer "appeared to be somewhat confused," was slurring his speech, and appeared to be "unsteady on his feet"; and

police testimony that Bauer performed poorly on field sobriety tests used to detect drug impairment.

¶26 In light of the foregoing, we conclude that the error in admitting the surrogate testimony was harmless. We reject Bauer's arguments to the contrary.

¶27 Bauer argues that the substance of the surrogate testimony—that Bauer's blood tested positive for a metabolite of cocaine and for methamphetamine—was mentioned frequently at trial. This is true, as far as it goes. However, because there was additional admissible evidence showing that Bauer was under the influence and that he had a different, additional restricted controlled substance in his blood, we nonetheless conclude that the error was harmless.

¶28 Bauer further contends that the admission of the surrogate testimony was not harmless because the jury might not have been in unanimous agreement as to which substance he was under the influence of or had in his blood. However, this argument fails because, as noted, an error is harmless if it is "'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" ***Harvey***, 254 Wis. 2d 442, ¶49 (quoting ***Neder***, 527 U.S. at 18). Here, it is clear that without the surrogate testimony (which was the only direct evidence related to the cocaine metabolite and methamphetamine), the jury would have found Bauer guilty based on the admissible evidence, discussed above, showing that Bauer was intoxicated and that he had delta-9-THC in his blood.[5]

[5] We note that Bauer does not advance a stand-alone unanimity challenge outside of his argument that admission of the surrogate testimony was not harmless. For example, he does not appear to argue, nor provide any authority establishing, that in order to convict him of the two (continued)

¶29 Bauer also appears to argue that the State presented only circumstantial evidence that he operated the vehicle, and that this purported weakness in the State's case weighs against a determination that the error was harmless. However, the fact that the State relied on circumstantial evidence to show that Bauer operated the vehicle does not mean that the State's case was weak in this regard. Indeed, as stated, "in some cases, circumstantial evidence may be stronger and more satisfactory than direct evidence." ***Mertes***, 315 Wis. 2d 756, ¶11. Here, although circumstantial, the evidence that Bauer operated the vehicle was strong, and thus does not support his argument that admission of the surrogate testimony was not harmless.

¶30 In sum, we conclude that the admission of the surrogate testimony was harmless error.[6]

*III. Grab's testimony*

¶31 Bauer argues that the circuit court was required to strike Grab's testimony under WIS. STAT. § 906.12 because the prosecutor did not produce a report that Grab wrote, which Bauer asserts Grab used to refresh his memory before testifying. Bauer also argues that the prosecutor's failure to produce the report violated ***Brady***. We reject both arguments.

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charges, the jury was required to agree on the specific controlled substance that Bauer was under the influence of or the specific restricted controlled substance that Bauer had in his blood.

[6] Bauer asserts in a footnote as part of his harmless error argument that the circuit court should have engaged in an other-acts analysis under ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998). We do not address this argument because it is undeveloped. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (explaining that this court need not consider arguments that are unsupported by legal authority or are otherwise undeveloped).

*A. WISCONSIN STAT. § 906.12*

¶32 Bauer argues that the circuit court erroneously exercised its discretion when it denied Bauer's motion to strike Grab's testimony pursuant to WIS. STAT. § 906.12. We review a circuit court's evidentiary rulings for an erroneous exercise of discretion. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. We "will not overturn the circuit court's exercise of discretion if the decision had a 'reasonable basis' and was made in accordance with the proper legal standard and the facts in the record." ***State v. Dobbs***, 2020 WI 64, ¶32, 392 Wis. 2d 505, 945 N.W.2d 609 (quoted source omitted). When a discretionary decision is based on an underlying finding of fact, we will not overturn that finding unless it is clearly erroneous. ***State v. Holmgren***, 229 Wis. 2d 358, 366, 599 N.W.2d 876 (Ct. App. 1999). "The burden to demonstrate an erroneous exercise of discretion rests with the appellant." ***Winters v. Winters***, 2005 WI App 94, ¶18, 281 Wis. 2d 798, 699 N.W.2d 229. We conclude that Bauer fails to show that the court erroneously exercised its discretion.

¶33 In arguing that the circuit court was required to strike Grab's testimony, Bauer relies on WIS. STAT. § 906.12, which provides:

> If a witness uses a writing to refresh the witness's memory for the purpose of testifying, either before or while testifying, an adverse party is entitled to have it produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness…. If a writing it not produced or delivered pursuant to order under this rule, the judge shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the judge in the judge's discretion determines that the interests of justice so require, declaring a mistrial.

Specifically, Bauer argues that Grab relied on a report that he had written to refresh his memory before testifying, and that, as a result, the prosecutor was required to produce the report pursuant to § 906.12. Because the prosecutor did not produce the report, Bauer argues, the court was required to strike Grab's testimony.

¶34 This argument fails because the circuit court specifically found that Grab did not use the report to refresh his memory for the purpose of testifying. Bauer does not argue, much less show, that this finding was clearly erroneous, nor does he otherwise show that the court erroneously exercised its discretion, particularly given Grab's undisputed testimony that he did not review his report at all after writing it.

¶35 As background, at trial, Grab testified that he wrote a report based on the incident with Bauer. Grab testified that he did not review his report before he testified or indeed at all after he wrote it. When defense counsel asked Grab how he remembered the incident, Grab testified that he did the following approximately six months before the trial, after receiving a phone call from Bauer's investigator:

> I looked up the date and I went into my logbook and saw who was there and looked at the time of the call and then … I had called the chief and asked them … some specifics about the call and they had looked at the report and said yeah, that's the one.

Although Grab's testimony suggests that Grab looked at his logbook and that his logbook is a separate writing, on appeal Bauer only properly raises an argument as

to Grab's report.[7] Accordingly, we do not further discuss Grab's logbook and address only the report.

¶36 After Grab testified, Bauer moved under WIS. STAT. § 906.12 for a mistrial or, alternatively, to strike Grab's testimony because Bauer argued that Grab's testimony showed that he had used his report to refresh his memory. The circuit court denied that motion. After Bauer renewed his argument in one of his postconviction motions, the court again rejected that argument, and specifically found that the report was not used to refresh Grab's memory *for the purpose of testifying*. In making this finding, the court stated that the report "may well have" refreshed Grab's memory, but the court relied on the fact that this would have taken place in response to questions from Bauer's investigator approximately six months before trial. We conclude that the court did not erroneously exercise its discretion in denying Bauer's motion for a mistrial or to strike Grab's testimony.

[7] In the circuit court, Bauer's argument focused on Grab's report, although at times in his motion for postconviction relief, he did refer to Grab's "logs and report," without advancing any separate argument as to Grab's logbook, specifically. On appeal, however, in his brief-in-chief, Bauer's argument concerns only Grab's report, and he does not advance any separate argument about Grab's logbook. In his reply brief, Bauer, for the first time, appears to assert that even if Grab's *report* was not used to refresh Grab's memory for the purpose of testifying, his *logbook* was. Because this analytical distinction between Grab's logbook and his report comes for the first time in Bauer's reply brief, because it is undeveloped in his reply brief, and because Bauer did not raise this argument in the circuit court, we do not address whether the circuit court erroneously exercised its discretion in denying his motion to strike Grab's testimony based on the prosecutor's failure to provide Bauer with Grab's logbook. *See* ***Pettit***, 171 Wis. 2d at 646 (explaining that this court need not consider arguments that are unsupported by legal authority or are otherwise undeveloped); ***Techworks, LLC v. Wille***, 2009 WI App 101, ¶28, 318 Wis. 2d 488, 770 N.W.2d 727 ("[W]e do not consider matters argued for the first time in a reply brief because that precludes the respondent from being able to address those arguments."); ***Schill v. Wisconsin Rapids Sch. Dist.***, 2010 WI 86, ¶45 & n.21, 327 Wis. 2d 572, 786 N.W.2d 177 (explaining that issues not raised in the circuit court are forfeited, and supporting the proposition that appellate courts generally do not address forfeited issues).

¶37 Grab's undisputed testimony shows that he did not review the report at all prior to testifying. Although the circuit court, in its ruling, did not foreclose that the report was used to refresh Grab's memory, we discern no evidence showing that Bauer ever reviewed the report. Grab's testimony shows that *Grab's chief* reviewed the report in order to confirm that Grab had the correct case in mind, but Bauer does not develop an argument that this would constitute *Grab's* use of the report to refresh Grab's memory such that WIS. STAT. § 906.12 would apply. Moreover, even if Grab's chief's review of the report could constitute Grab's use of the report to refresh his memory, Bauer fails to show that the court clearly erred in finding that this was not done for the purposes of testifying.

¶38 As to this last point, Bauer specifically challenges the circuit court's reliance on the fact that when Grab called his chief, who then consulted Grab's report, that would have taken place six months before trial. Specifically, Bauer argues that the trial was originally set to take place four months earlier but was then postponed, meaning that this interaction would have taken place approximately two months before trial was originally scheduled. Bauer argues that this makes it more likely that Grab "reviewed his report" in order to refresh his memory for the purpose of testifying. However, this does not render the court's finding clearly erroneous. The fact remains that this interaction took place only after Bauer's investigator contacted Grab, which shows that the court could reasonably find that Grab called his chief in response to that call, and not in preparation to testify. Moreover, that this interaction took place two months before trial still supports the court's finding that the purpose was not to prepare Grab to testify.

¶39 Accordingly, we conclude that Bauer fails to show that the circuit court erroneously exercised its discretion in denying Bauer's motion to strike Grab's testimony.

*B.* ***Brady***

¶40 Bauer also argues that the prosecutor's failure to produce Grab's written report violates ***Brady***. Under ***Brady***, a prosecutor has a duty to disclose evidence favorable to the accused, meaning evidence that "'if disclosed and used effectively, … may make the difference between conviction and acquittal.'" ***State v. Harris***, 2004 WI 64, ¶12, 272 Wis. 2d 80, 680 N.W.2d 737 (quoting ***United States v. Bagley***, 473 U.S. 667, 676 (1985)). To establish a ***Brady*** violation, the defendant must prove that the withheld evidence is favorable to him. ***Harris***, 272 Wis. 2d 80, ¶13.

¶41 We conclude that Bauer forfeited any argument under ***Brady***. In one of his postconviction motions, Bauer asserted that Grab's report "constitutes ***Brady*** material" because "[t]he report necessarily would have contradicted … Grab's testimony because he contradicted himself on the stand." However, at the hearing on the motion, when the circuit court described Bauer's argument as arising under WIS. STAT. § 906.12, and did so without mentioning any argument under ***Brady***, Bauer confirmed that the court's understanding of his argument was accurate. Moreover, when the court did not address Bauer's undeveloped ***Brady*** argument, Bauer did not renew it or develop further. Bauer thus forfeited this argument by failing to adequately raise it below. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 (explaining the forfeiture rule: "Issues that are not preserved at the circuit court … generally will not be considered on appeal."); ***Bishop v. City of Burlington***, 2001 WI App 154, ¶8, 246 Wis. 2d 879,

631 N.W.2d 656 (stating that to preserve an issue for appeal, a litigant must raise the issue with "with sufficient prominence such that the [circuit] court understands that it is being called upon to make a ruling").

¶42 Even if Bauer's ***Brady*** argument were not forfeited, we would reject it on the merits. Bauer argues that the report could have been used as impeachment evidence regarding various aspects of Grab's testimony that Bauer argues were inconsistent. Specifically, Bauer argues that Grab's testimony was inconsistent regarding who was on his crew that day, whether he wrote and reviewed a report, and the "exact sequence of events as they occurred."[8] However, Bauer's claim that Grab's report would be inconsistent with Grab's testimony and thus be valuable for impeachment purposes is purely speculative. Finally, even if we assume that Grab's report would have shown these alleged inconsistencies, Bauer does not develop an argument as to how such inconsistencies might "make the difference between conviction and acquittal." ***Harris***, 272 Wis. 2d 80, ¶12. In sum, Bauer fails to make the required showing that he was entitled to Grab's report under ***Brady***.

## CONCLUSION

¶43 For the reasons stated, we affirm.

[8] Bauer asserts that Grab's testimony was inconsistent on these points without developing this argument further. With the possible exception of Grab's testimony regarding who was on the crew that day, we do not discern the inconsistencies alleged. In any event, any such inconsistencies are inconsequential for purposes of our analysis.

*By the Court*.—Judgment affirmed.

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