STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2011AP1803-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GENERAL GRANT WILSON,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE VICTOR MANIAN PRESIDING, AND FROM AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE SAME COURT, THE HONORABLE JEFFREY A. CONEN PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED FOR REVIEW

Because Wilson has framed the questions presented in a decidedly biased manner, the State submits its own version of the issues raised on appeal.

1. Did the trial court erroneously exercise its discretion when it prevented Wilson from presenting third-party-perpetrator evidence under *State v. Denny*, 120

Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984), with respect to Willie Friend and/or his brother?

The trial court and postconviction court said no.

2. By withdrawing an objection to the prosecutor's question whether Wilson referred to his .44 caliber gun as his "Dirty Harry" gun, did Wilson forfeit the right to complain about this question on appeal? Alternatively, was the question improper?

The forfeiture question was not presented below. In denying Wilson's postconviction motion, the postconviction court implicitly found no impropriety in the question.

3. Is Wilson entitled to a new trial based on the prosecutor's redirect examination of Terry Bethly and the prosecutor's question as to whether Wilson told investigators one of his guns was taken during a 1986 domestic disturbance?

The trial court said no.

4. Did the postconviction court err in denying without a hearing Wilson's claim that trial counsel was ineffective in failing to make an adequate offer of proof regarding evidence of two third-party perpetrators under *Denny*?[1]

In denying Wilson's motion without a hearing, the court implicitly said no.

[1] In the "Issues Presented for Review," Wilson raises the issue whether counsel was ineffective in "fail[ing] to object properly to the introduction of prejudicial character evidence" against Wilson. Wilson's brief at 1. Because Wilson fails to address this issue in his argument, the State does not believe this issue is before the court. *See* argument III.D., *infra*.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Because the parties' briefs thoroughly set forth the relevant facts and legal authorities, the State does not believe oral argument is warranted.

The State does not request publication because this appeal does not involve any novel issue but merely requires the application of well-settled legal principles to the facts of this case.

SUPPLEMENTAL STATEMENT OF FACTS

Facts additional to those presented at pages 5-17 of Wilson's brief will be set forth where necessary in the Argument section.

ARGUMENT

I. WILSON FAILED TO SATISFY THE REQUIREMENTS OF *DENNY* WITH RESPECT TO WILLIE FRIEND OR HIS BROTHER.

The majority of Wilson's brief is devoted to the argument that the trial court erred in preventing him from introducing evidence under *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984), suggesting that Willie Friend and his brother, Larnell "Jabo" Friend, had motive, opportunity and proximity to commit the murder of Eva Maric. Wilson's brief at 17-33. While Wilson lumps Willie and Jabo together in his discussion, the evidence potentially inculpating Willie is very different from the evidence potentially inculpating his brother. Relatedly, while Jabo Friend did not appear at Wilson's trial, Willie Friend was not only a prosecution witness; he was the victim of count two of the information, which charged Wilson with attempted first-degree intentional homicide while possessing a dangerous weapon (4). In

convicting Wilson of this crime (14), the jury necessarily found beyond a reasonable doubt that Wilson had fired shots at Willie during the same course of events in which Eva Maric was killed.

Because of these differences, the State will separately discuss the *Denny* evidence with respect to each brother. But before doing so, the State will present additional facts relevant to the first issue that are missing from Wilson's brief.

A. Additional facts relevant to the *Denny* issue.

On the morning of July 7, 1993 – the sixth day of trial – the parties informed the court that the night before, defense attorney Peter Kovac had taken the extraordinary step of going to the home of the district attorney, E. Michael McCann, to ask him to intervene on behalf of the defense with respect to admission of the *Denny* evidence (57:2). As a result of this meeting, Mr. McCann instructed the prosecutor not to object to admission of the evidence (*id.*). While she followed the district attorney's directive, the prosecutor made it clear she disagreed with Mr. McCann's position (*id.*:4-5). She told the court that based on the physical evidence and Carol Kidd-Edwards's testimony, her position was that Willie Friend "did not have the opportunity to commit this homicide" (*id.*:9). The prosecutor also informed the court that if the *Denny* evidence were admitted, she planned to "put in an additional wealth of other evidence to rebut the inferences that Mr. Kovac seeks to raise with this" (*id.*:4).

Because Mr. McCann did not appear before the court, there is no record of what defense counsel told him that caused the district attorney to order the prosecutor not to object to the evidence.

Despite the trial court's ruling on the proffered *Denny* evidence, trial counsel in closing argument was

able to float the theory that Willie Friend was involved in Eva's murder and that his motive was to avoid a paternity action (*see* 58:71-73). Counsel pursued this theory based on the evidence of record:

> [T]here is a case against Willie. If the District Attorney's office here in Milwaukee wanted to charge Willie with this crime, it could have done it. And they could have made a very strong argument to a jury just like you that Willie in fact had done it. Now, I'll tell you right from the beginning . . . Willie did not fire the shots.
>
> There were two people who came by in that car, at least two people. There was nobody in the driver's seat. There was somebody in the passenger seat. Those two people shot and killed Eva. I don't know who those people are.
>
> . . . .
>
> [W]hen you look at what's going on here, it's reasonable to me that Willie was involved. Willie had her there at this location knowing that these guys were going to come by.
>
> . . . .
>
> Remember what Willie said he was doing that day and how this started? Eva picked him up in court because he was there on a legit case as he calls it, paternity case. Willie was there on a paternity case.
>
> Now, he wasn't really questioned about that. I assume it was somebody else other than Eva. And I think you can assume that it was somebody else other than Eva.
>
> But he's going with Eva now, and remember what Willie told Mrs. Edwards, the most important witness in the case, the one who is undeniably a truth teller, no ax to grind, she said Willie told her that Eva was pregnant, and at the time of her death she was, she had put on some weight, and it was believable.

> She looked pregnant, she thought. When she came into court she thought that Eva was pregnant.
>
> Why did she think that Eva was pregnant? Because she saw Eva and she heard what Willie said. So isn't it interesting that Willie thought she was pregnant and Willie had a legit case, and I can assume he wasn't too happy about it. Do you think he might have had some interest in not having another legit case?
>
> Now, I'm not here as the investigator and I hope somebody wouldn't do this for that reason, but that's a hell of a lot of reason than the no reason we get as to why Grant did it.

(58:71-73.)

Most of the evidence supporting defense counsel's theory that Willie's motive for killing Eva was to prevent a paternity suit being brought against him came in via Carol Kidd-Edwards. She testified that at the scene of the shooting, Maric "looked . . . like she was pregnant" (51:121). Kidd-Edwards said she asked Willie after the shooting whether Eva was pregnant, and he confirmed that she was (*id.*:122).

Evidence that Willie was already involved in a paternity action came from Willie himself. He testified that on the day preceding the shooting, Eva picked him up at the courthouse, where he had appeared "on a legit case," which he explained was a child support action (51:19).

Despite the trial court's ruling, therefore, Wilson was able to present the theory that Willie had a motive for killing Eva.

B. Wilson has failed to satisfy *Denny*'s motive requirement with respect to Jabo Friend.

Wilson's claim that he satisfied *Denny*'s motive requirement with respect to casting Larnell "Jabo" Friend as a third-party perpetrator is based solely on information contained in an April 21, 1993 police report (27:21-24; D-App. 131-134). As Wilson points out, that report recounted statements of the victim's mother and sister relating that the victim had been involved in prostitution and that Jabo was her pimp. Wilson's brief at 21. Relying on the report, Wilson claims that Clara Maric, Eva's mother, "stated that Ms. Maric had been trying to break free from the prostitution business and, thus, Jabo, to change her life." *Id.*

Wilson's reference to the report misleadingly suggests that the victim's attempt to dissociate herself from Jabo was an ongoing effort at the time of her murder. If true, this information would provide Jabo with a motive for killing Eva Maric. But contrary to Wilson's suggestion, the police report indicates that this was a relic of the past when Eva was murdered:

> Clara stated her daughter's problems began at the age of 14. At that time, she was gang raped by a group of individuals in South Milwaukee. After that incident occurred, Eva became involved in prostitution.
>
> During that time, Eva met a man known as "Jabo". "Jabo" is the brother of a boyfriend of the victim by the name of Willie Friend, B/M, approximately 35 years of age, who resides in the area of N. 9th St. and W. Capitol Dr., telephone no. 374-3361. Clara stated "Jabo" acted as Eva's pimp during the time in which she prostituted herself. She stated "Jabo" had some type of tavern, or other, possibly a corner store grocery business near the area of N. 9th St. and W. Capitol Dr. She heard the aforementioned information through her eavesdropping on telephone calls which Eva made to

> Wille and "Jabo", as well as General Grant, and other friends of hers who frequented that area.
>
> Clara stated she heard, through her eavesdropping, that "Jabo" runs both a drug house and an after-hours establishment somewhere in the area of N. 9th St. and W. Capital Dr. Eva, "Jabo", Willie Friend, and other friends and acquaintances of Eva frequented the after-hours establishment.
>
> . . . After some time, Clara stated Eva told "Jabo" she wanted to get out of the prostitution business. Upon doing so, "Jabo" threatened to kill Eva if she attempted to leave him and that type of business. Clara could not exactly describe how Eva managed to free herself from "Jabo's" control, but somehow, she did manage to alienate herself from him.

(27:21-22; D-App. 131-32.)

According to Clara Maric, Eva became involved in prostitution after her gang rape at the age of fourteen. The police report does not say how long the period of prostitution lasted or how old Eva was when she started the practice or when she abandoned it. The Case Details for Milwaukee County Circuit Court case no. 1987CM380556 reveal that Eva was twenty-seven when she was killed in 1993 (R-Ap. 101, 103)[2] and that in 1987 – when she was twenty-one – she had been charged with prostitution. R-Ap. 101. On the morning of the shooting, Clara Maric told police that Jabo was her daughter's pimp during the time she engaged in prostitution (27:21; D-App. 131).

Assuming that the information from Eva's mother – which Clara admitted she obtained by eavesdropping on Eva's phone calls – was correct, it would not show a pimp/prostitute connection between Eva and Jabo near the time of her death. The CCAP information showing a 1987

[2] Eva's date of birth is given as February 22, 1966 (R-Ap. 101), and the entry for November 27, 2006 indicates that she was a homicide victim on April 21, 1993 (R-Ap. 103).

prostitution charge would only connect Eva to Jabo six years before her murder, and that length of time is too remote to infer that Jabo still harbored ill will towards Eva – who had recently become his brother's girlfriend – in 1993. And if the information the State located on CCAP is ignored and only the police report is considered, Eva could have severed her ties with Jabo as long as ten years before her death. Based on the information in the police report, it is impossible to tell when Eva and Jabo parted ways because Clara Maric told police she "could not exactly describe how Eva managed to free herself from 'Jabo's' control, but somehow, she did manage to alienate herself from him" (27:22; D-App. 132).

Absent some indication of when Eva's liberation from Jabo occurred, it is highly speculative to say that Jabo had a motive to kill the woman his brother was dating. This is why the prosecutor objected to the presentation of evidence suggesting Jabo as the killer, noting that Jabo's relationship with the victim had ended "possibly years" before the shooting (51:10). It is also why the trial court correctly barred the admission of evidence regarding Jabo's prior relationship with Eva, i.e., because the evidence adduced by the defense "simply afford[ed] a possible ground of suspicion" against Jabo. Under *Denny*, 120 Wis. 2d at 623, this is insufficient to render the evidence admissible.

Significantly, even when Wilson filed his postconviction motion in 2011, he never provided additional information from Eva's mother or sister – or anyone else for that matter – specifying when the prostitute/pimp relationship had ended and indicating whether Jabo harbored any animus toward Eva long after the fact. That no additional evidence was cited in the motion suggests that whatever information is available from the Maric family does not support the theory that Jabo Friend had a motive to kill Eva in 1993. If such evidence had surfaced in the eighteen years between the crime and the filing of Wilson's motion, surely the motion would have referenced this evidence.

Wilson's assertion that the police report "stated that Ms. Maric had *recently* left the prostitution business" (Wilson's brief at 23; emphasis added) is therefore false. Nothing in the report suggests that Eva's exit from the sex trade was of recent vintage. According to her mother's statement, Eva had been dating Wilson for the past four years (27:22; D-App. 132), and there is no indication she was involved in prostitution during that time. Rather than supporting the inference of a recent split between Eva and Jabo, information in the police report establishing that Eva and Jabo's brother, Willie, were in a romantic relationship and visited Jabo's after-hours bar together suggests a more cordial relationship between Eva and Jabo had developed. Otherwise, why would she voluntarily frequent such an establishment if she thought the proprietor was intent on killing her?

Under this set of facts, the trial court correctly refused to allow Wilson to present evidence casting Jabo Friend as an alternate suspect. The only purported motive Jabo had to kill Eva was her desire to break free from him when he served as her pimp. *See* Wilson's brief at 21. But because there is no evidence to indicate that this motive existed near the time of her murder and not just six or more years earlier, Wilson did not – either at trial or eighteen years later when he filed his motion – satisfy *Denny*'s motive requirement with respect to Jabo Friend. Wilson's inability to forge a temporal connection between Eva's exit from the prostitution business and her murder is fatal to his *Denny* argument.

Finally, insofar as Wilson in a footnote denigrates the State's postconviction argument that the evidence in the police report was inadmissible on hearsay grounds (*see* Wilson's brief at 21), his contention that the statements of Clara and Deja Maric were admissible as excited utterances is nonsense. An excited utterance is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Wis. Stat. § 908.03(2). The Marics' statements were made while they were still

under the stress of excitement caused by Eva's murder. Their statements, however, did not relate to that startling event but instead recounted the history between Eva and Jabo Friend. Accordingly, those statements do not qualify as excited utterances.

For all these reasons, the trial court correctly prevented Wilson from introducing *Denny* evidence with respect to Jabo Friend.

C. Wilson has failed to satisfy *Denny*'s opportunity requirement with respect to Willie Friend; alternatively, any error in excluding the *Denny* evidence was harmless.

The *Denny* analysis with respect to Willie Friend is different than it was for his brother. Willie was present at the shooting scene, so it would be disingenuous to argue that Wilson failed to show Willie's proximity to the murder. As for motive, the defense offered the testimony of Mary Lee Larson, a friend of the victim, who said that two weeks before the shooting, Willie threatened that if Eva didn't keep "in check," he would kill her (56:15-16). During the same time frame, Larson also saw Willie slap Eva (*id.*:16-17). This evidence arguably was sufficient to satisfy *Denny*'s motive requirement.

Where the evidence failed was on the opportunity prong of *Denny*. As the prosecutor argued, in light of the physical evidence and Carol Kidd-Edwards's testimony, Willie "did not have the opportunity to commit this homicide" (57:9). The physical evidence[3] supported Willie's testimony that he had exited the passenger side of the victim's car when Wilson got out of his car, armed

[3] Unfortunately, by the time the record reached this court, all of the photographs and other exhibits had been destroyed. Accordingly, the State relies on the description of these exhibits furnished in the trial testimony.

with "a blue steel large revolver" (51:38), and started shooting at him, causing Willie to duck down on the passenger side of the opened door and start running (*id.*:39-40). Exhibits 3, 4, 14 and 15 depicted the bullet holes in the front passenger-side door of the victim's car (51:145-48), supporting Willie's testimony that he was shot at while ducking down behind the opened door. As Detective Dennis Kuchenreuther testified, the trajectory of the bullet strikes was consistent with the passenger door being open at the time shots were fired (*id.*:149).

Willie's testimony that he was still being shot at while running away (*see* 51:41) was also corroborated by exhibits 22, 23 and 24, showing bullet strikes in the concrete and in the dirt on either side of the sidewalk (51:154).

Willie's testimony was further corroborated by the testimony of eyewitness Carol Kidd-Edwards. As she was getting dressed for work, Kidd-Edwards heard "maybe five" consecutive gunshots ring out, causing her to take cover on her bedroom floor (51:97). When this set of shots stopped, she ran to her bedroom window and saw a man she identified as Willie Friend running from the car (*id.*:97-98); she saw no objects in Willie's hand while he was running (*id.*:100-01). After Willie had fled the scene, Kidd-Edwards saw another man approaching the car while loading a gun (*id.*:103). She saw the man go up to the driver's side of the victim's car and, from a distance of two feet, shoot five to seven rounds into the driver's side (*id.*:104-05). This observation was consistent with Willie's testimony that after he ran away, he heard "rapid shots back to the [sic] back" (*id.*:43). He believed the second set of shots came from a smaller gun than the first (*id.*:42) because the impact of the first shots was "much louder and heavier" (*id.*:43).

Expert testimony also was consistent with Willie's version of events. Firearams examiner Monty Lutz testified that two of the bullets recovered from the victim's body were fired from the same gun as the

jacketed bullet retrieved from the sidewalk area (53:58-59). This evidence is consistent with the same person killing Eva and shooting at Willie.

Additionally, the Milwaukee County medical examiner, Dr. Jeffrey Jentzen (53:100), testified that during the autopsy of Eva Maric, he recovered two large bullets and five smaller ones (*id.*:109). He opined that the larger caliber wounds were inflicted prior to the smaller caliber wounds (*id.*:113). This testimony is consistent with Willie's testimony that the first shots fired were from a larger weapon than the shots he heard after running away from the scene.

While Wilson in his brief suggests that the evidence was sufficient to show Willie had the opportunity to fire the large-caliber bullets into Eva (*see* Wilson's brief at 21-22, 23), trial counsel after hearing all of the evidence disavowed such a theory. Instead, during closing argument he told the jury that "Willie did not fire the shots" (58:71). Counsel theorized that Willie lured Eva to the shooting scene, where she was killed by two unknown people who drove by in a car (*id.*:71-72).

Even this theory is inconsistent with the physical evidence, however, because it fails to explain why the same person who shot Eva also fired shots at Willie.

The foregoing discussion establishes that the prosecutor was correct in arguing that the *Denny* evidence involving Willie Friend was insufficient to show opportunity. Or, as postconviction counsel for the State explained, the evidence was inadmissible because under the circumstances surrounding the murder, there was not a legitimate tendency that Willie could have committed it (*see* 36:7).

While the State submits that the trial court's ruling was correct, the State agrees with Wilson that some of the court's reasoning was not. For example, the trial court's apparent dislike of the *Denny* decision and its desire to

have the supreme court address the issue (*see* 57:12; D-App. 240) does not mean the court was free to disregard *Denny* or to wait for the supreme court to tackle the issue. But as this court is well aware, it can affirm the trial court's ruling even if it disagrees with that court's reasoning.[4] *See State v. Holt*, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985) (if trial court reaches the right result for the wrong reason, it will be affirmed).

Regardless of how inelegantly the trial court expressed itself, exclusion of the *Denny* evidence potentially inculpating Willie Friend was correct. Alternatively, for some of the same reasons the evidence did not establish a legitimate tendency that Willie killed Eva, any error in its exclusion was harmless.

While Wilson does not specifically acknowledge this, the theory that Willie was responsible for murdering Eva would necessarily require the jury to believe that he also framed Wilson. This is because Willie testified that in the hours before the shooting, he and Eva saw Wilson's car – a gold Lincoln with a personalized plate that read "G-Ball" (51:23-24) – on numerous occasions, including at the shooting (*id.*:36). Willie also testified that at some point after Eva left him at his mother's house shortly before 2 a.m. (*id.*:30), she came to his brother's house and reported that Wilson had just tried to run her off the road (*id.*:32). According to Willie, "she said the dude walked up to the car, supposed to have had a revolver and told her

[4] Wilson's reliance on SCR 60.04(1)(g)(2) to suggest that Judge Manian violated the Judicial Code of Ethics in consulting with a fellow jurist without notifying the parties (*see* Wilson's brief at 29) is ill-advised. That provision took effect January 1, 1997, three-and-one-half years after Wilson's trial. *See* Sup. Ct. Order 95-05, found at 202 Wis. 2d xvii. The previous version of the Code did not contain such a provision. *See* Volume 2, Wis. Stat. (1967), Appendix at 20-22. But even if the cited provision had been in effect during Wilson's 1993 trial, it does not apply to Judge Manian's consultation with a fellow jurist, which is covered by SCR 60.04(1)(g)3. That provision, quoted in full in Wilson's brief at 28, does not require notice to the parties when a judge consults with another judge.

that if I see you and that nigger together again, I'm going to kill you" (*id.*). Willie, who had never met Wilson before the night Eva was killed (*id.*:50), picked him out of a lineup as the shooter (*id.*:48).

Had Wilson been permitted to introduce *Denny* evidence with respect to Willie Friend, that evidence would have been contradicted by the physical evidence. As the trial court noted, Willie's hands were swabbed right after the crime but tested negative (57:14; D-App. 242). The court also remarked on how the physical evidence at the crime scene showed Willie was not Eva's killer:

> There were bullet fragments recovered in the door where – where he was sitting on the side where he was sitting, there were chips in the concrete and the dirt.
>
> That confirmed that he was being shot at while he was running down the street, as he says, and there's a lady across the street [Carol Kidd-Edwards] that was looking out the window that confirms that he was running away when the shots were being fired.

(57:14-15; D-App. 242-43.) When defense counsel referred to the above evidence as "the State's interpretation," the court disagreed:

> No, all I'm saying, that's the physical evidence, that's not an interpretation.

(*Id.*:15; D-App. 243.) While the above comments were made in the context of the trial court denying Wilson's request to present *Denny* evidence, they also serve to explain why any error in that ruling was harmless.

As the trial court remarked, the theory that Willie could have shot Eva fails to account for the physical evidence supporting his testimony that the person who killed Eva fired several shots at him. And even if appellate defense counsel switches gears and embraces

trial counsel's closing-argument theory that Willie just set up Eva but did not shoot her (*see* 58:71-72), that theory would fail to explain why one of his unnamed confederates tried to kill him.

The related but unstated theory that Willie framed Wilson does not lessen the impact of testimony from Carol Kidd-Edwards, whom trial counsel dubbed "the absolute truth teller" (58:83), that she saw a "gold toned Lincoln" departing the scene right after a gunman fired "a lot of shots" into the driver's side of the victim's car (51:105-06). While Wilson presented testimony from his sister Sandra establishing that she had observed other gold Lincoln Mark VII's in the general vicinity (*see* 53:174-180), it is highly unlikely the jury would have bought the theory that a different gold Lincoln than the one Wilson was driving that night was involved in Eva's murder.

The fact the proffered *Denny* evidence would have been contradicted by the physical evidence is not the only reason any error in excluding the former was harmless. Admission of any *Denny* evidence relating to Willie Friend would not have detracted from the fact Wilson repeatedly lied to police about his ownership of a .44 caliber weapon, the type of gun used to kill Eva Maric. The *Denny* evidence would not have diminished the impact of Wilson's belated admission at trial[5] that he did in fact own a .44 Smith and Wesson Magnum as recently as April 3, 1993 (55:56-57) and his eleventh-hour claim that he traded the gun for drugs and sex in Alabama on his way home from a vacation to Florida days before the shooting (*see id.*:57-60).

In light of the above evidence – and additional trial evidence not recounted here that points to Wilson as the killer of Eva Maric – any error in the exclusion of *Denny* evidence regarding Willie Friend was harmless.

[5] On cross-examination, the prosecutor elicited Wilson's admission that the first time he mentioned his ownership of the .44 was at trial (55:100).

II. WILSON IS NOT ENTITLED TO A NEW TRIAL ON THE GROUND THE STATE IMPROPERLY INTRODUCED EVIDENCE OF HIS GUN OWNERSHIP AND OTHER ACTS.

Wilson next claims that he merits a new trial because the State "improperly introduced prejudicial evidence of gun ownership and other acts." Wilson's brief at 33. According to Wilson, the allegedly improper evidence was designed to further two of the State's theories: 1) Wilson was a man who owned and used guns; and 2) Wilson used violence, allegedly in domestic disturbances. *See id.* He asserts that "[t]he State's pursuit of both theories was highly prejudicial error." *Id.*

Before addressing the specific questions Wilson deems improper, the State will debunk the notion that the prosecutor was the one who depicted Wilson as a man who owned and used guns. Contrary to Wilson's suggestion, the record reveals that defense counsel was the first to inject this information into the case. Specifically, defense counsel during his opening statement informed the jury of his client's familiarity with guns:

> Grant is not only a drill sergeant, but he's an expert marksman, which is an important issue in this case. He was an expert marksman. He's very familiar with weapons and he owned a number of weapons, you're going to hear all that about Grant.

(50:24.)

The record shows the defense *wanted* the jury to know that Wilson was an expert marksman familiar with guns. This point is further illustrated by defense counsel's closing argument, in which he pointed out that because of Wilson's "expert marksmanship," he could have shot Willie if he wanted to (58:121). Because the defense tried to use Wilson's expert marksmanship to its advantage in defending the charge of attempted first-degree intentional

homicide, it is hypocritical for Wilson to claim on appeal that the prosecutor improperly provided this information to the jury. *See* Wilson's brief at 35-36 (accusing the prosecutor of portraying Wilson as someone with a propensity for using guns, by asking whether he was "an expert marksman" (55:107)).

A. Wilson has forfeited the claim that the prosecutor improperly asked him whether he called his .44 his "Dirty Harry" gun; Wilson's assertion that he moved for a mistrial based on this question misrepresents the record.

Wilson at pages 33-36 of his brief argues that the prosecutor improperly asked him whether he called his .44 his "Dirty Harry" gun; claims that he moved for a mistrial based on this questioning but that the prosecutor averted a mistrial by promising she would call Pedro Smith, Wilson's roommate, to testify; and asserts that the prosecutor broke her promise by calling Smith but not asking him if Wilson called this weapon his "Dirty Harry" gun.

These arguments – presumably inadvertently – misrepresent the record in several respects. First, after trial counsel objected to the question but then withdrew his objection, he did not seek a mistrial based on this questioning. Second, the prosecutor's statement that she planned to call Pedro Smith related to a completely different objection, which the trial court had sustained. Third, during Smith's testimony the prosecutor did ask him about the matter to which the sustained objection related, i.e., his statement that Wilson's car was gone when Smith left for work at 3:55 a.m. (*see* 56:57).

In quoting a series of questions the prosecutor asked Wilson during cross-examination, appellate defense counsel begins with the following question and answer:

> Q. Okay. Pedro Smith was your roommate at the time, isn't that correct?
>
> A. He is still my roommate, yes.
>
> (Pause)

Wilson's brief at 34 (*see* 55:106).

By grouping the foregoing question and answer with the next series of questions asking Wilson whether he called his .44 his "Dirty Harry" gun, counsel creates the impression that the reference to Pedro Smith was meant to suggest that the "Dirty Harry" remark was made to him. In reality – and the pause between the two lines of questioning reinforces this – the prosecutor's reference to Smith was in conjunction with the *previous* line of questioning regarding the time Wilson told police he arrived home that morning and whether his roommate was there (*see* 55:102-04). During that portion of her cross-examination, the prosecutor began to frame the following question, to which defense counsel successfully objected:

> Q. So that if your roommate, Pedro[,] said that he got up at about –

(55:105.) Following an unreported sidebar,[6] the court sustained the objection on the ground the question was "going to assume a fact not in evidence" (*id.*).

The prosecutor then rephrased the question and asked Wilson a different one, which also elicited a defense objection (*id.*). After this objection was overruled, Wilson

[6] This case exemplifies the risks of unreported sidebars recognized in *State v. Mainiero*, 189 Wis. 2d 80, 95 n.3, 525 N.W.2d 304 (Ct. App. 1994), decided the year after Wilson's trial.

answered and the prosecutor continued her cross-examination:

> WITNESS: I got home between 3:30 and 4 o'clock and Pedro was not there.
>
> BY MS KRAFT:
>
> Q. Where did you park your car?
>
> A. In front of my house.
>
> Q. In fact, your car was not in front of your house between 3:50 and 4:10, was it?
>
> A. My car was in front of my house from 3:30 until I left that morning.
>
> It was there when I got up and went to work.
>
> Q. Okay. Pedro Smith was your roommate at the time, isn't that correct?
>
> A. He is still my roommate, yes.
>
> (Pause)

(55:106.) Pedro Smith's status as Wilson's roommate was therefore part of the questioning regarding the time Wilson claimed to have arrived home and whether his roommate was there; the reference to Smith was not part of the "Dirty Harry" inquiry. Contrary to the impression created in Wilson's appellate brief then, the prosecutor never asked Wilson whether he had told Smith that the .44 Wilson owned was his "Dirty Harry" gun.[7]

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[7] Appellate defense counsel is not the only one to misread the trial transcript. In his Rule 809.30 motion, postconviction counsel erroneously asserted that "the prosecutor asked Wilson if he had told his roommate, Pedro Smith, that his .44 was his 'Dirty Harry' gun" (27:6; D-App. 116). The transcript reveals that this is not what the prosecutor asked Wilson (55:106)

Additionally, Assistant District Attorney Denis Stingl, who filed a response to the postconviction motion (*see* 36; D-App. 135-42), acquiesced in defense counsel's representation that the reference

While Wilson claims his attorney moved for a mistrial based on the "Dirty Harry" questioning (*see* Wilson's brief at 34), that assertion is dead wrong.

After Wilson had left the stand (55:111), and the court had engaged in a lengthy discussion with counsel and the jury about when the case was likely to conclude (*id.*:112-15), defense counsel stated: "Your Honor, I may forget but I think I had two mistrial motions" (*id.*:115). Based on defense counsel's description of the first mistrial motion, and the prosecutor's response, it is apparent that defense counsel moved for a mistrial based on the question implying that Pedro Smith had told police Wilson was not home when Smith awoke to go to work:

> Ah, one [mistrial motion] was reference to Pedro's statement. Counsel wafted into the jury box the supposed statement of the roommate, Pedro Smith not in the record and I think that's a basis for a mistrial.
>
> I think there was no need to ask the question in that manner, other than to suggest to the jury that somebody, who's never been seen by these jurors and has never been in the courtroom would of here testified to, it denies the confrontation right guaranteed under the constitution and given the obvious tactical advice, it was to accomplish that to frustrate the constitutional right of my client, I think that that is grounds for mistrial.
>
> Adding another similar –
>
> MS KRAFT: I want to respond to that. I want to say I fully expect to be able to call Mr. Smith. I know the Court sustained the objection and I rephrased the question so it did not imply testimony that was in the record by Mr. Smith and I –
>
> That's all.

---

to Pedro Smith was part of the questioning about the "Dirty Harry" gun (36:2; D-App. 136).

(55:115-16.) The prosecutor's remark that the court had sustained the objection and that she then rephrased the question (*see id.*:116) makes it abundantly clear that the mistrial motion was not based on the question regarding Wilson's nickname for his .44. The objection to that question was promptly withdrawn rather than sustained (*id.*:106), and it was not followed by a rephrased question or an unreported sidebar.

Therefore, when the prosecutor informed the court "I fully expect to be able to call Mr. Smith" (55:116), she meant that she planned to call Smith to question him about whether Wilson was home when Smith left for work the morning of the homicide, and that is precisely what she did. She called Smith as a rebuttal witness, establishing that he got up at about 3:35 a.m. on April 21 and left for work around 3:55 a.m. (56:56). Smith testified he did not see Wilson in their home while he was getting ready for work, nor did he see Wilson's car parked in front of the house when he left (*id.*:56-57). Smith's testimony remedied any potential confrontation violation engendered by the prosecutor's remark "So that if your roommate, Pedro[,] said that he got up at about" (55:105).

A more careful reading of the record reveals that the "Dirty Harry" questioning did not prompt a mistrial motion or a promise by the prosecutor to ask Pedro Smith about Wilson's nickname for his .44. While defense counsel initially objected to the question, he promptly withdrew his objection and never raised it again, even after the prosecutor asked virtually the same question a second time (55:106).

The foregoing discussion establishes that Wilson forfeited any objection to the prosecutor's question by promptly withdrawing the objection and not mentioning it again. Contrary to Wilson's assertion (Wilson's brief at 34 and 36), there was no mistrial motion based on the question, so the trial court could not have erred in failing to grant one. Had Wilson pursued the objection, there would be a record of why the prosecutor asked the

question and a ruling on whether it was proper. While the State disagrees with Wilson's contention that asking him what he called a gun he admitted owning is other-acts evidence (*see* Wilson's brief at 35), the State will forego an extended discussion of this point, given Wilson's forfeiture. But insofar as Wilson accuses the State of asking the questions to show he "was a gun-using individual" (Wilson's brief at 35), the defense in opening statements had already stated its intention to do precisely that as part of its strategy. It is therefore difficult to see how Wilson could be prejudiced by the State embracing the same theory.

In conclusion, the State asks the court to refuse to consider the merits of that part of argument II. involving the "Dirty Harry" question because Wilson forfeited the right to raise that claim. *See State v. Jones*, 2010 WI App 133, ¶ 25, 329 Wis. 2d 498, 791 N.W.2d 390; Wis. Stat. § 901.03(1)(a).

B. The defense in cross-examining Terry Bethly opened the door to the questions the State asked her on redirect; alternatively, any error in the scope of the State's questioning was cured during recross-examination and was harmless.

As part of his second argument, Wilson claims the State improperly asked Terry Bethly the following questions in order to portray him as a violent person:

> Q. Did you tell [two detectives] that Grant is a very jealous person?
>
> A. No, I did not.
>
> Q. Did you tell them that, um, in fact, um, on previous occasions he was so jealous that he beat you?

A. No, I did not.

. . . .

Q. Did you tell them that there was an occasion that, in fact, he beat you and, um, was placed on supervision by the Court and had to attend Batterers' Anonymous?

. . . .

A. Not that he beat me, no, and yes, that he did have to go to Batterers' Anonymous.

(53:16-17; D-App. 168-69.)

Contrary to Wilson's argument, the purpose behind this questioning was to impeach Bethly's testimony – elicited by the defense on cross-examination – painting Wilson as a person devoid of jealousy, who was unfazed by his sexual partners contemporaneously maintaining relationships with other men. That the prosecutor's design was not to use Bethly to portray Wilson as a violent person is illustrated by the timing of the questions Wilson finds objectionable.

After calling Bethly to testify in the State's case-in-chief, the prosecutor on direct questioned her on a single topic, i.e., her trip to a Menominee Falls firing range with Wilson on April 3, 1993 (53:5-7). In contrast to the narrow scope of the prosecutor's direct examination, the defense cross-examined Bethly about a variety of subjects (*id.*:7-14). One subject was Wilson's tolerance in allowing Bethly to date other men while she was dating Wilson (*id.*:8-10). To make his point, defense counsel elicited Bethly's acknowledgment that on the night preceding Maric's murder, Bethly, within earshot of Wilson, had arranged a date with another man (*id.*:10). The obvious purpose behind this line of questioning was to undercut the State's theory that Wilson's motive for murdering Maric was jealousy arising from her relationship with Willie Friend.

It was only *after* defense counsel used Bethly as a sort of character witness for Wilson that the State on redirect undertook to impeach her by cross-examining her about whether she had told Detectives Murphy and O'Keefe that Wilson was a jealous person who had beaten her out of jealousy on previous occasions (53:16-17; D-App. 168-69).

When the prosecutor asked the first question about whether Bethly had told the detectives Wilson beat her out of jealousy, defense counsel raised the vague objection "that's not appropriate at all," which the trial court overruled (53:17; D-App. 169). No simultaneous record was made as to the prosecutor's reason for asking the question. But when defense counsel later argued that evidence about the incident involving Bethly should be grounds for a mistrial (*id.*:66; D-App. 171), the prosecutor explained that the defense had opened the door to such testimony by "attempting to show that he's not a jealous person" and "[h]e wouldn't have any reason to be jealous of Ms. Maric" (*id.*:67; D-App. 172). The trial court agreed and denied the mistrial motion:

> THE COURT: You opened the door by asking the witness about her relationship with the defendant and with other men and and his relationship with other women and that they knew each other for nine years. That didn't bother her, didn't bother him and left it with the impression that the defendant tolerated all this without in any way being affected. The witness was then asked about a specific incident, not about his reputation or what she thought about him, and under the circumstances, it appeared to me that that was appropriate rebuttal.

(53:68; D-App. 173.)

In attacking the trial court's decision to admit the evidence, Wilson points out that the State did not claim the evidence was admissible for any of the purposes spelled out in Wis. Stat. § 906.08(2). *See* Wilson's brief at 38. That statute does not govern the admissibility of Bethly's testimony, however. Section 906.08(2) provides

that "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than a conviction of crimes . . . may not be proved by extrinsic evidence." If the conduct at issue is that of Wilson, then asking Terry Bethly on redirect whether she told police that Wilson beat her because he was jealous did not involve a "specific instance[] of the conduct of a witness." Wilson was not a witness at that point of the trial. Rather, Bethly was the witness, and the incident the prosecutor inquired into had nothing to do with conduct evincing her jealousy.

Alternatively, because the prosecutor's questions were couched in terms of what Bethly had told detectives (*see* 53:16-18; D-App. 168-70), her statements to police can be regarded as her conduct. So viewed, the questioning was proper under § 906.08(2) because examining Bethly about what she told the police was designed to attack the credibility of her defense-elicited testimony. And, in compliance with that statute, the prosecutor did not call either of the detectives to prove that Bethly had in fact made the statements she denied on redirect. Had the State done so, the detectives would have been providing extrinsic evidence under the statute. While what occurred here does not precisely track the statutory language, given that Bethly was a prosecution witness, as a practical matter the State on redirect was cross-examining her about a topic Wilson raised that went far beyond the scope of her direct examination. Either way, the prosecutor's questions to Bethly on redirect did not violate § 906.08(2).

In complaining about Bethly's redirect testimony, Wilson fails to acknowledge that he used Bethly as a kind of character witness, i.e., an intimate who would vouch for his character for non-jealousy, without complying with Wis. Stat. § 904.05(1). That statute limits character evidence to reputation or opinion testimony, but Bethly's was neither. Where character is proved by reputation or opinion testimony, § 904.05(1) provides that on cross-examination, "inquiry is allowable into relevant specific

instances of conduct." So although that statute does not technically apply here, the State's conduct in cross-examining Bethly about what she told police about Wilson's jealous nature was consistent with the spirit of the statute. In other words, had Wilson asked Bethly her opinion on whether Wilson was a jealous person, under § 904.05(1) the State could have cross-examined her about "relevant specific instances of [his] conduct." *See King v. State*, 75 Wis. 2d 26, 40, 248 N.W.2d 458 (1977) (proper for State to cross-examine expert witness on incidents of defendant's violence after expert gave opinion testimony on defendant's general character trait of nonhostility).

For the reasons discussed above, there was no impropriety in the prosecutor questioning Bethly about her statement to police regarding Wilson's jealousy. But even if this court were to disagree, any error was cured by defense counsel's recross-examination of the witness. During recross, the defense established that the incident resulting in Wilson having to attend Batterers' Anonymous involved Bethly brandishing a gun and Wilson taking it away from her and did not arise from his jealousy (53:19-20). Because Wilson grabbed her by the hair, and someone contacted the police, Wilson agreed to attend Batterers' Anonymous to avoid having to go to court over the incident (*id.*). This recross-examination refuted the notion that the prior incident involved Wilson being jealous or beating Bethly. Any error in allowing the prosecutor to question Bethly about the incident was therefore cured and rendered harmless by the recross-examination of the witness.

C. The prosecutor's reference to a pistol having been taken by police during a 1986 domestic disturbance was not improper and does not entitle Wilson to a new trial.

The last claim of error encompassed in Wilson's second major argument is that the prosecutor improperly

asked Wilson, "Did you tell [officers] that one of the pistols that you have was taken in 1986 during a domestic disturbance?" (55:83). *See* Wilson's brief at 39. Although that question did not elicit an immediate objection (55:83), once Wilson answered it, defense counsel requested and received a sidebar (*id.*:84). While that sidebar is unreported,[8] a later discussion between the court and both counsel indicates that the defense had moved for a mistrial during the sidebar (*id.*:117-21). The trial court reconstructed the sidebar as follows:

> [The Prosecutor] indicated that she didn't intend to pursue that, that that wasn't her intention was not [to] bring out anything about a domestic dispute, but to refresh the defendant's recollection regarding the third weapon, which it did, and then he remembered that there was a third weapon.
>
> Ah, I – the prosecutor asked if the defense wanted some kind of a curative instruction at that point and you indicated at side bar that if that's as far as she was going, that you prefer to just leave it at that for the time being.

(55:121.) Noting that defense counsel had chosen to forego a cautionary instruction after the prosecutor asked the question, the trial court denied the mistrial motion "on the totality of the circumstances" (*id.*:122).

Contrary to Wilson's assertion, the question the prosecutor asked Wilson about what he told police regarding ownership of a particular weapon was not intended "to cement the idea that Mr. Wilson owned guns and was violent." Wilson's brief at 39. Rather, as the prosecutor explained, she asked the question in response to Wilson's direct testimony that during interviews with police after the shooting, he neglected to mention to officers weapons he had owned but no longer possessed (55:118). The prosecutor wanted to illustrate that in fact, Wilson had told police about several guns he owned but

[8] This is yet another example of the pitfalls of holding unreported sidebars. *See* n.2, *supra*.

no longer possessed, including one he described as having been taken from him during a 1986 domestic disturbance (*id.*). While Wilson is correct in asserting that the question could have been sanitized to remove any reference to a "domestic disturbance," he is wrong in imputing malevolent motives to the prosecutor in posing the question. The question was designed to stress that Wilson purposely avoided telling police about his ownership of a .44 because he knew that caliber of weapon was used to shoot Eva Maric.

Under the circumstances, the trial court's denial of the mistrial motion was not an erroneous exercise of discretion, particularly given the fleeting reference to "domestic disturbance" and counsel's strategic decision to forego a cautionary instruction telling the jury to disregard the reference. *See State v. Doss*, 2008 WI 93, ¶ 69, 312 Wis. 2d 570, 754 N.W.2d 150 (denial of mistrial motion will be reversed only on clear showing of an erroneous exercise of discretion).

For all these reasons, Wilson is not entitled to a new trial on the claims of error raised in argument II. of his brief.

III. WILSON HAS NOT SHOWN THAT COUNSEL WAS INEFFECTIVE IN FAILING TO PROVIDE A MORE DETAILED OFFER OF PROOF WITH RESPECT TO THE *DENNY* EVIDENCE.

A. General principles and standard of review.

Strickland v. Washington, 466 U.S. 668 (1984), establishes the standards for evaluating claims of ineffective assistance of counsel. To prove an ineffective-assistance claim, the defendant must satisfy *Strickland's*

two-part test: he must prove that counsel's performance was deficient and that the deficient performance was prejudicial. *Id.* at 687. In light of this two-pronged test, this court in reviewing a claim of ineffective assistance "may reverse the order of the two tests or avoid the deficient performance analysis altogether if the defendant has failed to show prejudice." *State v. Johnson*, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990); *State v. Kuhn*, 178 Wis. 2d 428, 438, 504 N.W.2d 405 (Ct. App. 1993).

An attorney's performance is deficient if the attorney "'made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" *Johnson*, 153 Wis. 2d at 127, quoting *Strickland*, 466 U.S. at 687.

To demonstrate prejudice under *Strickland*, a defendant must show that there is a reasonable probability that the result of the proceeding would have been different, but for his attorney's deficient performance. *See State v. Thiel*, 2003 WI 111, ¶ 20, 264 Wis. 2d 571, 665 N.W.2d 305. Stated another way, the prejudice inquiry focuses on "the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993).

A claim of ineffective assistance of counsel presents a mixed question of fact and law. *State v. O'Brien*, 223 Wis. 2d 303, 324, 588 N.W.2d 8 (1999). The appellate court will affirm the trial court's findings of historical fact concerning counsel's performance unless those findings are clearly erroneous. *Id.* at 324-25 But the ultimate question of ineffective assistance is one of law, subject to independent review. *Id.*

B. With respect to *Denny* evidence implicating Jabo Friend, Wilson still has not shown that any member of the victim's family could have provided the necessary linkage between Eva's refusal to work as a prostitute and her murder.

As an alternative to his argument that the trial court erred in excluding *Denny* evidence inculpating Jabo Friend in Eva Maric's murder, Wilson contends trial counsel was ineffective because he "should have called either or both Clara Maric and Deja Maric as witnesses at trial or, at least, made an offer of proof." Wilson's brief at 42.

The flaw in this argument is the glaring omission from the postconviction motion (27; D-App. 111-134) of any statement indicating that postconviction counsel had contacted either or both Marics and determined that they could have temporally connected Eva's decision to cut ties with Jabo and her murder. Absent such a connection, the same lacuna in the Jabo-related *Denny* evidence that supports its exclusion also torpedoes Wilson's claim that counsel was deficient in failing to furnish a better offer of proof, and that the trial court should have afforded him an evidentiary hearing on this claim. The motion relied on the police report as the sole support for Wilson's assertion that Jabo harbored a motive to kill Eva. But as the State has already demonstrated in argument I., the report was so vague with respect to the timing of Eva working as a prostitute for Jabo and eventually leaving his employ that it failed to establish that he had a motive to kill her in 1993. Nothing in the postconviction motion cures that deficiency. Without some indication that trial counsel had available, but did not explore or use, witness testimony that would have rendered the Jabo-related *Denny* evidence admissible, the motion failed on the deficient-performance prong of *Strickland*. In other words, for the same reason

the trial court correctly excluded *Denny* evidence inculpating Jabo, the postconviction court correctly denied this claim of ineffective assistance without a hearing.

C. With respect to *Denny* evidence implicating Willie Friend, any deficiency in counsel's performance was not prejudicial under *Strickland*.

The State has already shown in argument I. why any error in excluding *Denny* evidence inculpating Willie Friend was harmless error. For the same reasons, even if this court assumes that trial counsel was deficient in failing to make a more thorough offer of proof with respect to the *Denny* evidence implicating Willie in Eva's murder, counsel's deficiency did not prejudice Wilson.

Simply stated, evidence that Willie had been physically abusive toward Eva in the weeks before her death would not have diminished the impact of the State's evidence, particularly the physical evidence supporting Willie's version of how the shooting unfolded. Evidence that Willie had said he would kill Eva if she didn't stay "in check" would not have detracted from testimony of a disinterested witness, Carol Kidd Edwards, whose eyewitness testimony described a portion of the shooting that jibed with Willie's version of events and linked a car like Wilson's to the crime scene. Nor would evidence of Willie's mistreatment of Eva have undercut evidence that Wilson possessed a gun of the caliber used in the murder and attempted to hide that fact from police.

Because Wilson has not shown he was prejudiced by counsel's failure to present a more thorough offer of proof regarding the *Denny* evidence inculpating Willie, this court need not address the deficient performance prong of *Strickland*. This is because in evaluating a claim of ineffective assistance, reviewing courts "may reverse

the order of the two tests or avoid the deficient performance analysis altogether if the defendant has failed to show prejudice." *Johnson*, 153 Wis. 2d at 128; *Kuhn*, 178 Wis. 2d at 438.

D. Because Wilson has failed to develop the argument – suggested in his statement of the issues – that counsel was ineffective in objecting to the introduction of "prejudicial character evidence," this court should decline to address that question.

In framing the third issue presented for review, Wilson indicates that one claim of ineffective assistance being raised is that his attorney "failed to object properly to the introduction of prejudicial character evidence against Mr. Wilson." Wilson's brief at 1.

Despite his framing of the issue, Wilson in argument III. of his brief argues only that counsel was ineffective in crafting the offers of proof necessary to admit the *Denny* evidence. *See* Wilson's brief at 41-43. Wilson does not allege that counsel was ineffective in failing to register the proper objection to the admission of what Wilson characterizes as "prejudicial character evidence" against him. *See id.* at 1.

In his entire argument III., Wilson makes but a one-sentence reference to this evidence: "The absence of proof is all the more glaring when the State could introduce prejudicial character evidence, to which [defense counsel], at times, did not effectively object." Wilson's brief at 43. Even coming from a pro se litigant – which Wilson is not – that sentence is undeniably inadequate to raise a claim of ineffective assistance. Because Wilson has made no effort to develop this argument, this court should decline to address it. *See State*

v. Pettit, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court need not consider arguments that are inadequately briefed).

CONCLUSION

This court should affirm the judgment and order of the circuit court.

Dated this 18th day of October, 2012.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9176 words.

_____
Marguerite M. Moeller
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 18th day of October, 2012.

_____
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