

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**September 27, 2012**

Diane M. Fremgen  
Clerk of Court of Appeals

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**Appeal Nos. 2011AP880-CR, 2011AP1640-CR  
2011AP1641-CR, 2011AP1642-CR  
2011AP1643-CR, 2011AP1644-CR**

**Cir. Ct. Nos.  
2008CF114, 2007CF461,  
2007CF462, 2007CF468,  
2007CF476, 2007CF371**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**FREDERICK L. LUCHT,**

**DEFENDANT-APPELLANT.**

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APPEAL from orders of the circuit court for Marquette County:  
RICHARD O. WRIGHT, Judge. *Affirmed.*

APPEALS from judgments and orders of the circuit court for  
Portage County: JAMES M. MASON, Judge. *Affirmed.*

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 BLANCHARD, J. In these consolidated appeals, Frederick Lucht appeals two Marquette County circuit court orders denying his motion for postconviction relief from his conviction, based on his no-contest plea, for conspiracy to commit first-degree intentional homicide. He also appeals five Portage County circuit court judgments for six additional convictions in five cases in that county and five identical postconviction orders denying his five identical motions for postconviction relief from those convictions.<sup>1</sup>

¶2 Each of Lucht's challenges is based on recordings of conversations that Lucht had with an undercover agent who posed as Lucht's co-conspirator in the Marquette County homicide conspiracy case. Lucht argues in the Marquette County case that the recordings show that there was an insufficient factual basis for his plea, that he received ineffective assistance of counsel based on his trial counsel's failure to obtain and review copies of the recordings, and that the recordings are a new sentencing factor justifying a sentence modification.<sup>2</sup> In the Portage County cases, Lucht argues that the recordings are a new sentencing factor justifying a sentence modification, because the sentencing court in those cases considered his alleged conduct related to the conspiracy to commit homicide conviction as a sentencing factor, and the recordings shed new light on that

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<sup>1</sup> The nature of the six offenses in the five Portage County cases is not material to our decision.

<sup>2</sup> Lucht actually argues, at least at some points in his briefing, that the recordings reveal that there was "no" factual basis, but it is clear from all argument he makes that he means that the factual basis the circuit court relied on in taking his plea was insufficient or inadequate, not that there was a complete failure by the court to make a factual basis inquiry.

conduct. We reject Lucht's arguments and therefore affirm each of the judgments and orders that he appeals.

## **BACKGROUND**

¶3 The complaint against Lucht in the Marquette County case alleged as follows. A detective learned from a citizen informant in the Marquette County jail that Lucht wanted to have a Portage County assistant district attorney killed, the house of Lucht's girlfriend burned down, and an adult male assaulted. A Wisconsin Department of Justice agent was assigned to conduct an undercover investigation. The agent, acting in an undercover role, repeatedly met with Lucht. In those meetings, Lucht confirmed that he wanted the described acts done and offered to pay the agent \$10,000 to perform them. The complaint charged Lucht with conspiracy to commit first-degree intentional homicide, conspiracy to commit arson of a building, and conspiracy to commit aggravated battery.

¶4 At Lucht's preliminary hearing, the agent testified to facts consistent with those alleged in the complaint and supplied additional detail. More specifically, the agent's preliminary hearing testimony included the following. The agent's meetings with Lucht consisted of visits to Lucht at the Marquette County jail. The conversations between the agent and Lucht took place over a jail phone and were recorded. During the first visit, they discussed what Lucht wanted done and the price. Lucht did not expressly say during this first visit that he wanted the assistant district attorney killed and the two other individuals targeted for arson and assault, respectively, but the agent presumed this was because jail phone conversations were recorded. Nonetheless, the agent believed that he knew, through the confidential informant, what Lucht wanted done. When the agent

asked Lucht, “You got some work for me?” Lucht responded, “Yeah.” In this way, the agent testified, it was understood between the agent and Lucht what Lucht wanted done.

¶5 The agent further testified that, during a second visit, Lucht told the agent that he would be released from jail on a date several weeks in the future. Lucht indicated that he would be able to provide the agent with “collateral” at that time for the crimes Lucht wanted committed because Lucht would have his bond money back.

¶6 The agent also testified about a subsequent visit, during which the agent confirmed the identities of the three individuals Lucht wanted targeted. The agent did so by showing Lucht photographs of the assistant district attorney and of the residences of the other two individuals. Referring to the photograph of the assistant district attorney, the agent asked Lucht, “Is that the bitch you want smoked?” and Lucht responded, “Yeah, yeah, that’s her.” During that same visit or another one, Lucht said that he first wanted the male individual beat up, next his ex-girlfriend’s house burned down, and “last” the assistant district attorney killed. According to the agent, by the time of his last visit, Lucht had made clear that, in return for paying the agent \$10,000, he wanted the agent to “beat up [the male individual] with great bodily harm,” “burn down the house of [his] ex-girlfriend,” and “kill” the assistant district attorney “at a later time.”

¶7 Lucht pled no contest to the charge of conspiracy to commit first-degree intentional homicide, and the other two conspiracy charges were dismissed. The court accepted Lucht’s stipulation, through his attorney, that the agent’s

testimony provided a factual basis for the conspiracy to commit homicide charge and entered a judgment of conviction.

¶8 While Lucht awaited sentencing on the conspiracy to commit homicide conviction in Marquette County, he was sentenced on his convictions for the six Portage County offenses. The Portage County circuit court considered as a factor at sentencing Lucht's conduct in connection with the Marquette County conviction for conspiracy to commit homicide.

¶9 Subsequent to sentencing in both the Marquette County case and the Portage County cases, Lucht moved for postconviction relief in each of the cases. Lucht asserted that his trial counsel in the Marquette County case failed to obtain and review copies of the recordings of the conversations he had with the agent. He argued that the recordings showed there was an insufficient factual basis for his plea on the conspiracy to commit homicide charge and that he received ineffective assistance of counsel in connection with that charge. He also argued that the recordings were a new factor justifying a sentence modification in both the Marquette County case and Portage County cases.

¶10 As indicated above, the circuit court in each county denied Lucht's corresponding motions, and Lucht now appeals. We reference additional facts as needed in our discussion below.

## **DISCUSSION**

¶11 Lucht renews each of his above arguments on appeal. We address them in the sections below.

¶12 It is undisputed that Lucht’s trial counsel in the Marquette County (conspiracy to commit homicide) case failed to obtain and review copies of the recordings of the agent’s conversations with Lucht.<sup>3</sup> It is also undisputed that the circuit courts in the Marquette County case and the Portage County cases were not presented with the recordings or transcripts of the recordings in connection with the respective sentencing hearings.

**1. Factual Basis**

¶13 Under WIS. STAT. § 971.08(1)(b) (2009-10),<sup>4</sup> a circuit court must “make such inquiry as satisfies it that the defendant in fact committed the crime charged” before accepting a guilty or no contest plea. The circuit court may satisfy this “factual basis” requirement based on a variety of sources, including witness testimony. *State v. Thomas*, 2000 WI 13, ¶21, 232 Wis. 2d 714, 605 N.W.2d 836.

¶14 As indicated above, Lucht stipulated, through his attorney, at his plea hearing on the conspiracy to commit homicide charge that the agent’s preliminary hearing testimony established a factual basis for that charge. Lucht’s argument on appeal, stated generally, is that what the recordings reflect about his conduct is inconsistent with the agent’s testimony and therefore undermines the factual basis for the charge. He cites *State v. Lackershire*, 2007 WI 74, 301

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<sup>3</sup> Also undisputed is that Lucht’s trial counsel received a transcript of one of the recordings in discovery. However, the parties do not suggest that this should make any difference in our analysis.

<sup>4</sup> All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Wis. 2d 418, 734 N.W.2d 23, asserting, based on that case, that a plea lacking a factual basis is not knowing, intelligent, and voluntary, and may be withdrawn. *See id.*, ¶¶67-68 (defendant entitled to hearing to determine whether her plea was knowing and voluntary after she raised a “substantial question” as to factual basis relied on by court for plea).

¶15 In rejecting Lucht’s argument below, the Marquette County circuit court concluded that the recordings supported the factual basis for the charge. Implicit in the court’s conclusion was a determination that the recordings were consistent with the agent’s testimony in all relevant respects for purposes of whether there was a factual basis for a plea to the charge.

¶16 Before proceeding, we address two preliminary matters. First, the parties dispute our standard for reviewing the circuit court’s decision to reject Lucht’s factual basis argument. Lucht argues that our review is *de novo*. The state advocates a “clearly erroneous” standard. We need not resolve this dispute because, even if we apply *de novo* review, Lucht’s argument fails, because we agree with the circuit court that the recordings support the factual basis established by the agent’s testimony. In all material respects, the recordings are consistent with, and do not undercut, the agent’s testimony, and therefore do not undercut the factual basis for the plea.

¶17 Second, we pause to observe that, under case law that the State cites, we question whether the content of the recordings matters for purposes of Lucht’s attempt to withdraw his plea for lack of a factual basis, given his stipulation at the plea hearing, through his attorney, that the preliminary hearing testimony established a factual basis. *See State v. Black*, 2001 WI 31, ¶16, 242 Wis. 2d 126,

624 N.W.2d 363 (“[A] factual basis for a plea exists if an inculpatory inference can be drawn from the complaint *or facts admitted to by the defendant* even though it may conflict with an exculpatory inference elsewhere in the record and the defendant later maintains that the exculpatory inference is the correct one.”) (emphasis added). However, we need not and do not decide the factual basis issue based on the State’s cited case law, or address arguably conflicting case law that Lucht cites, because we conclude that the recordings are consistent with the testimony, as the State separately argues.

¶18 We now proceed to address Lucht’s more specific arguments and the recordings.

¶19 As indicated above, Lucht’s only ground for asserting the lack of a factual basis is that the recordings of the conversations between Lucht and the undercover agent are inconsistent with the agent’s testimony, and therefore, in Lucht’s view, the recordings reveal that there could not be a factual basis for the plea. Lucht argues that the recordings “tell a significantly different story” than the agent’s testimony and characterizes that testimony as “spin.” Indeed, Lucht goes so far as to argue that the recordings establish that he is *not* guilty of the conspiracy to commit homicide offense. We disagree with that position, and also disagree to the extent Lucht argues that the recordings, whether considered alone or together with the testimony, would have been insufficient to establish a factual basis. The recordings are in all material respects consistent with the agent’s testimony, which supported a charge of conspiracy to commit homicide.



¶20 We start with the elements of conspiracy to commit a crime. WISCONSIN STAT. § 939.31 sets forth the applicable elements. The statute provides, as pertinent here, that

whoever, with intent that a crime be committed, agrees or combines with another for the purpose of committing that crime may, if one or more of the parties to the conspiracy does an act to effect its object, be fined or imprisoned or both not to exceed the maximum provided for the completed crime ....

§ 939.31. “Thus, there are three elements: (1) an intent by the defendant that the crime be committed; (2) an agreement between the defendant and at least one other person to commit the crime; and (3) an act performed by one of the conspirators in furtherance of the conspiracy.” *State v. Routon*, 2007 WI App 178, ¶18, 304 Wis. 2d 480, 736 N.W.2d 530.

¶21 Lucht focuses on the second element and whether the recordings show that the agent and Lucht had an “agreement” to commit homicide. Lucht does not develop any separate argument specific to the intent or overt act elements, with the possible exception of a “simultaneity of elements” argument we address at the end of this section.<sup>5</sup>

¶22 The general standards for what constitutes an agreement for purposes of a criminal conspiracy are as follows:

Criminal conspiracies are by their very nature covert. Smart criminals do not conduct their affairs with the formality which attends legitimate contracts. In fact, ... [a]

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<sup>5</sup> As to the overt act element, it is not disputed that both the recordings and the agent’s testimony show that Lucht arranged for the agent to receive a rifle from one of Lucht’s family members as “collateral” for undertaking the crimes under discussion.

conspiratorial agreement may be demonstrated by circumstantial evidence. “The agreement need not be an express agreement; rather, a mere tacit understanding of a shared goal is sufficient.”

*State v. Cavallari*, 214 Wis. 2d 42, 51-52, 571 N.W.2d 176 (Ct. App. 1997) (citations omitted).

¶23 Here, the recordings show, consistent with the agent’s testimony, that the discussions between the agent and Lucht represented an agreement between the agent and Lucht that the agent was to kill the assistant district attorney. We illustrate this in the next several paragraphs with summaries of and excerpts from key portions of the recordings.

¶24 The recording of conversation from the agent’s first visit to Lucht in jail, in September 2008, begins with the agent confirming with Lucht that Lucht had told the confidential informant that he wanted a job done. It reflects the agent indicating to Lucht that the agent would charge \$10,000 for this job, with Lucht agreeing to pay several weeks later, on November 10, when he anticipated he would be released:

[Agent:] .... My boy said you got something for me.

[Lucht:] Yep. He told you already.

[Agent:] You got an itch that needs to be scratched.

[Lucht:] Yep.

....

[Agent:] Because your boy talking—I mean, you know—me talking ten and—what we doing now? Tell me what we doing.

[Lucht:] As soon as I get out of here, you’re going to get it.

[Agent:] I need something up front though, man. When you getting out?

[Lucht:] The tenth.

....

[Agent:] The tenth of?

[Lucht:] November.

Although this initial confirmation was vague, the recording shows that, later during the visit, the agent and Lucht expressly discussed all three targeted individuals:

[Agent:] Okay. What I'm saying is he said something about some female DA.

[Lucht:] Um'huh.<sup>6</sup>

[Agent:] Okay?

[Lucht:] Um'huh.

[Agent:] And I want to go start looking at her—

[Lucht:] Okay.

[Agent:] You know, and then some dude that hit you or—

[Lucht:] Hit me with my—with a truck, yeah.

[Agent:] Okay. And then your baby momma or girlfriend—ex-girlfriend or something?

[Lucht:] Yeah, but that'll be later.

[Agent:] Later?

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<sup>6</sup> It is apparent from the audio recording of this visit that Lucht is indicating in the affirmative whenever his answer is transcribed as, "Um'huh." Lucht does not argue to the contrary.

[Lucht:] Yeah, later on.

[Agent:] Okay. Well, see—but you want this done right?

[Lucht:] Um’huh.

[Agent:] I’ve got to start looking at it, all right? I’ve got to plan my thing.

[Lucht:] Right.

[Agent:] You know, you feeling me?

[Lucht:] Right. Definitely.

At one point during the visit, there appeared to be some confusion or even possible momentary disagreement regarding whether the total price was \$5,000 or \$10,000. However, the agent broke down the total price into three parts (presumably one for each of the three targeted individuals), with Lucht then agreeing to the \$10,000 total:

[Lucht:] ... I thought he—he said it was going to be the whole thing for five.

[Agent:] The whole thing for five?

[Lucht:] That’s what he thought.

[Agent:] No. No. No. No. No. No.

[Lucht:] He—he wants more—you want more?

[Agent:] Yeah. Five—five, three then the deuce—you know what I’m saying, five—

[Lucht:] Ten?

[Agent:] Yeah, you feel me?

[Lucht:] Um’huh.

[Agent:] I mean, that—that’s where I’m coming at—you know what I’m saying—you know, you—you feel what I’m saying?

[Lucht:] Okay.

¶25 The recording of the conversation from the agent's next visit to the jail shows, consistent with the agent's testimony, that Lucht again indicated that he would pay the agent on his anticipated release date of November 10. The recorded conversation also shows, consistent with the agent's testimony, that Lucht at least tacitly confirmed that he wanted the assistant district attorney killed, albeit not until after his November 10 anticipated release date, "because she's got to be there [on] the tenth for my—my [court] date and everything":

[Lucht:] I'll get ten grand right away when I get out of here, on the—hopefully on [November] 10th.

[Agent:] Well, okay, let me—

[Lucht:] That's my bond money.

[Agent:] —let me run this one by you. Okay. I go ahead and—and—and—smoke this DA—you know, and then I—I go where's my money, well, I don't know what you're talking about. What do you mean? What am I, going to take you to small claims court? You know what I'm saying? You feel me?

[Lucht:] I feel yeah.

[Agent:] You know, I mean—

[Lucht:] Well, that's why I told him, I said—before he got out, I said I don't need her done right away.

[Agent:] Who?

[Lucht:] DA.

[Agent:] Oh. When do you want her done? That the first one I was going to do.

[Lucht:] Well, I wanted the—the boyfriend.

[Agent:] Oh, you want him first?

[Lucht:] That's what I told him—you know—

[Agent:] Oh, see, he didn't tell me that part.

[Lucht:] Yeah, I told him to mess him up a little bit, put him in the hospital and stuff—you know, I said the DA, that's got to wait—you know, because she's got to be there [on] the tenth for my—my date and everything.

¶26 The recording of the conversation during a subsequent visit to Lucht in the jail, in October 2008, shows that, consistent with the agent's testimony, the agent confirmed the identities of the three target individuals using photographs. Lucht again said that the assistant district attorney could "wait awhile," and Lucht indicated that only the male target needed to be "take[n] care of" before Lucht's anticipated release on November 10.

¶27 Focusing in particular on the last of these recordings, Lucht argues that the agent and Lucht never reached agreement that the agent would kill the assistant district attorney, only that the agent would beat the male target. Lucht argues that "[a]t best, these recordings support the inference of an agreement to negotiate an agreement on [the ex-girlfriend and assistant district attorney] sometime in the future." We disagree and conclude that, taken together, the recordings show, consistent with the agent's testimony, that the agent and Lucht reached agreement as to all three targeted individuals for a total price of \$10,000, with part of the agreement being that the agent would wait until after Lucht's November 10 hearing date to kill the assistant district attorney.

¶28 Lucht refers us to cases standing for propositions that a conspiracy cannot be based on a mere "agreement to negotiate," *see United States v. Podolsky*, 798 F.2d 177, 178 (7th Cir. 1986), or on an "exploratory and

inconclusive” or “preliminary” discussion, *see United States v. Iennaco*, 893 F.2d 394, 398 (D.C. Cir. 1990), or on an “apparent or imagined” agreement, *see State v. Sample*, 215 Wis. 2d 487, 500, 573 N.W.2d 187 (1998).<sup>7</sup> Here, however, the recordings of the discussions between the agent and Lucht show more than an agreement to negotiate in the future, more than a preliminary or inconclusive discussion, and more than an “imagined” agreement.<sup>8</sup>

¶29 Much of Lucht’s remaining argument wrongly equates an agreement to perform an act at a later time with the failure to reach an agreement. Obviously, many agreements are for the performance of an act in the future. We do not agree with Lucht that the recordings show that he was in fact putting off any agreement as to the homicide. Rather, they show him agreeing to have the assistant district attorney killed, but “later,” after the date that he believed he would be released and would have the money to pay the agent.

¶30 To the extent Lucht is making a related argument that the recordings show there was no agreement because the exact date for the assistant district attorney’s murder was not specified, that argument fails. *See United States v.*

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<sup>7</sup> The term “apparent” as used in *State v. Sample*, 215 Wis. 2d 487, 500, 573 N.W.2d 187 (1998), might seem broad enough to support Lucht’s argument, but in the context of that case it is clear that the court was using this term to refer to a purported agreement that does not actually exist. *See id.* at 497-98, 500.

<sup>8</sup> Both parties rely on federal case law addressing what constitutes an “agreement” for purposes of federal conspiracy statutes. We agree with the parties that this case law is helpful in analyzing the questions of Wisconsin conspiracy law presented here and therefore consider this law for its persuasive value. *See State v. Routon*, 2007 WI App 178, ¶¶23-38 & n.10, 304 Wis. 2d 480, 736 N.W.2d 530 (concluding that federal case law interpreting federal conspiracy statutes has persuasive value for interpreting analogous aspects of WIS. STAT. § 939.31 and discussing federal cases in this context).

*McDermott*, 245 F.3d 133, 137 (2d Cir. 2001) (“The coconspirators need not have agreed on the details of the conspiracy, so long as they agreed on the essential nature of the plan.”); *see also Iennaco*, 893 F.2d at 398 (“There need not be a specific agreement as to price, quantity, and time, place and manner of delivery.”).

¶31 Lucht argues that the recordings show that there was never an agreement on exact price. Putting aside whether a failure to agree on exact price matters, *see McDermott*, 245 F.3d at 137, we disagree. As demonstrated above, the recordings showed that Lucht agreed, if at times somewhat reluctantly, to a total payment of \$10,000. The fact that there may have initially been a misunderstanding or even a possible momentary disagreement as to price makes no difference.

¶32 Lucht asserts that all elements of a criminal conspiracy must “exist simultaneously,” and implies that the recordings reveal that that did not occur here. However, to the extent Lucht makes any more specific argument on this topic, it is clear that he is basing it on a characterization of the recordings that we have already rejected. Specifically, Lucht wrongly characterizes the recordings as showing that, by the time Lucht undertook the overt act of providing the agent with the rifle, *see supra*, footnote 5, there was no longer an agreement to have the assistant district attorney killed, only an agreement to have the male target assaulted.

¶33 In sum, for the reasons stated, we conclude that the recordings are consistent with the agent’s preliminary hearing testimony. Lucht’s argument that the recordings undermine the factual basis for the charge of conspiracy to commit homicide therefore fails.



## 2. *Ineffective Assistance of Counsel*

¶34 We turn next to Lucht’s argument that he received ineffective assistance of counsel. Ineffective assistance of counsel requires the defendant to show both that (1) counsel performed deficiently, and (2) counsel’s deficient performance resulted in prejudice. *State v. Moats*, 156 Wis.2d 74, 100, 457 N.W.2d 229 (1990). When we address ineffective assistance of counsel claims, we uphold circuit court fact findings unless they are clearly erroneous, but the ultimate determinations of whether counsel’s performance was deficient or prejudicial are questions of law we review de novo. *See id.* at 101.

¶35 Lucht argues that his trial counsel performed deficiently by failing to obtain and review copies of the recordings and that this was prejudicial because, if counsel had obtained and reviewed the recordings, counsel would have advised Lucht that there was no factual basis for the conspiracy to commit homicide charge and therefore Lucht would not have entered his no contest plea. Lucht’s prejudice argument thus depends on his previous argument, which we have rejected above, that the recordings show there was no, or an insufficient, factual basis for the conspiracy to commit homicide conviction. Lucht does not develop any other argument that there was prejudice from alleged deficient performance of his attorney. Lucht’s ineffective assistance of counsel claim therefore fails.

## 3. *New Factor*

¶36 We turn finally to Lucht’s “new factor” sentencing argument. As noted above, Lucht argues that the recordings represent a new sentencing factor, both for his sentence on the conspiracy to commit homicide conviction and for his sentence in the six Portage County convictions.

¶37 The parties agree on the definition of a “new factor” and on our standard of review for this issue.

The definition of a “new factor” is set forth in *Rosado v. State*, 70 Wis.2d 280, 288, 234 N.W.2d 69 (1975) as follows: “a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.”

*State v. Harbor*, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828. Whether there is a new factor under these standards is a question of law we review de novo. See *id.*, ¶36. The existence of a new factor does not automatically entitle a defendant to sentence modification. *Id.*, ¶37. Whether a new factor justifies a sentence modification is a discretionary decision for the circuit court. *Id.*

*a. Conspiracy to Commit Homicide Conviction*

¶38 Regarding the conspiracy to commit homicide conviction, the Marquette County circuit court determined or assumed that the recordings constituted a new factor. The court nonetheless concluded that the recordings did not justify a modification to Lucht’s sentence.

¶39 Assuming, without deciding, that the recordings are a new sentencing factor in the conspiracy to commit homicide case under the definition given above, we conclude that the circuit court’s decision not to modify Lucht’s sentence was a reasonable exercise of discretion. The court provided a lengthy and reasoned explanation on the record for declining to modify Lucht’s sentence. In essence, the court concluded that, although the recordings sometimes showed “ambiguity” or “equivocation,” such ambiguity or equivocation was already

apparent to the court from the agent's preliminary hearing testimony and had already been considered by the court at sentencing. Nothing about Lucht's arguments persuades us that this conclusion is unreasonable. The court's reasoning comports with our conclusion that the recordings are consistent with the agent's testimony in all material respects. In addition, Lucht fails to persuade us that the recordings are materially inconsistent with any other information that the sentencing court may have considered in addition to the preliminary hearing testimony.

¶40 Lucht refers to isolated statements by the court which, when taken out of context, might appear to support his argument that the court unreasonably exercised its discretion in declining to modify sentence. However, when we read those statements in context, it is apparent that Lucht misinterprets them. For example, Lucht asserts that the court stated that ambiguity reflected in the recordings would have justified taking the case to trial. However, the portions of the record Lucht cites suggest that the court was simply making an offhand observation about the court's view of the strength of the State's case with or without the recordings. Such observations do not undermine the court's conclusion that the recordings, even if a new factor, did not justify modification of Lucht's sentence.

*b. Portage County Convictions*

¶41 As indicated above, the Portage County circuit court, when sentencing Lucht on his six Portage County convictions, considered as a factor Lucht's alleged conduct underlying the Marquette County conviction for

conspiracy to commit homicide, including that Lucht had involved one or more of his own family members in the conspiracy.

¶42 In addressing Lucht’s motion for postconviction relief, the court concluded that the recordings were not a new factor justifying resentencing. In addition, the court determined, in effect, that, even if the court considered the recordings as new and relevant sentencing information, the recordings did not justify sentence modification. More specifically, the court determined that, if the court had had before it at the time of sentencing all the details in the recordings, it would have imposed the same or a *more* severe sentence, because the court viewed the recordings as reflecting poorly on Lucht, including showing that he lacked remorse. We uphold the court’s decision on this basis, as a reasonable exercise of discretion to deny Lucht a sentence modification.<sup>9</sup>

¶43 Lucht devotes considerable briefing to his disagreement with the circuit court’s reasoning, but none of it comes close to demonstrating that the court was unreasonable in its view of the recordings and the impact they would have had on sentencing in the Portage County cases. In addition, Lucht fails to persuade us that there was any fact that the court considered at sentencing that is materially inconsistent with what the recordings show.

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<sup>9</sup> The circuit court determinations we reference here were made in response to a claim of ineffective assistance of trial counsel that Lucht raised in the Portage County cases. However, the court’s rationale provides a reasonable basis for the court’s contemporaneous decision to deny Lucht sentence modification on those convictions. Lucht does not in this appeal renew his ineffective assistance of counsel claim as to the Portage County convictions.

## CONCLUSION

¶44 In sum, for the reasons stated above, we affirm each of the judgments and orders Lucht appeals.

*By the Court.*—Judgments and orders affirmed.

Not recommended for publication in the official reports.

