OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

January 30, 2025

To:

Hon. Troy D. Cross
Circuit Court Judge
Electronic Notice

Julie Kayartz
Clerk of Circuit Court
Columbia County Courthouse
Electronic Notice

Michael J. Conway
Electronic Notice

Dennis Schertz
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2024AP20-CR State of Wisconsin v. Mitchell K. Merkes (L.C. # 2020CF336)

Before Kloppenburg, P.J., Blanchard, and Taylor, JJ.

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

Mitchell Merkes appeals a judgment of conviction, following a jury trial, for homicide by intoxicated use of a motor vehicle, knowingly operating while revoked causing death, and hit and run involving death. Merkes argues that the circuit court erred by denying Merkes' motion to exclude video evidence at trial based on the State's alleged discovery violation under WIS. STAT. § 971.23(1).[1] Based on our review of the briefs and record, we conclude at conference that this

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

Close to midnight one night in mid-July 2020, Merkes was involved in a one-vehicle crash in which Merkes' friend, Zachary Austin, was killed. Merkes was charged with crimes related to the crash. Merkes' defense at trial was that Austin, not Merkes, was driving the vehicle at the time of the crash.

On September 19, 2022, the parties appeared for the first day of trial. At that time, defense counsel objected to the State's plan to offer into evidence a Snapchat video recovered from Austin's phone to support the State's theory that Merkes was driving at the time of the crash. The disputed Snapchat video was purportedly taken by Austin at 11:53 p.m. from the passenger's seat of the vehicle that would shortly crash. Defense counsel explained: "We have received a copy of a Snapchat video in the past, but it would have to be those same—that same discovery that we received. Otherwise, we've never seen them before, until today, your Honor."[2] Defense counsel asserted that, because defense counsel had viewed the 11:53 p.m. Snapchat video for the first time that morning, the State should not be allowed to play that video at trial.

[2] At the September 1, 2022 final plea hearing, defense counsel informed the circuit court that the State had provided defense counsel with all of the discovery counsel had requested, including "the telephone information that [counsel] requested," contained on "two data sticks and … three DVDs." Defense counsel also said that the State had provided defense counsel with "a video that's going to be an exhibit." The State alleges that that video exhibit consisted of a compilation of Snapchat videos that Austin had sent his girlfriend from Merkes' vehicle on the night of the crash, with the latest video allegedly sent at 11:47 p.m. Merkes does not dispute those allegations in his reply brief and accordingly concedes their accuracy for purposes of this appeal. *See* ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (lack of response in reply brief may be taken as a concession).

The prosecutor provided the following sequence of events related to the 11:53 p.m. Snapchat video. On August 16, 2022, defense counsel made a discovery demand for "Zachary Austin's phone." The prosecutor explained: "[P]rior to the final plea hearing in this case [on September 1, 2022], [I] did provide what I believed to be responsive material to that request, specifically, a Cellebrite download of the Zachary Austin phone." The prosecutor discovered that he was not able to play the video files on the Cellebrite download, and defense counsel told the prosecutor that defense counsel had the same problem with the defense copy. The prosecutor asked the sheriff's department to recover Austin's phone, which by that time had been returned to Austin's family.

On September 12, 2022, the prosecutor notified defense counsel that Austin's phone had been obtained again by the State. The prosecutor said that, at that time, he told defense counsel "that at trial, it would be [the prosecutor's] intention to play video files from the phone, or at least certainly the possibility that [the prosecutor] would do so." The prosecutor said that he "specifically invited [defense counsel] to inspect the phone itself and indicated a willingness to make any arrangements prior to trial to allow for that to happen."[3] The prosecutor said that, just before trial began, he "had [the State's detective] bring the phone, [and] open the phone in front of [defense counsel]" and he "play[ed]" the videos for them. The prosecutor said that he had "no reason to doubt that there are video files and metadata [on the phone] that [defense counsel had] not previously seen."

[3] The parties sometimes refer to Merkes' opportunity to "inspect" the phone before trial. However, the parties discuss only whether Merkes had the opportunity to view the 11:53 p.m. Snapchat video on the phone prior to trial. That is, Merkes does not make any argument related to "inspecting" the phone other than viewing the Snapchat videos from the night of the crash.

In response, defense counsel did not address the prosecutor's assertions that, a week prior, the prosecutor had informed defense counsel that the State had recovered Austin's phone, that it was possible that the prosecutor would play videos from the phone at trial, and that the prosecutor was willing to arrange a time for defense counsel to inspect the phone before trial. Rather, defense counsel argued that the 11:53 p.m. Snapchat video should not be allowed into evidence because it was "a video [defense counsel had] never seen before. It is not part of that Snapchat story that [defense counsel] previously had. It was … [a] brand new video that [defense counsel had] never seen until [that] morning."[4]

The prosecutor then offered the following facts to "make a more complete record." The prosecutor said that he had

> a meeting with [defense counsel] either on September 6th or September 7th where [the attorneys] discussed [the videos], and [defense counsel] indicated … that they were unable to play the video file. And that's why on September 12th, when [the prosecutor] received information from [the detective] that he had recovered the phone itself and that there was information on the phone, [the prosecutor] specifically provided an e-mail notice to defense [counsel].

The circuit court then had the following exchange with defense counsel:

> THE COURT: So everybody has had the opportunity for at least a week. You just didn't take it until this morning, to see what was on the rest of the phone.
>
> [DEFENSE COUNSEL]: That – that's not correct, your Honor. The file numbers that [the prosecutor] gave me for the videos to review—He e-mailed me the actual file numbers. They were not on—I could not find—There's literally hundreds of these videos

[4] Defense counsel made other arguments for excluding the 11:53 p.m. Snapchat video that were unrelated to the alleged discovery violation, which have not been renewed on appeal. We deem those other arguments abandoned.

> on the Cellebrite information. He provided me with the numbers on them, and they would not play from it.
>
> THE COURT: Right.
>
> [DEFENSE COUNSEL]: And I informed [the prosecutor] of that.
>
> THE COURT: Right.
>
> [DEFENSE COUNSEL]: So today was, again, the first day I was able to see the videos.

The circuit court overruled Merkes' objection to the video evidence. The court explained that it was "not going to suppress on any discovery issue at this point," and more specifically that it was "not ruling this is a [WIS. STAT. §] 971.23 violation."

Defense counsel then argued that, as of that morning, defense counsel

> thought there was one video that was going to be played and that was it. That's the way [defense counsel] prepared [the] defense. And now [the prosecutor] says, no, we've got all these other videos on here that I want to play …. I don't see how that could not be, you know, kind of an ambush kind of thing, when we had no idea they were there.

The circuit court responded that the court was "not sure how [defense counsel] had no idea [the additional videos] were there." The court said again that it did not "see any reason to suppress" the videos from the phone. Following Merkes' conviction and sentencing, Merkes appeals.

"Upon demand, the district attorney shall, within a reasonable time before trial, disclose to the defendant or his or her attorney and permit the defendant or his or her attorney to inspect and copy or photograph" any physical evidence within the State's possession that the district attorney intends to use at trial. WIS. STAT. § 971.23(1)(g). "We analyze alleged discovery violations in three steps, each of which poses a question of law reviewed without deference." ***State v. Rice***, 2008 WI App 10, ¶14, 307 Wis. 2d 335, 743 N.W.2d 517 (2007). We must decide,

first, if the State failed to disclose information it was required to disclose under § 971.23(1). ***Id.*** If so, we must determine whether the State had good cause for the failure to disclose. ***Id.*** "Finally, if evidence should have been excluded under the first two steps, we decide whether admission of the evidence was harmless." ***Id.*** As we now explain, we need go no further than the first step of the analysis here. We conclude that Merkes has not established that the State violated its duty to disclose, and we reject Merkes' argument on that basis.

In his opening brief on appeal, Merkes argues that the State violated its duty "to disclose the information contained on [Austin's] phone within a reasonable time before trial" because, Merkes asserts, the State "failed to provide this information to the defense until the morning of the first day of trial." Merkes also argues that "the State failed to provide the ability for the defense to view those videos until the first day of the trial." However, Merkes did not dispute in the circuit court, and does not dispute on appeal, that the prosecutor informed defense counsel a week before trial that there were video files on the phone that the State would possibly play at trial. Moreover, in his reply brief on appeal, Merkes concedes that "the State advised defense counsel that they could come and inspect the phone a week before trial." Merkes argues instead that defense counsel had no reason to believe that counsel needed to view any additional videos on the phone because counsel "already knew about the single Snapchat video that the State intended to introduce a[t] trial."[5] Merkes argues that, on the morning of trial, defense counsel was "undoubtedly surprised to learn of these additional videos."

[5] As stated, it appears to be undisputed between the parties that the video that defense counsel had in counsel's possession, and that Merkes argues was the only video that defense counsel believed would be played at trial, was a compilation of Snapchat videos that Austin sent to his girlfriend, ending at 11:47 p.m.

Thus, the only argument that Merkes maintains on appeal is that the State violated its duty to disclose the information on Austin's phone because defense counsel asserted that counsel did not believe that it was necessary for counsel to view the videos on the phone before trial.[6] We note that this argument is raised for the first time in Merkes' reply brief. We therefore need not address this argument. *See* ***State v. Reese***, 2014 WI App 27, ¶14 n.2, 353 Wis. 2d 266, 844 N.W.2d 396 ("This court need not address arguments that are … raised for the first time in the reply brief."). Moreover, as we now explain, that argument is both unsupported by the record and insufficiently developed. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (this court need not consider arguments that are unsupported by the record or insufficiently developed).

First, it was undisputed in the circuit court—and remains undisputed on appeal—that the prosecutor informed defense counsel one week prior to trial that the State possessed Austin's phone and that it was possible that the State would play videos from the phone at trial. Merkes does not cite any facts in the record, or factual findings by the circuit court, to support his claim that defense counsel would have reasonably believed it was unnecessary for counsel to view the

[6] Merkes argues both that defense counsel was surprised to learn of the additional videos on the phone and that defense counsel believed that the State intended to play only the video exhibit already provided to defense counsel. Merkes does not clarify whether he is asserting that defense counsel did not know that there were additional videos on the phone, or that counsel knew there were additional videos but did not believe that the State would play any additional videos at trial. In any event, as explained, Merkes' claim of a discovery violation is based on his assertion that defense counsel did not believe it was necessary for counsel to view the videos on the phone.

videos on the phone.[7] Second, and more importantly, Merkes does not explain how defense counsel's asserted belief that it was unnecessary to view the videos on the phone refutes the State's timely disclosure of that evidence under WIS. STAT. § 971.23(1). We decline to develop that argument on Merkes' behalf. *See* ***Pettit***, 171 Wis. 2d at 647 ("We cannot serve as both advocate and judge.").

Therefore,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals

[7] Merkes does not cite anything in the record, beyond defense counsel's arguments on the first day of trial, to support his assertion that defense counsel did not believe it was necessary to view the videos on the phone. To the extent that defense counsel's reasonable belief that it was unnecessary to view the videos from the phone could support a claim of a discovery violation (a conclusion we need not, and do not, reach here), the circuit court's decision to deny defense counsel's motion to exclude the videos was an implicit finding that defense counsel's asserted beliefs were not reasonable. *See* ***State v. Martwick***, 2000 WI 5, ¶31, 231 Wis. 2d 801, 604 N.W.2d 552 (when a circuit court does not make express findings, we assume that the court made implicit findings in a manner supporting the court's decision).