COURT OF APPEALS
DECISION
DATED AND FILED

FEBRUARY 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

Nos. 97-0918-CR, 97-1193-CR, 97-0919-CR

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

NO. 97-0918-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DALE M. BASTEN,

DEFENDANT-APPELLANT.

NO. 97-1193-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

REYNOLD C. MOORE,

DEFENDANT-APPELLANT.

NO. 97-0919-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL L. JOHNSON,

DEFENDANT-APPELLANT.

APPEALS from judgments and orders of the circuit court for Outagamie County: JAMES T. BAYORGEON, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

CANE, P.J. Defendants Dale Basten, Reynold Moore and Michael Johnson appeal their judgments of conviction and postconviction orders.[1] This case involves the November 21, 1992, murder of Thomas Monfils, an employee of James River Corporation. Defendants were tried together, along with three additional codefendants, and were found guilty by a jury of first-degree intentional homicide, party to a crime. Postconviction motions were denied and these appeals followed.

All three defendants have at least five issues in common. They claim: (1) their convictions should be reversed because of insufficiency of the evidence; (2) they are entitled to new trials based on newly discovered evidence; (3) the court erroneously admitted hearsay evidence and permitted it to be used

[1] These appeals were consolidated by order dated February 9, 1998.

against them; (4) the court erred by denying their motions to sever their cases and try them individually; and (5) the court erroneously excluded impeachment evidence of a prosecution witness. These issues are discussed in Part I of the opinion.

Moore raises three additional issues. He claims: (1) the trial court erred by allowing the admission of a videotape showing the recovery of the victim's body from the pulp vat; (2) his conviction should be reversed based on the State's failure to disclose exculpatory and material evidence; and (3) he is entitled to a new trial based on ineffective assistance of counsel. Part II of the opinion addresses these claims.

Johnson raises two additional issues. He claims he is entitled to a new trial (1) because the prosecution failed to disclose a pretrial meeting with a prosecution witness and (2) because his trial counsel had a conflict of interest that denied him effective assistance of counsel. Part III of the opinion addresses these claims. For the reasons set forth in each section, the judgments are affirmed as to each defendant.

Several significant events occurred prior to November 21. On November 10, the police received an anonymous call reporting that Keith Kutska, a James River employee, planned to steal an expensive electrical cord from his employer. When Kutska finished his shift and was leaving the premises, a security guard asked to inspect his bag. Kutska refused to open the bag and, as a result, received a five-day unpaid suspension. Kutska later obtained from the police department a tape of the call, and identified the caller as Monfils.

On November 21, Kutska arrived at work at 5 a.m. and began to play the tape for employees, attempting to garner support for his position that he had

been wrongly turned in for actions that should have been handled within the union. Kutska played the tape for Monfils, who admitted it was his voice. Monfils performed a turnover (a change in the paper roll) on his paper machine at 7:30 a.m. At approximately 8 a.m., Monfils was reported missing. The State presented evidence that between 7:30 and 8 a.m., Monfils was confronted by a group of employees, including Basten, Moore and Johnson, and the three other defendants, Michael Piaskowski, Keith Kutska, and Michael Hirn. The verbal confrontation became physical, and Monfils was beaten and rendered unconscious by a blow to the back of the head. The following day, Monfils's partially decomposed body was found in a pulp vat. A heavy weight was tied around his neck. Additional facts will be included as necessary in the discussions below.

PART I - COMMON CLAIMS
SUFFICIENCY OF THE EVIDENCE

Defendants claim their convictions should be reversed because there is insufficient evidence against each of them to support the jury's verdict of guilt. They do not dispute that the State proved Monfils was the victim of a brutal murder, but they argue the evidence against each of them is not sufficient to establish beyond a reasonable doubt that each was guilty as parties to the crime of first-degree intentional homicide.

Our review is governed by ***State v. Poellinger***, 153 Wis.2d 493, 451 N.W.2d 752 (1990), and is the same whether the evidence is direct or circumstantial. ***Id.*** at 500, 451 N.W.2d at 755. We may not reverse a conviction "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable

doubt." ***Id.*** at 501, 451 N.W.2d at 755. We do not substitute our judgment for that of the jury. ***Id.*** at 507, 451 N.W.2d at 757-58. "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," we may not overturn a verdict even if we believe that the trier of fact should not have found guilt based on the evidence before it. ***Id.*** at 507, 451 N.W.2d at 758. We are bound to accept reasonable inferences drawn by the jury unless the evidence, on which the inferences are based, is incredible as a matter of law. ***Id.*** at 507, 451 N.W.2d at 757.

The State has the burden of proving beyond a reasonable doubt that the defendants committed the offense by either directly committing the crime, intentionally aiding and abetting the commission of the crime, or being a party to a conspiracy to commit the crime. Section 939.05(2), STATS. The State presented evidence that Monfils had been the victim of a physical assault and that his death was caused by asphyxiation due to inhaling paper pulp and strangulation by a rope tied to a weight. That evidence is not challenged. The State also presented the following evidence: On November 10, 1992, the police received a tip from an anonymous caller saying Kutska intended to steal an expensive electrical cord from his employer. At the end of Kutska's shift, he was stopped by a security guard who asked to search his bag. Kutska hurriedly left the premises before the guard could check his bag. He received a five-day suspension without pay as a result of his actions.

Kutska obtained a tape of the anonymous tip and determined that the caller was Monfils. On November 21, Kutska arrived at work and played the tape for various co-workers. Kutska, Piaskowski and Randy LePak went to the No. 7

coop[2] and played the tape for Monfils, at which time Monfils admitted he had made the call. The tape was played again in the No. 9 coop for a group that included Basten, Moore, Johnson, Piaskowski, Hirn and Kutska.

Brian Kellner, a friend of Kutska's, testified that on July 4, 1994, while at the Fox Den bar, Kutska described to him the November 21, 1992, confrontation with Monfils, himself, Basten, Moore, Johnson, Piaskowski and Hirn. Kutska told Kellner that he stood back and watched as the others shouted at Monfils, shook the tape in his face, and Hirn shoved Monfils in the chest. Kutska described the events in terms of "what if" somebody had hit Monfils in the head with a wrench or a board. Kutska admitted telling Hirn to "go give [Monfils] some shit."

James River employee David Wiener testified that on November 21, 1992, at approximately 7:40 a.m., he saw Basten and Johnson walking toward a vat connecting the No. 7 and No. 9 paper machines. They were walking hunched over, approximately six feet apart, and appeared to be carrying something. Shortly thereafter, Kutska told Piaskowski to notify a supervisor that Monfils was missing. Piaskowski informed the supervisor that "some heavy shit was coming down." Monfils's body was discovered the next day in a pulp vat with a heavy weight tied to a rope around his neck.

Without reciting all of the evidence, including the testimony of Kellner, Wiener and the defendants,[3] we are satisfied the jury could reasonably

[2] Located across from each paper machine is a control room or "coop."

[3] The evidentiary portion of the trial covered five and one-half weeks and produced thousands of pages of transcript. Our recitation of the evidence need not be comprehensive in order to comply with the standard of review.

infer that the defendants who were present at the confrontation and had participated in the verbal and physical assault of Monfils, which ended with Monfils beaten to unconsciousness, took action, independently and collectively, to dispose of the evidence of their actions. The jury could reasonably infer from this evidence that the defendants intended to permanently dispose of Monfils's body. Evidence that the defendants were subject to immediate dismissal for participating in the assault on Monfils, as well as their exposure to criminal charges, coupled with evidence that the confrontation escalated to violence rendering Monfils unconscious, provides the basis for a reasonable inference that the defendants had the motive and purpose to dispose of the victim to avoid being identified and suffering the likely consequences of their actions. The evidence showed that Monfils's body had suffered decomposition in the hours it had been in the pulp vat, and there was testimony that if the body had not been promptly discovered, it would have been completely decomposed as a result of the chemical processes and propellers in the vat.

Based on evidence of the time frame of the events and the short time between the confrontation with Monfils and the time he was reported missing, the jury could reasonably infer that the defendants put in motion the actions necessary to dispose of Monfils's body, which resulted in his death. The jury could reasonably infer from Wiener's testimony that he saw Basten and Johnson carrying Monfils's body toward the vat during the time period immediately prior to Monfils's disappearance.

In addition to the evidence that Basten was present and participated in the confrontation with Monfils and that he was seen walking hunched over toward the vat apparently carrying something with Johnson, the State presented evidence that Basten approached Wiener on several occasions to find out what

Wiener knew about the incident; that he had a threatening conversation with Connie Jones, a State witness;[4] that he told his employer that Monfils could have been kicked in the groin at a time when that information had not been made public; and that he called Wiener a "fuckin' squealer." When Basten was interrogated by the police, he started to cry and said he did not mean to kill Monfils. Following his arrest, he said that he should have left town when the police started to question him because now they knew for a fact that "we did the shit."

The jury could reasonably infer from this evidence that Basten's curiosity about what Wiener had seen, if anything, was rooted in his fear that his involvement in carrying Monfils's body was observed and would be reported; that he had a motive to intimidate Jones; that he had knowledge of the victim's injuries that only a perpetrator would possess; that he cried during his interrogation because he was sorry for his actions; that he had committed the battery and murder with the others based on his comment that they know "we did the shit"; and that Wiener's testimony about what he saw was truthful.

Johnson was identified as present at the confrontation with Monfils and a participant in the physical and verbal assault as well as carrying something heavy toward the vat with Basten immediately prior to Monfils's disappearance. The jury could reasonably infer from this evidence that Johnson played a part in disposing of Monfils's body in the vat, either by carrying the body, or by dumping or helping to dump the body in the vat.

[4] Jones testified that she had been in the No. 9 coop when the tape was played for a group of people; that prior to entering the room she had seen Monfils seated near the No. 7 machine and he looked pensive; that while the group was listening to the tape, Kutska pointed out Monfils to the group through the window; and she estimated the events occurred at approximately 7:30 a.m.

Moore was also identified as one of the participants in the confrontation with Monfils. Kellner testified that Kutska told Moore to give Monfils "some shit," and that Kutska instructed Moore to block Monfils's possible exit through the back door of the coop when the group went to confront Monfils; that Moore joined the group, was swearing at Monfils, and asked Monfils "what his fuckin' problem was and why he had called the cops and turned Keith in." In addition, James Gilliam testified to statements Moore made to him concerning his involvement in the confrontation. Gilliam testified:

> Q. [W]hat did Mr. Moore say he had done?
>
> A. He said he came over everybody else's arm and just started popping him in the head, I mean, with his fist.
>
> Q. He said he had struck Mr. Monfils?
>
> A. Yes.

The jury could reasonably infer from this evidence that Moore had reason to act together with the other defendants and agreed to the actions taken subsequent to the beating to prevent their identification and implication in the crimes.

The jury determines the credibility of the witnesses, resolves conflicts in the testimony, weighs the evidence and draws reasonable inferences from the evidence. ***Poellinger***, 153 Wis.2d at 504, 506, 451 N.W.2d at 756, 757. The jury is free to choose among conflicting inferences and may, within the bounds of reason, reject an inference that is consistent with the innocence of the accused. ***Id.*** at 506, 451 N.W.2d at 757. We are bound to accept and follow the inferences drawn by the jury unless the evidence on which the inferences are based is incredible as a matter of law. ***Id.*** at 506-07, 451 N.W.2d at 757.

We conclude that the evidence in support of the jury's verdicts has such probative value and force that a reasonable jury could have drawn the

inferences that Basten, Moore and Johnson committed the offense of first-degree intentional homicide by either directly committing the crime, intentionally aiding and abetting the commission of the crime, or being a party to a conspiracy to commit the crime. *See* § 939.05(2), STATS.

NEWLY DISCOVERED EVIDENCE

Defendants claim they are entitled to a new trial based on newly discovered evidence. Defendants offer two forms of newly discovered evidence: Kellner's recantation of his trial testimony and the testimony offered to impeach prosecution witness Wiener. They contend the trial court erred when it concluded there was no reasonable probability of a different result. We disagree.

A motion for a new trial based on newly discovered evidence is submitted to the trial court's discretion. ***State v. Terrance J.W.***, 202 Wis.2d 496, 500, 550 N.W.2d 445, 447 (Ct. App. 1996). "We will affirm the trial court's exercise of discretion as long as it has a reasonable basis and was made in accordance with accepted legal standards and the facts of the record." ***Id.*** In ***Terrance J.W.***, we summarized the requirements for granting a new trial based on newly discovered evidence:

> The trial court may grant a new trial based on newly discovered evidence only if the following requirements are met: (1) the evidence was discovered after trial; (2) the moving party was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; (4) the evidence is not merely cumulative to the evidence that was introduced at trial; and (5) it is reasonably probable that a different result would be reached at a new trial.

Id. Also, when the newly discovered evidence is a witness's recantation of trial testimony, the recantation must be sufficiently corroborated by other newly

discovered evidence before the defendant is entitled to a new trial. ***Id.*** at 500-01, 550 N.W.2d at 447.

1. Brian Kellner's recantation

At the postconviction motion, Kellner recanted his testimony naming the individuals who were present during the confrontation with Monfils. He also testified that he did not testify truthfully at the trial because he was pressured by the police and threatened with losing custody of his children. Kellner's post-trial testimony was that when he testified at trial that Kutska told him that Hirn, Moore, Basten, Johnson, Piaskowski, Kutska and another individual were present at the confrontation with Monfils near the bubbler outside the No. 7 coop, his answers naming those individuals as present at that location were untruthful. His post-trial testimony was that Kutska's identification to him was of individuals present in the No. 9 coop when the tape was being played "so that it would get out around the mill that Keith had the tape, and that everybody would know that was Tom's voice on there." Contrary to his trial testimony, Kellner stated that Kutska's description of the confrontation did not involve the names of any individuals, that the total conversation took place in the context of "what if," and that Kutska never told him the names of anyone in relation to any events that occurred after the tape was played in the No. 9 coop.

Kellner testified that the reason he gave untruthful answers at trial was because he was threatened with the loss of his children and job, but that he was no longer afraid of those threats because he had now resolved to obtain legal counsel if indeed any repercussions should arise regarding custody of his children or his employment. His trial testimony was that he felt badgered by the police and that he did not agree with everything Sergeant Randy Winkler, the investigating

officer, had put in the statement. Kellner also testified that although he had testified untruthfully at trial about naming individuals present at the confrontation, he maintained that his answers concerning Hirn's involvement were truthful.[5] At the post-trial hearing, Kellner also testified that he had experienced difficulties at his job since the trial because he had testified against fellow union members. His post-trial testimony was that Kutska and Piaskowski were very close friends of his, and he felt he had been forced into a situation of testifying against them.

A motion for a new trial based on a witness's recantation is entertained with great caution, ***Terrance J.W.***, 202 Wis.2d at 500, 550 N.W.2d at 447, because of the possibility of undue influence or coercion, ***State v. McCallum***, 208 Wis.2d 463, 481, 561 N.W.2d 707, 714 (Ct. App. 1995) (Abrahamson, C.J., concurring). Recantation is not a rare happening in the law, and it does not automatically entitle a defendant to a new trial. ***Id.*** at 481, 561 N.W.2d at 713-14. The five requirements, *supra*, as well as corroboration, must be met. By its nature, a recantation generally satisfies the first four requirements. In determining whether there is a reasonable probability of a different outcome, the standard is whether there is a reasonable probability that a jury, considering both the trial testimony

[5] At the postconviction motion, Kellner testified:

> Q. Do you recall Mr. Boyle, on cross-examination of you, asking you the following question and you giving the following answer, sir? Question at line 7 of page 118 of the Day 9, jury transcript: You knew that Mr. Hirn was involved according to what Mr. Kutska talked about? Answer: Yes, sir. Do you recall being asked that question and giving that answer?
>
> A. Yes.
>
> Q. Was that answer truthful that Mr. Kutska told you that?
>
> A. Yes, sir.

and the recantation, would have a reasonable doubt as to the defendant's guilt. ***Id.*** at 474, 561 N.W.2d at 711. However, a determination by the trial court that the recantation is not credible is sufficient to conclude that it is not reasonably probable that a different result would be reached at a new trial. ***Terrance J.W.***, 202 Wis.2d at 501, 550 N.W.2d at 447.

Here, the trial court found that the first three requirements were met: (1) Kellner's post-trial recantation was discovered after trial; (2) the defense was not negligent in seeking the evidence since it did not exist until Kellner had a change of heart; and (3) the evidence was material because it related to circumstantial evidence relied on by the State. The court found Kellner's reasons for his recantation cumulative to evidence heard by the jury at trial. The court did not find the recantation credible and therefore concluded there was no reasonable probability of a different outcome at a new trial.

The trial court heard Kellner's trial testimony and had the opportunity to observe his demeanor while testifying. The same is true of Kellner's postconviction motion testimony. In its decision and order dated February 24, 1997, the trial court made two determinations; first, that the recantation was not credible[6] and, second, even if the recantation was credible, there was still no reasonable probability of a different result.[7]

The trial court did not erroneously exercise its discretion by denying the motion for a new trial based on Kellner's recantation. It is the circuit court's

[6] The trial court wrote, "This Court has a great deal of difficulty in accepting that the recantation is in fact credible …."

[7] "However, even if such recantation were believable and a jury were to accept it as truthful, there is still no reasonable probability of a different result in the jury verdict."

role to determine whether the recanting witness is worthy of belief, whether he or she is within the realm of believability, whether the recantation has any indicia of credibility persuasive to a reasonable juror if presented at a new trial. ***McCallum***, 208 Wis.2d at 487, 561 N.W.2d at 716. Upon review, we will not upset a finding of credibility unless clearly erroneous. ***Id.*** at 488, 561 N.W.2d at 716. This standard of review recognizes that the circuit court is in a much better position than an appellate court to resolve credibility issues. ***Id.*** Here, the trial court observed Kellner's testimony both at trial and at post-trial hearings. It found Kellner's reasons for changing his testimony unworthy of belief. We fail to see how the trial court's rejection of Kellner's recantation as credible was clearly erroneous and therefore we affirm.

2. Evidence offered to impeach David Wiener

Defendants also sought a new trial based on newly discovered testimony of three witnesses stating that Wiener falsely testified at trial. The court denied the motion. Edward Wnek, Wiener's fellow inmate, testified to conversations he had with Wiener while they were both incarcerated at the Oshkosh Correctional Institution. Wnek testified that Wiener told him that he did not see anybody carry the body across the plant, which was contrary to Wiener's testimony at trial that he saw Basten and Johnson hunched over as if carrying something toward one of the vats. He also testified that Wiener said, "What would they do to me if they really found out that I killed him?"

Michael Grunkowski, another fellow inmate of Wiener's at Oshkosh, testified:

> A. … Mr. Wiener had walked up and had--I don't know if he was stating a comment or asking an actual question on

> what could happen to him now if they were to find out that he's the one that killed Tom Monfils.
>
> Q. Okay. When he used the word "they," who was he referring to?
>
> A. I would assume he was referring to the courts and the police.
>
> Q. He used the words that he was the one that killed Tom Monfils?
>
> A. Yes, he did.

Harrison Marcum, yet another fellow inmate, likewise testified that Wiener said to him, "What do you think they would do to me now if they found out I killed him?"

We review the denial of a motion for a new trial based on impeachment evidence using an erroneous exercise of discretion standard. ***Terrance J.W.***, 202 Wis.2d at 500, 550 N.W.2d at 446. The same five requirements must be met. The trial court found four of the five requirements were met: the evidence was discovered after trial, the defense was not negligent in seeking the evidence, the evidence was material and was not cumulative. The court determined, however, it was not reasonably probable that a different result would be reached at a new trial based on its determination that the impeachment testimony was not credible.[8] The analysis set forth in ***Terrance J.W.*** for determinations as to the credibility of a recantation is applicable to impeachment evidence as well. *See* ***Id.*** at 501, 550 N.W.2d at 447. If the trial court finds the new evidence is not credible, it necessarily leads to the conclusion that the impeachment evidence would not lead to a different result at a new trial. ***Id.***; *see also* ***McCallum***, 208 Wis.2d at 474-75, 561 N.W.2d at 711.

[8] The court stated: "Quite frankly, the testimony and affidavits submitted both in support of and in denial of defense's present contentions might be described as imaginative, resourceful and innovative, but in no event could the word 'credible' be attached to them."

As stated previously, we will accept the trial court's finding of fact as to the credibility of the testimony unless it is clearly erroneous. ***Terrance J.W.***, 202 Wis.2d at 501, 550 N.W.2d at 447 (citing ***State v. Herro***, 53 Wis.2d 211, 215, 191 N.W.2d 889, 891 (1971)). The trial court had the advantage of hearing the witnesses testify and observing their demeanors. It heard the witnesses describe the circumstances in which Wiener's statements were made. It noted the witnesses may have harbored "suspect agendas" and that their testimony contained gratuitous information having little probative value. We cannot say that the trial court's finding that the impeachment evidence was not credible is clearly erroneous; therefore, we affirm the denial of the motion for a new trial based on impeachment evidence.

ADMISSIBILITY OF KUTSKA'S STATEMENT TO KELLNER

Defendants claim they are entitled to a new trial because the trial court erroneously allowed Kellner to testify to statements Kutska made to him on July 4, 1994, at the Fox Den bar. They claim the statement was inadmissible hearsay, the admission of which constitutes reversible error. Specifically, the defendants argue that the statement does not meet the requirements for admission under § 908.045(4), STATS.[9] Additionally, the defendants contend that, even if

[9] Section 908.045(4), STATS., provides:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> ….
>
> **(4)** STATEMENT AGAINST INTEREST. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in the declarant's position would not have made the statement unless

(continued)

Kutska's statement to Kellner was admissible, it was admissible only against Kutska. They argue that its admission as evidence of guilt as to any of them was improper and establishes grounds for reversal and the granting of a new trial. They reason that Kutska's statement was essentially exculpatory and as such was inadmissible hearsay. In response, the State claims Kutska's statement is admissible as a statement against interest under § 908.045(4), or as a prior inconsistent statement under § 908.01(4)(a)1, STATS.

Generally, a trial court's decision on the admission of hearsay evidence is a matter within its discretion and we will not reverse unless there has been a misuse of discretion or the trial court based its decision on an erroneous view of the law. ***State v. Stevens,*** 171 Wis.2d 106, 111, 490 N.W.2d 753, 756 (Ct. App. 1992). Whether a statement is admissible under a hearsay exception, however, is a question of law we review de novo. ***Id.*** at 112, 490 N.W.2d at 756.

At trial, Kellner was permitted to give testimony about a conversation he had with Kutska at the Fox Den. Kellner testified that Kutska arrived at his house around 10 a.m. on July 4. During Kutska's visit, the men "sat around, B.S.'d, drank beer." Kellner's wife Verna was also present during the visit. At approximately 5 p.m., Kutska left the Kellner house to meet his wife Ardis at their home. The Kellners agreed to meet Keith and Verna at the Fox Den. They arrived at the bar at approximately 6 p.m., ate hamburgers and continued drinking. Kellner estimated he drank between six and eight beers at his house between noon and 5 p.m. and another two or three beers at the Fox Den; he then

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> the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborated.

began drinking 7-Up because he was beginning to feel sick. Kutska, however, continued to drink beer during this time.

Kellner testified that sometime between 8 and 10 p.m., Kutska began discussing the events of November 21, 1992, the day of Monfils's murder. Kellner further testified that Kutska described the playing of the tape in the No. 9 coop, including the names of the people present at that time. The jury heard the following testimony:

> Q. Can you tell the jury who Mr. Kutska told you were present in the No. 9 coop after the tape had initially been played to Mr. Monfils?
>
> A. Yes, sir. There was Rey Moore, he was the last man in. There was Mike Johnson, Dale Basten, Keith, John Mineau, Mike Hirn.
>
> Q. Did he indicate anyone else?
>
> A. Yes, sir. He said there was two others, but I don't remember who they are.
>
> Q. What did he say occurred?
>
> A. He said that they played the tape. I don't know if the guys in the coop were getting wound up about it and that they wanted to go confront Tom [Monfils] about it.
>
> ….
>
> Q. Do you recall Mr. Kutska telling you that Mike Piaskowski was in the coop at that time?
>
> A. Yes, sir.
>
> ….
>
> Q. So the people in the coop just after the playing of the tape or prior to their leaving the coop, the No. 9 coop, who were they?
>
> A. Dale Basten, Mike Hirn, Rey Moore, Keith, John Mineau and Mike Piaskowski.
>
> Q. And that's what Mr. Kutska told you on that occasion?
>
> A. Yes, sir.

Kellner also testified that Kutska directed himself, Kellner's wife, and Kutska's wife in a role-play of the confrontation and explained events in the context of "what if" situations. Kellner testified as follows:

> Q. What did [Kutska] say happened?
>
> A. He said that during this confrontation that somebody had come up and given Tom [Monfils] a slap upside the back of his head.
>
> ….
>
> Q. Did Mr. Kutska ever indicate that Tom [Monfils] had been struck in any other manner at that time?
>
> A. He did. That what if somebody had used a wrench or board or something from that area ….

Kellner's testimony was presented during the State's case-in-chief on the eighth day of a twenty-eight-day jury trial. The trial court had previously rejected the defendants' motion to suppress the testimony as hearsay and found the statements admissible. For that reason, it included an accomplice instruction in its preliminary instructions to the jury at the start of the trial. However, no cautionary or limiting instruction was either requested or given directly before or after Kellner testified regarding the jury's use of Kellner's testimony against any or all defendants. Kellner was cross-examined by counsel for all defendants regarding his recollection of the events, his state of intoxication, Kutska's state of intoxication, and the specifics of what Kutska said.

Kutska testified in his own defense on the eighteenth and nineteenth days of trial. He, too, was examined at length by all counsel regarding his statement to Kellner and the events of November 21. He denied ever having a conversation with Kellner at the Fox Den describing a confrontation or being involved in any role-playing at that time.

At the close of all testimony, the court instructed the jury as follows:

> The State has introduced evidence of statements which it claims were made by several of the defendants. It is for you, the jury, to determine how much weight, if any, to give to each statement.
>
> In evaluating each statement you should consider three things. First, you must determine whether the statement was actually made by the defendant. Only so much of a statement as was actually made by a person may be considered as evidence. Second, you must determine whether the statement was accurately restated here at trial. Finally, if you find that the statement was made by the defendant, and accurately restated here at trial, you must determine whether the statement is trustworthy. Trustworthy simply means whether the statement ought to be believed.
>
> Some evidence has been received in this trial which relates to one or more of the defendants, without having any reference to the remaining defendants. In considering and evaluating such evidence, you should exercise the utmost care and discretion. Such evidence may be used only in considering whether the individual or individuals with whom it is concerned are guilty or not guilty. Such evidence must not be used or considered in any way against any of the other defendants who are not implicated by such evidence, either directly or by inference, except insofar as you may consider that evidence in connection with the instructions which have been given you regarding a conspiracy.[10]

[10] The court instructed the jury as follows:

> A defendant is a party to the crime of First Degree Intentional Homicide if he either directly commits it, intentionally aids and abets the person who directly commits the crime, or is a member of a conspiracy to commit that crime ....
>
> A person is a member of a conspiracy if, with intent that a crime be committed, the person agrees with or joins with another for the purpose of committing that crime.
>
> A conspiracy is a mutual understanding to accomplish some common criminal objective or to work together for a common criminal purpose. It is not necessary that the conspirators had any express or formal agreement, or that they had a meeting, or even that they all knew each other. It is not necessary that there was distinctly stated the precise thing to be accomplished or the

(continued)

> During the course of this trial, evidence has been received that one or more of the defendants have made statements which, if true, would indicate that other named defendants may have participated in the events occurring at or about the time of the alleged crime. The person making such statements is referred to as an accomplice. A verdict of guilty may be based upon this testimony, provided it is of such a character, taken in connection with all the other evidence in the case, as to satisfy you of the guilt of the defendant beyond a reasonable doubt. But ordinarily it is unsafe to convict upon the uncorroborated testimony of an accomplice. Therefore, you should examine this evidence with the utmost care and caution, scrutinize it closely, and weigh it in the light of all of the attending circumstances as shown by all of the evidence. You should not base a verdict of guilty upon it alone, unless after such scrutiny and consideration, it satisfies you of the guilt of the defendant beyond a reasonable doubt. (Footnote added).

1. Admissibility of Kutska's statement under § 908.045(4), STATS.

The threshold issue is whether Kutska's statement was admissible under § 908.045(4), STATS.,[11] as an exception to the hearsay rule, § 908.02, STATS. A declarant's statement against his penal or social interests is considered admissible evidence notwithstanding the general bar of the hearsay rule. Section 908.045(4), STATS. The underlying rationale for allowing statements against interest into evidence is that such statements possess circumstantial guarantees of trustworthiness based on the assumption that people do not make damaging

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> plans for its accomplishment, either in a general way or in detail by any member of the conspiracy to any other member.
>
> It is sufficient to constitute conspiracy if there is a meeting of the minds; that is, a mutual understanding to accomplish some common criminal objective or to work together for a common criminal purpose. If a person is a party to a conspiracy with others to commit a crime, and that crime is committed by a member of the conspiracy, then that person is guilty of the crime, as well as the person who directly committed it.

[11] *See supra,* n. 9.

statements about themselves unless true. *See* ***State v. Buelow,*** 122 Wis.2d 465, 477, 363 N.W.2d 255, 262 (Ct. App. 1984) (citing Advisory Committee Notes on Proposed Rules, 28 U.S.C. Rule 804(b)(3) (1982)).[12] The declarant's out-of-court statement is admissible if two elements are met. First, the declarant must be unavailable; second, the statement must be against the declarant's penal, societal or pecuniary interest. Section 908.045(4), STATS.; ***Buelow***, 122 Wis.2d at 474-76, 363 N.W.2d at 260-62.

Here, the trial court found Kutska to be unavailable based on the fact that he was a named defendant in a criminal trial whom the State could not compel to testify. Section 908.04, STATS., provides in part as follows:

> (1) "Unavailability as a witness" includes situations in which the declarant:
>
> (a) is exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of the declarant's statement.

Defendants contend that, even though the declarant is a criminal defendant who cannot be compelled to testify against his will, there is no presumption of unavailability. Specifically, defendants rely on ***State v. McConnohie***, 121 Wis.2d 57, 75-76, 358 N.W.2d 256, 265-66 (1984), and ***United States v. Hamilton***, 19 F.3d 350, 357 (7th Cir. 1994), for the proposition that the declarant is not deemed unavailable unless and until he is called to the stand and asserts his right not to testify.

[12] Wisconsin's statement against interest exception is essentially the same as FED. R. EVID. 804(b)(3).

McConnohie and ***Hamilton***, however, do not support the defendants' contention. McConnohie was charged, along with his codefendant LaFrance, with party to the crime of armed robbery. LaFrance pled no contest to the charge one day before McConnohie's trial. McConnohie testified in his own defense and sought to introduce evidence that he heard LaFrance say that LaFrance and an individual named Serio committed the armed robbery. The court in ***McConnohie*** stated that at the time McConnohie attempted to testify to LaFrance's statement, § 908.045(4), STATS., was not applicable because there had been "no showing by the defendant of LaFrance's unavailability at the time the defendant testified. Although LaFrance possessed a fifth amendment privilege, it was not known that he would invoke that privilege until he was actually called." ***McConnohie***, 121 Wis.2d at 75-76, 358 N.W.2d at 265-66.

Our case is distinguishable from ***McConnohie***. First, our case involves the State's offer of a declarant-defendant's statement through a nondefendant third-party witness during its case-in-chief. The State could not compel Kutska to be a witness against himself. The Fifth Amendment to the United States Constitution provides that "No person ... shall be compelled in any criminal case to be a witness against himself." The same protection is provided under the Wisconsin Constitution by art. I, § 8, which provides, "No person ... may be compelled in any criminal case to be a witness against himself."

Second, the court in ***McConnohie*** stated that even though LaFrance possessed a Fifth Amendment right not to testify based on the fact that he had pled no contest, but had not yet been sentenced at the time McConnohie testified, it was not known at the time McConnohie testified whether LaFrance would actually invoke his privilege if and when he was called to testify. ***Id***. at 61-62, 70, 358 N.W.2d at 259, 263. The declarant, LaFrance, was in a substantially different

situation than Kutska. LaFrance had entered a no contest plea and was awaiting sentencing at the time of McConnohie's trial. ***Id***. Here, the declarant, Kutska, had entered a not guilty plea and was in the midst of a jury trial on the charge at the time the statement was offered. Under no circumstances could the State call Kutska to the witness stand without incurring a mistrial and, therefore, he was unavailable.

Hamilton is also distinguishable as it merely states that the declarant was considered unavailable because he asserted his Fifth Amendment right not to testify at trial. ***Id.*** at 357. However, this observation by the court provides no support for the defendants' position that a declarant-defendant is not considered unavailable unless and until he asserts the privilege. It merely shows the manner in which the unavailability requirement was met in a particular case. Thus, we agree with the trial court's conclusion that Kutska's status as a named defendant in the trial at hand rendered him unavailable for purposes of § 908.045(4), STATS., at the time the out-of-court statement was offered.

Next, we turn our attention to whether Kutska's statement meets the criteria for a statement against interest under § 908.045(4), STATS. The statute provides in part:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> ….
>
> **(4)** STATEMENT AGAINST INTEREST. A statement which ... at the time of its making … so far tended to subject the declarant to civil or criminal liability ... or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true.

It is not necessary for a statement against interest to amount to a confession, but the statement must tend to subject the declarant to criminal liability. ***Ryan v. State,*** 95 Wis.2d 83, 97, 289 N.W.2d 349, 355 (Ct. App. 1980), *overruled on other grounds by* ***State v. Anderson,*** 141 Wis.2d 653, 416 N.W.2d 276 (1987). Defendants contend that Kutska's July 4, 1994, conversation with Kellner can be distilled to an exculpatory statement, essentially stating that "he just stood back and watched the show" and then left the scene.

Whether a statement is against interest is determined under the circumstances existing at the time the statement was made. ***Hamilton***, 19 F.3d at 357 (citing Advisory Committee Note to Rule 804(b)(3)). The record reveals that at the time Kutska made the statements to Kellner, approximately two years had passed since Monfils's murder. Although Kutska had been questioned by police on numerous occasions, no arrests had been made in the case and the investigation was still pending. Additionally, he had been discharged from his job at the paper factory and had been named a party in a civil wrongful death action filed by Monfils's widow and children. Under the circumstances existing at the time Kutska's statement was made describing his involvement in instigating a verbal and physical confrontation, the content and nature of the conversation were of the kind that would tend to subject Kutska, as party to a crime, to criminal charges at least for party to the crime of battery, if not homicide. Even though Kutska may have subjectively believed he was exculpating himself by stating he was not actively involved in the confrontation, under the circumstances existing at the time the statement was made, a reasonable person would not untruthfully assert his involvement in a verbal and heated physical confrontation with a man who was murdered minutes later.

The trial court also concluded that Kutska's statements were against his societal interests. Two requirements must be satisfied in order to admit a statement against societal interests into evidence. First, the declarant must objectively face the risk of hatred, ridicule, or disgrace; and second, the declarant must subjectively appreciate the statement's propensity to subject him to such disgrace. ***Stevens***, 171 Wis.2d at 113, 490 N.W.2d at 757.

The defendants suggest that because Kutska had been terminated from his employment and was known to have been under investigation, he had already lost standing in the community. We evaluate the statement from the standpoint of whether Kutska actually faced a risk of hatred, ridicule or disgrace. "[T]he real issue is the extent of the declarant's personal connection to the activity reported in his or her declaration." ***Id.*** at 118, 490 N.W.2d at 759. We have no difficulty concluding that Kutska's statement, admitting his role in inciting a confrontation with Monfils and his presence at the confrontation, establishes a close personal connection to the events that transpired at the approximate time of Monfils's murder. This is the type of statement that would inspire hatred, ridicule or disgrace if it became known in the larger community.

Defendants submit, however, that since the statements were made in a public place and Kutska did not attempt to keep his conversation secret, the second prong is not met. We do not agree. We are satisfied from the fact that Kutska couched his comments in terms of "what if" certain things had occurred that he appreciated the risk of social disapproval. We conclude that Kutska's statement meets the requirements for admission as a statement against his societal interest as well as a statement against his penal interest.

2. Admissibility of Kutska's statement against Basten, Moore and Johnson

We next determine whether Kutska's statement was admissible at trial against anyone other than the declarant himself. Defendants contend that when a statement has self-inculpatory portions, which are admissible as a statement against interest, and self-exculpatory portions, which are inadmissible because considered inherently untrustworthy, then the portion of the statement that exculpates the declarant and inculpates others is inadmissible hearsay. We disagree.

Defendants cite ***Williamson v. United States***, 512 U.S. 594, 601 (1994); ***McConnohie***, 121 Wis.2d at 74, 358 N.W.2d at 265; and ***State v. Pepin***, 110 Wis.2d 431, 434-39, 328 N.W.2d 898, 899-902 (Ct. App. 1982), in support of their argument. In ***Williamson***, Harris refused to testify at Williamson's trial, and the court allowed a DEA agent to recount two custodial interviews he had with Harris, who admitted to receiving and transporting drugs and naming Williamson as the owner of the drugs. The trial court ruled that Harris's statements were admissible under the FED. R. EVID. 804(b)(3) statement against interest exception. Because it could not conclude that everything Harris said was properly admitted, the Supreme Court reversed and remanded for a determination of whether each of the statements was truly self-inculpatory, reasoning that the trial court cannot merely assume that a statement is self-inculpatory because it is part of a fuller confession, especially when the statement implicates someone else. ***Williamson***, 512 U.S. at 601. ***Williamson*** is actually distinct from the case at hand; it involved the in-custody confession of a co-participant. The ***Williamson*** Court also noted that arrest statements of a codefendant are viewed with special suspicion because of a defendant's strong motivation to exonerate himself. ***Id.***

Here, the statement was made by a declarant-defendant in a social setting to a friend. In Kutska's conversation with Kellner, he did not engage in "finger-pointing" or specifically blame another person. He described the events of the confrontation in "what if" terms, saying, "what if somebody had used a wrench or board or something from that area" to strike Monfils. Rather than making an incriminating statement about his codefendants, he specifically told Kellner he knew who hit Monfils but would not say who had done it.

The ***Williamson*** Court's comments are instructive:

> There are many circumstances in which Rule 804(b)(3) does allow the admission of statements that inculpate a criminal defendant ....
>
> For instance, a declarant's squarely self-inculpatory confession … will likely be admissible under Rule 804(b)(3) against accomplices of his who are being tried under a co-conspirator liability theory. Likewise, by showing that the declarant knew something, a self-inculpatory statement can in some situations help the jury infer that his confederates knew it as well. And when seen with other evidence, an accomplice's self-inculpatory statement can inculpate the defendant directly: "I was robbing the bank on Friday morning," coupled with someone's testimony that the declarant and the defendant drove off together Friday morning, is evidence that the defendant also participated in the robbery.
>
> Moreover, whether a statement is self-inculpatory or not can only be determined by viewing it in context .... The question under Rule 804(b)(3) is always whether the statement was sufficiently against the declarant's penal interest "that a reasonable person in the declarant's position would not have made the statement unless believing it to be true," and this question can only be answered in light of all the surrounding circumstances.

Id. at 603-04 (citation omitted).

In ***Pepin***, 110 Wis.2d at 433, 328 N.W.2d at 899, relied on by the defendants, Pepin attempted to admit his own statement implicating himself in an

armed robbery, but denying involvement in the shootings that occurred at the time of the robbery. We upheld the exclusion of his statement as inadmissible hearsay because he had a probable motive to falsify. Although ***Pepin*** presents a distinct factual scenario from the case at hand, the analysis set forth for determining whether to admit or exclude self-exculpatory portions of a defendant's statement is applicable. We stated: "The test for the admissibility of such an against-interest statement [one containing self-inculpatory and self-exculpatory statements] is *whether the exculpatory portions are sufficiently closely connected to the inculpatory portion so as to be equally trustworthy.*" ***Id.*** at 434, 328 N.W.2d at 899 (emphasis added).

Here, Kutska's description of the events establishes his involvement in a confrontation with Monfils close to the time of Monfils's murder. Each part of Kutska's statement to Kellner was self-inculpatory in nature and not an attempt to deflect Kutska's blameworthiness to others. Any of his statements tending to establish the presence or actions of any other persons is sufficiently closely connected to the inculpatory statements and satisfies the requirement of trustworthiness.

In summary, we conclude that Kutska's statement to Kellner was admissible as a statement against interest under § 908.045(4), STATS. Since Kutska's statement consisted of self-inculpatory statements, it was properly admissible as evidence, not only against Kutska, but also against Johnson, Basten and Moore. Thus, we need not address the State's alternative argument that the statement was admissible as a prior inconsistent statement under § 908.01(4)(a)1, STATS.

SEVERANCE

Defendants claim the trial court erred when it refused to sever each defendant's trial from the other defendants who were tried jointly.[13] They contend severance was mandated under § 971.12(3), STATS., because (1) they were prejudiced by the introduction of evidence largely unrelated to each of them and (2) the State intended to use Kutska's out-of-court statements to Kellner to incriminate the other defendants. Defendants claim the trial court misused its discretion in carrying out the provisions of § 971.12(3). First, they contend the trial court should have exercised its discretionary power to sever their trials because of the prejudice they claim would and did result from the sheer volume of testimony and the disparity of amount and strength of testimony against the various defendants. We affirm the court's denial of severance.

"A trial court has the power to try defendants together when they are charged with the same offense arising out of the same transaction and provable by the same evidence." ***State v. Brown***, 114 Wis.2d 554, 559, 338 N.W.2d 857, 860 (Ct. App. 1983). The decision whether to grant or deny a motion for severance is within the trial court's discretion, and we will not disturb its decision unless there has been a misuse of discretion. ***Id.*** Whether there has been a misuse of discretion is determined based on the facts of each case. ***Id.*** We will affirm the trial court if there is a reasonable basis for its decision. ***State v. Nelson***, 146 Wis.2d 442, 456, 432 N.W.2d 115, 121 (Ct. App. 1988).

If it appears that a defendant is prejudiced by the joinder of his trial with other defendants, the court may grant a severance of defendants or provide

[13] Basten, Moore and Johnson were tried along with Hirn, Piaskowski, and Kutska.

whatever other relief justice requires. Section 971.12(3), STATS. If it appears during the course of trial that evidence is produced that is only admissible as to one defendant and is unduly prejudicial to other defendants, then the trial court may order a severance at that time or the court may elect to give the jury a cautionary instruction to the effect that "evidence against one may not be treated as evidence against all, simply because they are being tried together." ***State v. Jennaro***, 76 Wis.2d 499, 505, 251 N.W.2d 800, 803 (1977) (quoting ***State v. DiMaggio***, 49 Wis.2d 565, 577, 182 N.W.2d 466, 473 (1971)). Where evidence is admissible against all defendants, there is no prejudice since the evidence could be introduced at separate trials. ***Id.***

The trial court determined that since all defendants were charged with the same offense, as party to a crime, involving the same victim, the elements of the offense were provable by the same evidence, and it further concluded that the bulk of the evidence would have been presented against each defendant if tried separately. It recognized that some evidence would not bear on certain defendants and cautioned the jury that, "Evidence … which relates to one or more of the defendants, without having any reference to the remaining defendants … may be used only in considering whether the individual or individuals with whom it is concerned are guilty or not guilty." This instruction guarded against the risk that jurors would apply all evidence in a blanket fashion against all defendants. ***State v. Lukensmeyer***, 140 Wis.2d 92, 110, 409 N.W.2d 395, 403 (Ct. App. 1987) (we presume jurors follow such admonitory instructions). The trial court had a proper basis for denying severance; consequently, there was no misuse of discretion and we therefore affirm.

Second, defendants contend the trial court was obligated to grant a severance because the district attorney intended to offer Kutska's out-of-court

statement to Kellner implicating other defendants in the crime of first-degree intentional homicide. *See* § 971.12(3), STATS. If the district attorney intends to use the statement of a codefendant that implicates another defendant in the crime charged, the judge shall grant a severance as to any such defendant. ***Id.*** The purpose of § 971.12(3) is to provide a mechanism to ensure compliance with ***Bruton v. United States***, 391 U.S. 123 (1968), which prevents the use of a codefendant's statement inculpating another defendant at a joint trial based on the codefendant's Sixth Amendment right to confront witnesses. ***Pohl v. State***, 96 Wis.2d 290, 301, 291 N.W.2d 554, 559 (1980). We conclude the trial court did not misuse its discretion for two reasons: first, Kutska's statement was self-inculpatory and directly admissible against all of his codefendants under a firmly-rooted hearsay exception,[14] *see* ***Williamson***, 512 U.S. at 601; and, second, because Kutska did testify in his own defense and was subject to cross-examination, no ***Bruton*** problem arose which would have required severance.

When deciding the severance issue, the trial court considered Kutska's out-of-court statement to Kellner to be one piece of evidence identifying codefendants who were present at the confrontation with Monfils, from which the jury could make inferences it deemed appropriate. The trial court had a reasonable basis for its decision to deny the motion for severance; therefore, we find no misuse of discretion and affirm the trial court.

In addition, even if the trial court had committed error by denying the motion to sever, any error under § 971.12(3), STATS., and ***Bruton*** was

[14] If the statement falls within a firmly-rooted hearsay exception, there need be no showing of particularized guarantees of trustworthiness, and adversarial testing can be expected to add little to the statement's reliability. *See* ***State v. Hickman***, 182 Wis.2d 318, 328, 513 N.W.2d 657, 662 (Ct. App. 1994).

consequently rendered harmless by the fact that Kutska eventually testified in his own defense and his codefendants had the opportunity to cross-examine him concerning his alleged statements to Kellner naming them as participants in the confrontation with Monfils. *See* ***State v. King***, 205 Wis.2d 81, 94, 555 N.W.2d 189, 194-95 (Ct. App. 1996).

EXCLUSION OF EVIDENCE TO IMPEACH DAVID WIENER

Defendants claim their ability to effectively impeach Wiener's testimony was impaired by the trial court's exclusion of a computer-generated video and expert testimony and that the State's case was wrongfully enhanced by the admission of a video depicting a similar scenario.[15] We disagree.

Wiener was working at the paper mill the day Monfils disappeared. He was employed as a stock prep handler in a repulper area located several rooms away from the paper machines. Wiener was questioned on at least two occasions by police during the investigation of Monfils's murder, and on both occasions stated he had not observed anything on November 21, 1992. Then, approximately six months later in May of 1993, Wiener recalled[16] that he had seen Basten and Johnson, facing each other, hunched over carrying something heavy toward the vat where Monfils's body was later found. He stated he observed them at approximately 7:40 a.m. on November 21, 1992. He said he was seated at the

[15] Moore does not specifically brief the issue of exclusion of expert testimony. Basten raises the additional issue of his inability to present bias testimony and other impeachment testimony, which we address below. Having noted this distinction, we continue to refer to the defendants collectively in addressing all issues relating to the impeachment of Wiener.

[16] Wiener's recollection occurred while he was at a party where he had consumed eight glasses of bourbon. Wiener claimed that while at the party, he heard the word "Roedel" and he suddenly remembered what he had seen on November 21.

time he observed Basten and Johnson, his view was partially obstructed, and he could only see the tops of their bodies and could not see what they were carrying.

At trial, defendants sought to impeach Wiener's testimony by presenting expert testimony regarding repressed memory to attack Wiener's account of his sudden and unexplained recollection of his observations six months after they occurred, and by using a computed-generated animated video showing Wiener's line of sight to impugn his account of what he could have seen from his position as he described it. The trial court in its discretion allowed neither the presentation of the expert testimony, finding it would not assist the jury, nor the video, finding insufficient foundation and that it was likely to confuse or mislead the jury.

Evidentiary rulings are committed to the trial court's sound discretion. ***State v. Clark,*** 179 Wis.2d 484, 490, 507 N.W.2d 172, 174 (Ct. App. 1993). We review a trial court's exclusion of evidence under the erroneous exercise of discretion standard. *See* ***State v. Pharr***, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983). If the trial court applies the proper law to the facts, we will not find a misuse of discretion if there is any reasonable basis for the trial court's ruling. ***Id.***; *see also* ***Village of Shorewood v. Steinberg***, 174 Wis.2d 191, 204, 496 N.W.2d 57, 62 (1993). The appellate court generally looks for reasons to sustain discretionary determinations. ***Steinbach v. Gustafson***, 177 Wis.2d 178, 185-86, 502 N.W.2d 156, 159 (Ct. App. 1993).

1. Expert testimony

Defendants offered the testimony of Dr. Edward Geiselman, a nationally recognized expert in human memory and cognitive function. They claimed the expert testimony was necessary to clarify for the jury the common

misconceptions about repressed memory, and to assist them in making informed decisions about the credibility of Wiener's claim of suddenly remembering the events of November 21, 1992, some six months after the fact.

The court considered the proffered testimony of Geiselman and the authorities cited by counsel and concluded the doctor could testify about matters affecting eyewitness identification and factors that affect memory, but could not testify about repressed memory, suggestive interrogation techniques, or application of those principles to Wiener's claim. It identified two problems with Geiselman's testimony: first, the danger that the doctor would become a "super juror" in the courtroom, and second, that the testimony would establish "mythic infallibility" on the part of the expert; that is, that the expert testifies that if certain events occur, the witness should not be considered reliable, amounting to a comment on credibility of the witness which invades the province of the jury. The court also found that the jury would likely be overwhelmed and confused by testimony if presented in an unlimited form, and that the expert's testimony on repressed memory and suggestive interrogation techniques were matters about which most jurors have some opinion based on common sense.

Based on our review of the record, we conclude that the trial court did not misuse its discretion. It examined the relevant facts, applied the proper law and reached a reasonable determination that the doctor's testimony on repressed memory or suggestive interrogation would not assist the jurors in any appreciable way and that any usefulness of the testimony was outweighed by the danger that the jurors would accept the expert's opinion on credibility in place of making its own determination based on the facts presented, credibility of the witness and the weight given to his testimony. *See* ***State v. Mordica***, 168 Wis.2d

593, 602, 484 N.W.2d 352, 356 (Ct. App. 1992). We therefore affirm the trial court's exclusion of expert testimony.

2. Computer-generated videotape simulation of Wiener's line of sight

The defense also sought to refute Wiener's claimed observations by presenting a computer-generated animated videotape simulation of what Wiener could and could not have seen from the position he claimed to be in when he observed Basten and Johnson carrying something toward the vat. The defense presented evidence that the video reconstruction was based on "highly accurate measurements taken with sophisticated equipment" taken from accounts of prosecution witnesses, resolving any ambiguity or discrepancy in favor of the State.

In evaluating whether to admit or exclude the video reconstruction, the court stated: "Now, there's no question that ordinarily exhibits and demonstrations, motion pictures, videotapes, are admissible under certain conditions; and, likewise, I have no problem with finding that a computer reproduction would be admissible under the same conditions." Also, the court observed the reconstruction was created with scientifically accepted software. The court found, however, that the most important factor in the computer generation, Wiener's position at the table at the time he made his observations, was actually a variable based on the testimony of Weiner[17] and another witness, David Webster, a James River employee, who testified as to the position of the table.

[17] Wiener was asked about the position of the table in the diagram. "As best you recall, is that table in the same spot on the diagram or that chart as it was in on November 21, 1992? Answer: I don't remember where it was exactly."

The court believed the video would add little to the evidence, and was concerned that it would mislead the jury

> primarily because of the fact that the location and position of Mr. Wiener which I view as the most important factor in the reconstruction and the video or computer animation is really not that precise, and I think it would be confusing and mislead the jury to allow it, so I'm going to … refuse to allow that into evidence.

The record demonstrates the court properly exercised its discretion by examining the facts of the record, applying the proper law, and reaching a reasonable conclusion that the basis for the measurements and calculations in the video was not sufficient to provide the foundation necessary to admit the evidence. Moreover, the court again properly exercised its discretion in concluding that whatever minimal probative value the evidence might arguably have was outweighed by the danger of confusing or misleading the jury. Because the trial court properly exercised its discretion, we affirm.

3. Admission of State's videotape

Defendants also claim the trial court erred by allowing the State to present a videotape of the area where Wiener made his observations of Basten and Johnson. The State's purpose was to show that it is possible to see from the area of the break room in the manner in which Wiener indicated. The video showed a six-foot-tall individual walking through the area. The video was not presented as a replication of what Wiener saw but rather to show what sight lines were possible and the positions from which it would have been possible for a person sitting in the break area to view people walking in the area.

The court allowed the video to be shown to the jury, stating that, "This is something really within common knowledge, and if it's shown simply to show that there is a field of view which allows something to be seen, it will be permitted for that." The State's video was offered to show a demonstration of general visibility and was not intended to be a reenactment of the actual scene. The record demonstrates the trial court had a reasonable basis for admitting the evidence and we therefore find no misuse of discretion.

4. Basten's additional claims of error

Basten also claims the trial court erred by sustaining the State's relevance objection when he asked Wiener whether his lawyer was negotiating with the district attorney's office to obtain a reduction in Wiener's sentence for his conviction in the unrelated case of his brother's homicide. He claims he was prevented from exploring whether Wiener had any bias in favor of the State because of a deal regarding his sentence in an unrelated case in exchange for his cooperation in this case. Basten's only reference to the record in his argument on this issue is to the transcript where the question was asked of Wiener, the State interposed its relevance objection, and the court stated, "Sustained." The record immediately following the objection reflects:

> Q. MS. ROBINSON [Basten's counsel]: Is it correct, sir, that you stated to other people that you intend to obtain benefit from the State by having participated—
>
> MR. ZAKOWSKI [district attorney]: Objection, Your Honor. This was discussed prior.

It appears from the record that there was some discussion about this line of questioning that might shed light on the court's reasons for precluding inquiry into this area. Without a citation to the record, however, we are unable to determine

whether an offer of proof was made at some other point. While we have no obligation to sift the record to find support for appellant's claim of error, ***Keplin v. Hardware Mut. Cas. Co.***, 24 Wis.2d 319, 324, 129 N.W.2d 321, 323 (1964), it nevertheless did make a cursory review of the transcript preceding Wiener's testimony and found no reference to an offer of proof.

When error is claimed as a result of the exclusion of evidence, an offer of proof must be made before the trial court as a condition precedent to appellate review of the alleged error. Section 901.03, STATS.; ***State v. Haynes***, 118 Wis.2d 21, 28, 345 N.W.2d 892, 896 (Ct. App. 1984). There being no offer of proof for this court to examine, review of this issue is precluded, and the trial court's ruling is affirmed.

Basten also claims the court erred when it prevented him from presenting evidence that Basten said "fuckin' killer" and not "fuckin' squealer" after seeing a news broadcast showing Wiener being handcuffed and arrested. The State had introduced Basten's "fuckin' squealer" statement through James Charleston, a fellow inmate of Basten's. Basten's counsel argued that the jury should have known that Wiener had been arrested for killing his brother in order to explain Basten's version of his statement as "fuckin' killer." The court determined that the probative value of the evidence was far outweighed by the extremely prejudicial nature and that it was not appropriate for impeachment purposes. The court did allow Basten to explain that he did not call Wiener a squealer but made a different disparaging remark about him. The trial court's assessment of the highly prejudicial nature of the evidence compared to the relatively low probative value shows the court had a reasonable basis for excluding the evidence and we therefore affirm.

PART II - MOORE'S ADDITIONAL CLAIMS

Moore claims "the trial court's admission of the videotaped recovery of Mr. Monfils' mangled and partially decomposed body from a paper vat was a clear abuse of discretion." He asserts the only purpose of showing the tape "depicting the victim's partially dismembered and engorged body being removed from the paper vat was to inflame and prejudice the jury."

The decision whether to admit photographs of a victim is a matter within the trial court's discretion, and we will not reverse the decision unless there has been a misuse of discretion. ***State v. Hagen***, 181 Wis.2d 934, 946, 512 N.W.2d 180, 184 (Ct. App. 1994). We do not review the matter de novo and substitute our judgment for the trial court's. *See* ***id***. In order to determine whether the trial court applied the appropriate law and engaged in a proper reasoning process, we turn to the record.

Here, the only citations to the record are from Moore's reply brief (1) directing our attention to the court's comment, "I have examined that video, and as far as I'm concern [sic], it's admissible;" and (2) to a colloquy regarding the playing of the videotape. The transcript indicates the following:

> THE COURT: Pursuant to your previously stated position agreement as to what's to be played, go ahead.
>
> MR. ZAKOWSKI: Can everybody see it all right?
>
> (The video was played for the jury.)
>
> We'll do it without the volume, Your Honor. We will stop it at that point.

The transcript reflects the videotape was not played in its entirety, and there was some type of agreement among the parties regarding the playing of the videotape,

yet no further record citation is supplied to this court. Furthermore, the transcript seems to reflect that the soundtrack of the video was not played, yet Moore and the State both argue that the tape portrayed the incessant noise present in the plant sufficient to prevent others from hearing any confrontation that occurred between the defendants and Monfils.

As previously noted, this court does not have an obligation to sift the record for support for the parties' contentions. ***Keplin***, 24 Wis.2d at 324, 129 N.W.2d at 323. In an effort to resolve this issue, however, we did search the record to determine the nature of the parties' "previously stated position agreement" referred to by the court. Indeed, the record reveals:

> MR. BOYLE [Defense counsel for Hirn]: Your Honor, I think I do not need to address anything except to put on the record that the State has indicated that they are only going to show the first 12 minutes up to the point in time where the actual hook goes into the back, and having made that representation Mr. Zakowski may get a representation I think that that first 12 minutes would obviously be admissible.
>
> The Court having said he was going to admit it anyway, so I just want to put on the record that that's the discussion I had with Mr. Zakowski. I passed it on to the other counsel so I'm satisfied that I don't have any objection–valid objections to the first 12 minutes of the video.
>
> ….
>
> MR. ZAKOWSKI: That is the same representation I made to Attorney Boyle and I would pass that along to other counsel. It's our desires [sic] to show up to the point where they actually start to try to retrieve the body from the vat. We're not going to go beyond that.

Moore argues, "Though the victim's body was fully-clothed in the videotape, it was also mangled, partially decomposed and in an undeniably shocking condition as it was shown being pulled through the vat's access hatch." The record indicates

the jury was not shown any attempts to actually remove Monfils's body from the vat, either by use of a hook or ultimately through the vat's access hatch. The first twelve minutes of the videotape merely show the location of the vat relative to other material areas and the location of Monfils's body when it was discovered. The video portrayal is not shocking and, therefore, not prejudicial. The record shows that the jury did not even see the "highly prejudicial and inflammatory" portions of the videotape that Moore now claims the trial court erroneously admitted.[18] On that basis, we decline to address the issue further, and affirm the trial court's discretionary determination to allow the jury to view the first twelve minutes of the videotape.

Moore next claims he was denied due process of law when he did not learn until the day Jones testified that what she had originally characterized as a paper turnover procedure could actually have been a paper break procedure. During the investigation, Jones said she had seen Monfils performing a turnover on the No. 7 machine on November 21, 1992. The plant records indicated a turnover was performed there at 7:34 a.m. Moore based his defense strategy on the timeline established by Jones's statement that she saw Monfils performing a turnover. Approximately one week prior to trial, the prosecution met with Jones and asked her whether she was certain the procedure she had observed was a turnover. She was not certain and decided to view both procedures at the plant. After observing both procedures, she concluded she could have observed Monfils performing a paper break, a function that was performed at 7:15 a.m. according to plant records. Jones testified at trial that when she saw Monfils working on the

[18] In the event the record inaccurately reflects the portions of the videotape that were played, Moore has failed to adequately make a record to preserve claim of error.

No. 7 machine, she believed it was a paper break procedure, and the timeline of her testimony was based on that conclusion.

Moore argues that Jones's recharacterization of her statement and its effect on the timeline of events was both exculpatory and material evidence. He contends the State was obligated to disclose this information pursuant to ***Brady v. Maryland***, 373 U.S. 83 (1963), and its failure to do so requires reversal of his conviction. We disagree.

Due process requires disclosure only of evidence that is both favorable to the accused and material either to guilt or punishment. ***State v. Ray***, 166 Wis.2d 855, 870, 481 N.W.2d 288, 294 (Ct. App. 1992) (citing ***State v. Garrity***, 161 Wis.2d 842, 848, 469 N.W.2d 219, 221 (Ct. App. 1991)). 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. ***Id.*** A reasonable probability is one sufficient to undermine confidence in the outcome. ***Id.***

The State in its reply points out that Jones's statement would not have been favorable to Moore, and we agree. On the contrary, it enlarged the amount of time for Moore's involvement in the tape-playing incident and the confrontation, and was actually more damaging evidence against Moore.

Moore attempts to persuade us that disclosure was required because the change in Jones's account was evidence material to the credibility of a witness, and the State was obligated to provide it under ***Giglio v. United States***, 405 U.S. 150 (1972); *see also* ***Ruiz v. State***, 75 Wis.2d 230, 236, 249 N.W.2d 277, 281 (1977). We are not persuaded. ***Giglio*** dealt with the State's failure to disclose a deal with a key prosecution witness that prevented the defendant from having

evidence bearing on the witness's credibility and bias. Jones's changed account is not the type of evidence bearing on credibility that requires disclosure. When the jury is presented with testimony that the witness's present account differs from previous statements, it evaluates the versions and decides which testimony to believe, or it may decide to disbelieve the witness altogether. Here, the defense had at its disposal, and did employ, all of Jones's prior inconsistent statements to impeach her present account and attack her credibility before the jury.

Even assuming the information had been favorable to Moore, we cannot say it is material, even under a ***Giglio*** credibility-of-the-witness analysis. The information did not go to Jones's motive or bias to testify for the State and against Moore. Under the ***Brady*** materiality test, there is not a reasonable probability that had the prosecution given the information to Moore, a different result would have occurred. Jones still would have been subject to cross-examination using the same methods actually employed by Moore's counsel, and the ultimate determination of believability would still have remained in the hands of the jury.

We recognize that disclosure of Jones's recharacterized statement at the time it was made would have been helpful to defense counsel; however, the State is not under a constitutional obligation to provide the defense with discovery of helpful but nonexculpatory evidence. ***State v. Denny***, 120 Wis.2d 614, 628, 357 N.W.2d 12, 19 (Ct. App. 1984).

Moore also contends the State's failure to disclose Jones's change in her statement violated his statutory right to discovery under § 971.23(1)(e), STATS. The district attorney's obligation under this section applies to written or recorded statements, and Jones's contacts with the district attorney were in the form of a

meeting where the prosecutor asked Jones a clarifying question, and her subsequent follow-up phone call advising the prosecution of her conclusion. No written or recorded statement was taken of Jones, and therefore we conclude Moore's statutory argument is inapplicable.

The prosecution did not violate any duty to disclose information to Moore because Jones's clarification of her testimony was not favorable evidence material to either Moore's guilt or punishment; therefore, we conclude there was no violation of Moore's due process rights. For the reasons stated above, we also conclude no right under § 971.23, STATS., was violated.

Finally, Moore claims he was denied his Sixth Amendment constitutional right to effective assistance of counsel. He contends his trial counsel was deficient by: failing to request a sidebar conference or hearing outside the presence of the jury to determine the State's involvement in Jones's testimony; failing to cite a violation of Moore's discovery rights; failing to request a continuance when presented with Jones's testimony of the time she observed Monfils and what activity he was engaged in; and failing to move for a mistrial.

In order to prove a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that he was prejudiced by counsel's unprofessional errors. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Pitsch***, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985). To establish deficient performance, the defendant must show that counsel's acts or omissions were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. Our scrutiny of counsel's actions is highly deferential, ***Pitsch***, 124 Wis.2d at 637, 369 N.W.2d at 716, and we judge counsel's challenged conduct based on the facts of the particular case as

they existed when the decisions were made. ***Strickland***, 466 U.S. at 690. Whether the defendant has established deficient performance or prejudice is a question of law we review de novo. ***Pitsch***, 124 Wis.2d at 634, 369 N.W.2d at 715.

Moore contends his counsel's failure to request a sidebar conference or hearing or to move for a continuance or mistrial was "wholly inadequate and not based upon any reasoned trial strategy." We are not persuaded that trial counsel's performance was, in fact, deficient. Attorney Robert Parent, Moore's trial counsel, testified at the postconviction motion that he believed he could adequately cross-examine Jones and continue with an appropriate defense of Moore. He testified:

> I knew we had at least one police statement and a deposition, and as I'm thinking of it maybe even John Doe testimony, but at least for sure the deposition and a police statement where she indicated definitively the time when she arrived back at the--back at the lab. She indicated she looked at the clock and her testimony did not become inconsistent with the amount of time each of these things took, and so if we--if we placed her back at the lab and then went backwards, it still appeared that she did see the turnover even though she was testifying that she saw a paper break.

Parent was also asked about whether he believed the prosecution's withholding of Jones's surprise testimony entitled him to a continuance or other mid-trial relief. He responded, "I didn't have any reason to believe--based on her testimony, I didn't have any reason to believe at that point that it had been withheld from us."

The record reflects counsel made reasoned decisions for proceeding with his theory of defense in light of Jones's changed testimony. The fact that he did not move for continuance or mistrial does not remove his performance from

the wide range of professionally competent assistance. We cannot conclude, based on the circumstances that existed at the time counsel became aware of Jones's testimony, that his failure to take the action Moore now suggests was deficient performance.

Even if counsel's omissions did constitute deficient performance, Moore's ineffective assistance of counsel claim would still fail because he has not established prejudice. He correctly states the standard for establishing the prejudice prong; counsel must establish that but for counsel's unprofessional errors, the result of the trial would have been different. ***Strickland***, 466 U.S. at 687, 694. He fails to demonstrate in any way, however, that had counsel made the motions for sidebar conference, continuance, and/or mistrial, the outcome of his trial would have been different. Because Moore has failed to show that counsel's performance was deficient and that he was prejudiced, his claim must fail.

PART III - JOHNSON'S ADDITIONAL CLAIMS

Johnson claims the State violated its duty to disclose exculpatory evidence under ***Brady*** when it did not inform him that Kellner met with the district attorney approximately one week before trial and said he was not comfortable with his prior statement. Apparently Kellner spoke to a defense investigator, William Craig, because he had concerns that discrepancies in his police statements were not being addressed by Sgt. Winkler. He testified at the postconviction hearing: "I told [Winkler] that since he wasn't going to listen to me, and straighten out the first statement, that I was going to give it to somebody who probably could." Kellner did give a statement to Craig, which was reduced to writing and signed by Kellner. Kellner also gave a clarifying addendum to Craig.

After Kellner's meeting with Craig, he met with assistant district attorney Griesbach to discuss his two statements and to prepare for the upcoming trial. Johnson contends that during this meeting between Kellner and the prosecutor, exculpatory information came to the latter's attention which he failed to disclose.

The prosecution is only required to disclose evidence that is both favorable to the accused and material either to guilt or punishment. ***Ray***, 166 Wis.2d at 870, 481 N.W.2d at 294. Disclosure of evidence that is material to the credibility of a witness is also required. ***Ruiz***, 75 Wis.2d at 236, 249 N.W.2d at 281. Kellner's postconviction testimony was that he told the district attorney he "wasn't happy with" his statement to Winkler and "there were parts I wanted to straighten out." Griesbach testified at the postconviction hearing that one of the purposes for meeting with Kellner was to have him explain the two statements. Griesbach also stated that Kellner had made it clear to him that Kellner was going to tell the truth and that he was not going to lie for anyone. Kellner's postconviction testimony also indicated that he never told the district attorney that anything in his initial statement to Winkler was false or untruthful.

Based on the record before us, we are not convinced that any favorable and material evidence came to the district attorney's attention at its pretrial meeting with Kellner that necessitated a disclosure under ***Brady***. We therefore conclude Johnson's due process rights were not violated.

Next, Johnson claims his trial counsel, Eric Stearn, was laboring under a conflict of interest at the time of his representation sufficient to impair Stearn's ability to zealously represent his client. Stearn had inquired about the

possibility of employment with the Brown County District Attorney's office[19] once the trial was completed. Johnson argues that this demonstrates Stearn was laboring under an actual conflict of interest, giving rise to a limited presumption of prejudice. *See* ***Strickland***, 466 U.S. at 692. In addition to the stipulation that Stearn inquired about possible employment with the district attorney's office, Johnson's own affidavit states: "On or about December 3, 1995, Eric Stearn visited me in the Brown County Jail, and told me that he was negotiating for a position with the District Attorney's Office." Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." ***Id.*** (quoting ***Cuyler v. Sullivan***, 446 U.S. 335, 350, 348 (1980)).

In order to prove a Sixth Amendment violation based on conflict of interest, a defendant who did not raise an objection at trial must demonstrate by clear and convincing evidence that his counsel had an actual conflict of interest and that the actual conflict of interest adversely affected his lawyer's performance. ***State v. Street***, 202 Wis.2d 533, 542, 551 N.W.2d 830, 835 (Ct. App. 1996). A full showing of prejudice under ***Strickland*** is not necessary. ***Street,*** 202 Wis.2d at 542, 551 N.W.2d at 835.

We review de novo whether the undisputed facts establish a constitutional violation. ***Id.*** at 543, 551 N.W.2d at 835. Johnson has not presented clear and convincing evidence that his counsel had an actual conflict of interest. Johnson's affidavit says that Stearn told him he was "negotiating" with the district

[19] A stipulation filed with the court on February 12, 1997, provided that if the Brown County District Attorney were to testify, he would testify that Stearn inquired about a position which was to open in the Brown County District Attorney's office.

attorney's office. Johnson, however, has not presented any evidence to suggest that Stearn had done anything more than inquire about the possibility of employment. We see nothing in the record to indicate that Stearn's expression of interest was of such a degree that his interest in the prospect of employment affected the discharge of his ethical duties to, or the actual representation of, his client. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 96-400, *Job Negotiations with Adverse Firm or Party* (1996). There is no evidence that Stearn's interest in the district attorney's office was reciprocal; that there had been any discussion of Stearn's qualifications and experience; or that any interviews, formal or informal, had been scheduled or had taken place. Johnson also fails to indicate how representing one's client less than zealously would in any way improve Stearn's employment prospects.

Johnson has not met his burden of proving by clear and convincing evidence that Stearn had an actual conflict of interest. Therefore, his claim of violation of his Sixth Amendment right to effective assistance of counsel must fail.

Regarding defendants' common issues, we make the following conclusions: (1) defendants are not entitled to reversal of their convictions based on insufficiency of the evidence because the jury could reasonably infer based on the evidence presented that defendants, as party to the crime, committed the crime of first-degree intentional homicide; (2) defendants are not entitled to a new trial based on newly discovered evidence because the trial court's finding, that neither Kellner's recantation nor the post-trial impeachment of Wiener's trial testimony was credible, was not clearly erroneous and, therefore, it is not reasonably probable that a different result would be reached at a new trial; (3) the trial court did not erroneously exercise its discretion by admitting Kutska's out-of-court statements to Kellner as a statement against interest against defendants; (4) the

trial court properly exercised its discretion by denying defendants' motions to sever, and even if it was error, it was harmless because defendants were not denied their right of confrontation in light of Kutska's eventual testimony; and (5) the trial court properly exercised its discretion in making evidentiary rulings regarding expert testimony and videotape simulations.

Regarding Moore's additional claims of error, we conclude: (1) the trial court properly exercised its discretion by allowing the jury to view a portion of the videotape of the recovery of Monfils's body; (2) the State did not violate any duty to disclose favorable and material evidence to the defense; and (3) Moore's ineffective assistance of counsel claim must fail because he has not met the two-prong ***Strickland*** test of deficient performance and prejudice.

Regarding Johnson's additional claims of error, we conclude: (1) the State's failure to disclose a pre-trial meeting with a State witness did not violate Johnson's constitutional right to exculpatory evidence; and (2) Johnson has not demonstrated his trial counsel was acting under an actual conflict of interest and, therefore, his ineffective assistance of counsel claim must fail.

By the Court.—Judgments and orders affirmed.

Not recommended for publication in the official reports.