STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP702-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MIGUEL MUNIZ-MUNOZ,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE RICHARD J. SANKOVITZ, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication because the issues in this case can be resolved by applying established legal principles to the facts.

SUPPLEMENTAL STATEMENT OF THE CASE

After a jury trial, Miguel Muniz-Munoz was convicted of first-degree intentional homicide and first-degree recklessly endangering safety, both as a party to a crime (54).[1] The charges were based on Muniz-Munoz's involvement in a shooting of rival gang members in Milwaukee, in which one person was injured and a second, Adrian Lara, was killed (2).

On appeal, Muniz-Munoz raises four issues for this court's review, none of which merit relief.

Muniz-Munoz does not present a full statement of the facts in his brief. Normally, the State would respond by providing a more detailed supplemental statement of the case. But under the circumstances, the State believes that it will most effectively assist this court by presenting the facts within each relevant part of the argument section, below.

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[1] The judgment of conviction appears to have at least two clerical errors. First, it indicates that Muniz-Munoz entered guilty pleas (54), but he pleaded not guilty (81:5) and a jury subsequently found him guilty after a trial (48; 49). Second, the judgment of conviction identifies the second crime to be attempted first-degree intentional homicide, party to a crime (54:2), but the jury actually found Muniz-Munoz guilty of the lesser-included offense of first-degree recklessly endangering safety, party to a crime (49).

Those clerical errors have no bearing on the issues Muniz-Munoz raises in his appeal. Nevertheless, with its disposition, this court should remand this case to the circuit court for the clerk of courts to correct the judgment of conviction. *See State v. Prihoda*, 2000 WI 123, ¶5, 239 Wis. 2d 244, 618 N.W.2d 857 (stating that the circuit court must correct a clerical error in a written judgment or direct the clerk's office to make the correction).

ARGUMENT

I. The circuit court properly exercised its discretion when it declined to hold hearings on claims that two jurors slept during testimony, after it found that neither juror had been sleeping.

Muniz-Munoz first argues that the circuit court erroneously exercised its discretion when it declined to further investigate allegations that two jurors appeared to be sleeping during portions of the trial (Muniz-Munoz's br. at 6).[2] He argues that this court should remand for a hearing on the issue (Muniz-Munoz's br. at 8). But because the court found, based on its contemporaneous observations, that neither juror had been sleeping, the circuit court soundly exercised its discretion in declining to further inquire into Muniz-Munoz's claim.

A. This court defers to the fact-finding and discretionary functions of the circuit court in considering inattentive juror claims.

Due process requires that jurors have heard all of the material portions of the trial. *State v. Novy*, 2013 WI 23, ¶47, 346 Wis. 2d 289, 827 N.W.2d 610 (citing *State v. Kettner*, 2011 WI App 142, ¶23, 337 Wis. 2d 461, 805 N.W.2d 132). A juror's failure to hear all material portions of a trial, whether due to a hearing impairment or a semiconscious state, "could imperil the guarantees of impartiality and due process." *Id.* (quoting *State v. Hampton (Hampton I)*, 201 Wis. 2d 662, 668, 549 N.W.2d 756 (Ct. App. 1996)) (internal quotation marks omitted).

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[2] Muniz-Munoz frames this issue as a purely constitutional question and summarily describes the standard of review as de novo (Muniz-Munoz's br. at 6). As described above, this court reviews the circuit court's factual findings under the clearly erroneous standard and any determination of prejudice for legal error.

When confronted with an allegation of juror inattentiveness, the circuit court must first determine, as a question of fact, whether the juror was actually inattentive to the point of potentially undermining the fairness of the trial. *Id*. (citing *State v. Hampton (Hampton II*), 217 Wis. 2d 614, 621, 579 N.W.2d 260 (Ct. App. 1998)). In other words, when a defendant claims that a juror appeared to be sleeping, the court must find whether the juror was actually asleep. *Id.* (citing same).

If the circuit court finds that the juror was in fact sufficiently inattentive, the court must then determine whether the defendant suffered prejudice as a result of the juror's inattentiveness. *Id.* (citing same).

Questions involving juror conduct and attentiveness require the circuit court to exercise its broad discretion. *Id.* ¶48 (citing same). Although this court reviews a circuit court's prejudice analysis as a matter of law, it will uphold a circuit court's factual findings regarding the conduct and attentiveness of the jurors, unless those findings are clearly erroneous. *Id.* (citing *Kettner*, 337 Wis. 2d 461, ¶12).

Again, as a prerequisite to a claim that a sleeping juror deprived a defendant of his right to an impartial jury and fair trial, the circuit court must make a factual finding that the juror was sleeping. *Id.* ¶49. Without such a finding by the circuit court, it follows that neither the circuit court nor this court needs to address the legal question of prejudice.

B. The circuit court's finding that the first juror was not sleeping was not clearly erroneous.

The challenge involving the first juror arose during the morning session of the trial on February 15, 2012 (107). During a midmorning break, the court explained that when defense counsel was cross-examining a State's witness about fifteen minutes earlier, one juror (Juror Brunner) was closing his eyes

and once nodded his head (107:69; A-Ap. 6). The court made the following observations:

> I watched him carefully trying to get my opportunity to catch him eye-to-eye so I could give him a nonverbal [cue] that he needed to keep his eyes open. I made these observations, two of them. First of all, his eyes were never closed for more than ten seconds at a stretch. Secondly, until the break, he never did the other thing we worry about[,] which is the head going and the mouth opening or head and chin dropping[,] which is a sign of a deeper snooze.
>
> In fact, that didn't happen until after we took [a brief sidebar break], and the instant it happened is when he started to keep his eyes open more frequently. After we took the break, what I mean by "break" is the sidebar, [defense counsel] wisely eyeballed him once and that helped revive him a bit. And then within I'd say about four minutes of that, at the end of the sidebar, I actually caught him eye-to-eye, and from that point forward it wasn't a problem.

(107:69-70; A-Ap. 6-7).

The court found that Juror Brunner was not asleep and did not miss testimony (107:70; A-Ap. 7). It found that Brunner was, at most, "closing his eyes and listening without looking[,] which isn't the best of situations but it's not the worst" (*id.*). Accordingly, it determined that it did not need to release Brunner or have testimony repeated (*id.*).

Defense counsel objected, telling the court that after the sidebar she saw Brunner "close his eyes quite a bit" and "looked like he was sleeping to me" (107:70-71; A-Ap. 7-8). She asked that Brunner either be removed or questioned away from the other jurors as to whether he had fallen asleep (*id.*).

After asking counsel follow-up questions, the court reiterated its findings that Brunner did not fall asleep:

> Like I said, for about four minutes after the sidebar, he continued to close his eyes on and off, never more than ten seconds. And I don't believe he was doing anything more than closing his eyes. I think it's fair to say that you [defense counsel] were concentrating on

> your cross-examination, so you weren't able, as I was, to watch him constantly for ten to fifteen seconds at a time, which is what I was doing . . . in hopes of catching him eyeball to eyeball. And the second I did that, he was perfectly awake for the rest of the time[,] which is another sign that he wasn't that deeply asleep. But I don't even want to suggest that he was at all asleep. He wasn't snoozing very much at all to begin with.

(107:72-73; A-Ap. 9-10).

The circuit court did not clearly err in finding that Juror Brunner was not sleeping. As the court explained, it was in a position to observe Brunner for extended periods. During that time, it never saw him close his eyes for more than ten seconds at a time. It observed Brunner briefly nod his head once, but also noted that eye contact from defense counsel and the court encouraged Brunner to keep his eyes open. It further observed that Brunner seemed "perfectly awake" and alert after that eye contact, which suggested that Brunner had not fallen asleep at all.

Under *Novy*, because the court found that Juror Brunner did not fall asleep, it properly exercised its discretion in declining to grant Muniz-Munoz's request for a voir dire, and for not making additional findings and conclusions as to prejudice.

Muniz-Munoz seizes upon the court's use of the word "snoozing"—i.e., "[h]e wasn't snoozing very much at all to begin with"—to argue that the court indeed conceded that Brunner was asleep (Muniz-Munoz's br. at 7-8). But because context matters, Muniz-Munoz's tortured interpretation cannot succeed.

Just before it made that remark, the court stated, "I don't even want to suggest that he was at all asleep" (107:73; A-Ap. 10). The court did not then immediately contradict itself and use the word "snoozing" to indicate that it indeed believed that Brunner was asleep. Rather, its use of "snoozing" appeared to be shorthand for its observations of Brunner's closing his eyes

for no more than ten seconds at a time and once nodding his head, before Brunner corrected himself. The court stated that from its vantage point, Brunner never became semiconscious such that he missed material testimony.

C. The circuit court likewise properly declined to question the second juror.

As an initial matter, Muniz-Munoz fails to present relevant facts or any argument for why the court's refusal to question the second juror was improper. Accordingly, this court may decline to address this portion of his argument, to the extent he raises it, as inadequately briefed. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (this court may decline to address issues inadequately briefed).

That said, it does not appear that there was a legitimate concern about a second juror sleeping. During the afternoon break on the same day, the court noted that defense counsel Vishny requested a sidebar because "she was concerned about one of the jurors nodding off, Mr. Gardner" (108:73; A-Ap. 11). The court explained that after being alerted to the concern,[3] he watched Juror Gardner and "had not seen a single problem" (*id.*).

The court invited Vishny to "add anything to the record," and Vishny stated, "Just that as soon as I saw it, I brought it to the Court's attention. [Defense co-counsel] Mr. Lockwood told me, and I tried to get the Court's attention right away" (*id.*). Shortly after, Attorney Lockwood provided no additional description of what he thought he saw Gardner doing (or if he did, it was inaudible to the reporter):

[3] Attorney Vishny appeared to request the sidebar at 108:67, when the court asked Vishny if she had "a question on something in the courtroom." After the sidebar, the testimony continued through the break at 108:73.

> The only thing I noticed about Mr. Gardner at some point before the cross, because I didn't want to interrupt Ms. Vishny, but he was—(Inaudible)—and trying to get her attention and kept looking at you and attempted to get your attention and simply thought it was appropriate when we went to sidebar to let you know that.

(108:75; A-Ap. 13). Vishny subsequently requested questioning of Gardner and Brunner, and the court declined that request (108:76; A-Ap. 14).

Again, Muniz-Munoz makes no argument why the court's decision was improper, nor can he. Defense counsel alerted the court to their concerns about Gardner, the court subsequently observed Gardner, and the court did not see "a single problem" (108:73; A-Ap. 11) with Gardner appearing to close his eyes or nod off. The record offers nothing to suggest what defense counsel thought Gardner did that caused concern, or that anyone else observed behavior in Gardner that would have justified further questioning on whether he was asleep.[4]

To be sure, during this discussion, counsel for the State expressed concerns about *Juror Brunner* seeming to show signs of drowsiness again (108:74; A-Ap. 12). The court explained that

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[4] If Muniz-Munoz suggests that counsel for the State, Attorney Huebner, agreed that Gardner was sleeping (Muniz-Munoz's br. at 7), that is false. As noted above, Huebner raised additional concerns during the discussion about Juror Brunner, not Juror Gardner. When Huebner did that, it became apparent that he mistakenly thought defense counsels' concerns were also about Brunner. *See* 108:74; A-Ap. 12 (series of questions where Vishny explained that she was talking about Gardner, and Huebner explained that he was not talking about Gardner but rather "purple," which the court seemed to understand to signify Brunner); *id.* at 75; A-Ap. 13 (Huebner explaining that he had mistakenly believed that defense counsel was concerned about the juror "in the purple shirt" and that he didn't realize that the defense had concerns "about a whole different juror"). Indeed, when asked whether he noticed any problems with Juror Gardner, Huebner stated, "I didn't notice anything about [Gardner]" (108:75; A-Ap. 13).

it had observed Brunner after the sidebar and again found that Juror Brunner was not sleeping:

> I would say less than half a dozen times, no more than three seconds I saw him close his eyes. I never saw a head nod or anything else like that. Sometimes when people's eyes' closing, they only are opened less than half-mast, you get the impression they are only fluttering open. He had his eyes open wider than that. I'm not concerned at all about Juror Brunner.

(108:75; A-Ap. 13). Again, those findings are not clear error, and the court properly declined to explore the issue further.

In sum, the court found that neither Juror Brunner nor Juror Gardner was sleeping. The court supported those findings with a detailed explanation of its own observations in the record; they are not clearly erroneous. Accordingly, Muniz-Munoz's rights to an impartial jury and fair trial were not compromised. He is not entitled to relief on this claim.[5]

II. The circuit court properly concluded that the State did not violate Muniz-Munoz's confrontation rights when it presented testimony from Dr. Peterson, a medical examiner who formed an independent opinion as to the cause of the victim's death based in part on an unavailable expert's autopsy report.

Muniz-Munoz's second argument, in which he invokes his right to confrontation based on the State's use of a medical examiner, Dr. Brian Peterson, who did not perform the autopsy of the victim, Lara, fails because Dr. Peterson formed his own opinion as to the cause of Lara's death. Further, Lara's cause of death by multiple gunshot wounds was not a fact in dispute,

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[5] Because the circuit court found that neither Brunner nor Gardner were sleeping, it did not make findings or conclusions as to prejudice. *See State v. Novy*, 2013 WI 23, ¶¶47-48, 346 Wis. 2d 289, 827 N.W.2d 610. Accordingly, if this court determines that the circuit court's findings were clearly erroneous, it should remand for a hearing for findings as to prejudice.

rendering any error in admitting Dr. Peterson's opinion harmless.

A. An expert witness who testifies to his independently formed opinion, even if that opinion is in part based on an unavailable expert's report, does not offend a defendant's confrontation rights.

"The Confrontation Clause of the Sixth Amendment provides that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" *State v. Deadwiller*, 2013 WI 75, ¶20, 350 Wis. 2d 138, 834 N.W.2d 362 (quoting U.S. Const. art. VI).

In *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court "held that the Confrontation Clause permitted the admission of '[t]estimonial statements of witnesses absent from trial . . . only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.'" *Deadwiller*, 350 Wis. 2d 138, ¶20 (quoting *Crawford*, 541 U.S. at 59).

But a defendant's right to confrontation is not violated when an expert testifies to his or her own independently formed opinion that is based in part on another unavailable expert's test results. *State v. Williams*, 2002 WI 58, ¶81, 253 Wis. 2d 99, 644 N.W.2d 919. In *Williams*, the supreme court emphasized the important "distinction between an expert who forms an opinion based in part on the work of others and an expert who merely summarizes the work of others. In short, one expert cannot act as a mere conduit for the opinion of another." *Id.* ¶19.

The *Williams* court set forth the following standard in confrontation cases:

> [T]he presence and availability for cross-examination of a highly qualified witness, who is familiar with the procedures at hand, supervises or reviews the work of the testing analyst, and renders her own expert opinion is sufficient to protect a defendant's right to confrontation, despite the fact that the expert was not the person who performed the mechanics of the original tests.

Id. ¶20.

Recently, the supreme court reexamined the principles of *Williams* and *Deadwiller* in light of subsequent federal law examining other confrontation challenges. *State v. Griep*, 2015 WI 40, ¶40, ___ Wis. 2d ___, ___ N.W.2d ___. In so doing, it reaffirmed the rule announced in *Williams* and *Deadwiller* that "if the expert witness reviewed data created by the non-testifying analyst and formed an independent opinion, the expert's testimony does not violate the Confrontation Clause." *Id.*

Although "'a circuit court's decision to admit evidence is ordinarily a matter for the court's discretion, whether the admission of evidence violates a defendant's right of confrontation is a question of law subject to independent appellate review.'" *Id.* ¶17 (quoting *Deadwiller*, 350 Wis. 2d 138, ¶17 and *Williams*, 253 Wis. 2d 99, ¶7).

B. Dr. Peterson testified to his independently formed opinion that multiple gunshot wounds caused Lara's death. He was not a conduit for the unavailable expert's view.

At trial, Dr. Peterson, the Milwaukee County medical examiner, testified that in his opinion, Lara died of multiple gunshot wounds (109:13; A-Ap. 22). Dr. Peterson testified that although he usually formed an opinion of the cause of death based on his own autopsy, his training and experience also allowed him to review others' work to form an opinion as to a cause of death (109:14-15; A-Ap. 23-24).

Dr. Peterson stated that in this case, he did not personally examine Lara and perform the autopsy, but rather that the late Dr. John Teggatz had done the autopsy (108:96; 109:15; A-Ap. 24). In cases where Dr. Peterson does not personally perform an autopsy, he looks to "everything that is available," including autopsy reports, investigative reports, any reports from paramedics or the police, toxicology reports, and photographs (109:15-16; A-Ap. 24-25). Here, Dr. Peterson stated that after reviewing all of the materials available to him—including multiple photographs of Lara's body that showed that Lara had 27 wounds caused by ten gunshots—he independently opined that those multiple gunshots caused Lara's death. (109:18, 22, 24; A-Ap. 27). As Muniz-Munoz indicates in his brief, Dr. Teggatz's autopsy report was not introduced at trial.

The facts of this case are consistent the other Wisconsin cases in which the courts concluded that a surrogate expert did not violate the defendant's confrontation rights.[6] Here, Muniz-Munoz does not dispute that Dr. Peterson, as the Milwaukee County Medical Examiner, is well-qualified to opine on the cause of death in forensic examinations. He does not dispute that Dr. Peterson is familiar with autopsy procedure, or that he is qualified to opine on the cause of death of a victim where he did not personally perform the autopsy. He does not challenge Dr. Peterson's numerous assertions that he formed his opinion independently based on his review of multiple reports and photographs, not just the autopsy report. Indeed, nothing in the record suggests that Dr. Peterson simply adopted Dr. Teggatz's opinions as his own and acted as a conduit to get those opinions in. Dr. Peterson made clear several times in his

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[6] *See, e.g., State v. Williams*, 2002 WI 58, ¶26, 253 Wis. 2d 99, 644 N.W.2d 919 (concluding that unit leader's testimony did not violate the Confrontation Clause because she was well-qualified and gave an independent expert opinion); *State v. Barton*, 2006 WI App 18, ¶11, 289 Wis. 2d 206, 709 N.W.2d 93.

testimony that he reached his opinion independently based on the materials available to him (109:18, 22, 23-24; A-Ap. 27).

Rather, Muniz-Munoz asserts that because he had no prior opportunity to cross-examine Dr. Teggatz, his "right to confrontation was violated when the surrogate, Dr. Peterson, testified to his opinion on the cause of death" (Muniz-Munoz's br. at 11). But as noted above, Dr. Teggatz's opinion was not presented to the jury, either in the form of the autopsy report or through Dr. Peterson as a conduit. Rather, Dr. Peterson provided his independent opinion, and Muniz-Munoz had an opportunity to cross-examine Dr. Peterson on Dr. Peterson's opinion. Hence, under *Griep*, *Williams*, and *Deadwiller*, there is no confrontation problem.

Because Dr. Peterson's testimony did not violate Muniz-Munoz's confrontation rights, the circuit court properly exercised its discretion in allowing him to testify.

C. Alternatively, any error was harmless.

Even assuming that the admission of Dr. Peterson's testimony was somehow improper, "a Confrontation Clause violation . . . is subject to harmless error analysis." *Deadwiller*, 350 Wis. 2d 138, ¶41 (citations omitted). An error is harmless, when the party benefitting from the error shows that "'it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *Id.* (citations omitted). Thus, "[t]o conclude that the error was harmless, this court must determine that 'the jury would have arrived at the same verdict had the error not occurred.'" *Id.* (citations omitted). Several factors guide this court's analysis: "'the frequency of the error; the importance of the erroneously admitted evidence; the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence; whether the erroneously admitted evidence duplicates untainted evidence; the nature of the defense; the

nature of the State's case; and the overall strength of the State's case.'" *Id.* (citation omitted).

Dr. Peterson's testimony was unimportant and unrelated to Muniz-Munoz's defense. The question in this case was not *how* Lara died, but rather *who* shot and killed him. Lara was shot ten times. Dr. Peterson's testimony that the many gunshot wounds killed him simply bolstered an obvious and undisputed fact. Indeed, although the autopsy photographs showing Lara's bullet-ridden body are not part of the appellate record, they were admitted and the jury viewed them.[7] No one questioned whether Lara died from his gunshot wounds, nor was there any basis to suspect that something else caused his death.

And appropriately, Muniz-Munoz did not present a defense theory that the gunshots did not kill Lara. Rather, his defense was that someone else shot and killed Lara. To that end, Muniz-Munoz highlighted that Dr. Peterson could not identify whose weapon caused the individual gunshot wounds (109:20-21). Further, the theme of his closing argument was that someone else—namely, one or both of the coactors who testified against Muniz-Munoz—shot and killed Lara (111:39).

In sum, it is clear beyond a reasonable doubt that the jury would have arrived at the same verdict without Dr. Peterson's testimony. Muniz-Munoz is not entitled to relief on this ground.

III. The circuit court properly declined to submit Muniz-Munoz's special jury instruction.

Next, Muniz-Munoz complains that the circuit court improperly denied his motion to include a special instruction to the jury telling it to weigh Muniz-Munoz's statements to police

[7] The autopsy photographs were admitted with testimony from Gary Temp, a police detective who observed Dr. Teggatz's autopsy and the wounds on Lara's body (108:93-99).

"with great caution and care" because he made them during an unrecorded interrogation (Muniz-Munoz's br. at 11-13). *See* 45; 110:89-90; A-Ap. 28, 30-31.

The circuit court "may exercise wide discretion in issuing jury instructions based on the facts and circumstances of the case." *State v. Roubik*, 137 Wis. 2d 301, 308, 404 N.W.2d 105 (Ct. App. 1987). As this court stated:

> This discretion extends to both choice of language and emphasis. The ultimate resolution of the issue of the appropriateness of giving a particular instruction turns on a case-by-case review of the evidence, with each case standing on its own factual ground. In addition, if the instructions of the court adequately cover the law applicable to the facts, this court will not find error in the refusal of special instructions, even though the refused instructions themselves would not be erroneous.

Id. at 308-09 (footnotes omitted).[8] Here, the circuit court did not erroneously exercise its discretion in declining Muniz-Munoz's proposed instruction.

The instruction at issue relates to a 2004 interrogation in which Muniz-Munoz admitted his involvement in the crimes (109:27, 49-61). Muniz-Munoz requested a special jury instruction, adapted from a New Jersey Supreme Court case, that included language instructing the jury to consider the fact that the interrogation was not recorded and therefore, to

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[8] Muniz-Munoz describes his challenge as asking "[w]hether jury instructions violate basic Due Process" and thus requiring de novo review, citing *State v. Kuntz*, 160 Wis. 2d 722, 735, 467 N.W.2d 531 (1991) (Muniz-Munoz's br. at 12). The State disagrees. Unlike the challenge here, *Kuntz* involved a question of whether the jury instruction provided relieved the State of proving an element of the crime, thus implicating Kuntz's due process rights. *Id.*

But regardless of what standard applies, Muniz-Munoz is not entitled to relief on this claim. As explained above, the circuit court's decision to deny the request for a special jury instruction misstating Wisconsin law was neither a legal nor a discretionary error.

"weigh the evidence of the defendant's alleged statement with great caution and care" (45; 110:89-90; A-Ap. 28, 30-31). But defense counsel also conceded that "it was not the policy of [Wisconsin] to record interrogations at the time this interrogation occurred" and that there was no Wisconsin law stating that there was a greater burden of proof or persuasion on the State when the evidence of the defendant's confession was unrecorded (110:90-91; A-Ap. 31-32).

The circuit court denied Muniz-Munoz's request for the special instruction, and instead provided the jury with the following standard instruction for confessions:

> The State has introduced evidence of statements which it claims were made by the defendant. It is for you to determine how much weight, if any, to give to the statement. In evaluating the statements, you must determine three things: Whether the statement was actually made by the defendant. Only so much of the statement as was actually made by the person may be considered as evidence; second, whether the statement was accurately restated here at trial; and third, whether the statement or any part of it ought to be believed.
>
> You should consider the facts and circumstances surrounding the making of the statement, along with all the other evidence in determining how much weight, if any, the statements deserve.

(111:21-22). *See* Wis. JI-Criminal 180.

The circuit court did not erroneously exercise its discretion. Although Wis. JI-Criminal 180 includes a paragraph instructing juries that it is the policy of the State to record interrogations and that the jury may factor in the absence of a recording in assessing the credibility of a confession, that instruction applies only to interrogations conducted on or after January 1, 2007, i.e., when that policy was in place. The interrogation of Muniz-Munoz occurred in 2004; hence, the court properly excluded that part of the instruction.

And Muniz-Munoz's proposed instruction took the law beyond what the 2007 amendment to Wis. JI-Criminal 180 required by demanding that the jury weigh the evidence of the defendant's confession with "great caution and care," rather than simply allowing the jury to assign whatever weight it wished to an unrecorded interrogation. As Muniz-Munoz's counsel correctly conceded before the circuit court, Wisconsin law does not demand a heightened burden for the State in cases involving an unrecorded interrogation.

Hence, Muniz-Munoz's proposed special instruction misstated Wisconsin law. The circuit court was well within its discretion to deny his request.

IV. The circuit court soundly exercised its discretion in denying Muniz-Munoz's motion seeking discovery of evidence of excessive force used against him when Mexican authorities apprehended him for extradition to the United States.

Muniz-Munoz filed a motion to compel discovery relating to his capture in Mexico allegedly by Mexican police at United States authorities' direction, claiming that abusive treatment during that process amounted to torture and violated human rights laws (27; A-Ap. 33-36). For the reasons below, the circuit court soundly exercised its discretion in denying Muniz-Munoz's request. *See Farmers Auto. Ins. Ass'n v. Union Pac. Ry. Co.*, 2009 WI 73, ¶30, 319 Wis. 2d 52, 768 N.W.2d 596 (appellate court reviews circuit court's denial of discovery request for an erroneous exercise of discretion).

On appeal, Muniz-Munoz does not present a full presentation of the facts or argument for why he is entitled to relief on this claim. Thus, this court may summarily affirm on this issue. *See Pettit*, 171 Wis. 2d at 646 (this court may decline to address issues inadequately briefed).

If this court wishes to address the issue, the claim is meritless. The circuit court made a detailed oral decision fully supporting its exercise of discretion in denying Muniz-Munoz's request (93:4-15; A-Ap. 37-48). The court noted that Muniz-Munoz sought this discovery ultimately in hopes that evidence that authorities in Mexico severely beat him when they apprehended him would support a motion to dismiss the charges in this case (93:3-4; A-Ap. 37). The court proceeded on the assumption that Muniz-Munoz's allegations were true, and assessed whether "the law authorizes a judge to dismiss the case?" (93:5; A-Ap. 38).

The court concluded that even if Muniz-Munoz's claims of abuse were true, it would not exercise its supervisory authority to remedy that wrong by dismissing the charges in this case. The court's rationale boiled down to three main points. First, dismissal of the charges was unlikely to deter future bad police behavior, given that the motion was directed primarily at federal agents who had only rare contact with state courts (93:8-9; A-Ap. 41-42). Second, it explained that if Muniz-Munoz was abused as he claimed, he had a remedy in a civil suit against the law enforcement agents directly (93:9; A-Ap. 42).

Third, and most importantly, the court believed that dismissal of the charges was an extreme remedy far out of proportion with the abuses alleged (93:9; A-Ap. 42). It quoted federal case law holding that the remedy of "excluding" the body of the defendant to deter police is an "'extreme measure,'" and that "'so drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase [to] an intolerable degree interference [with] the public interest in having the guilty brought to book.'" (93:10; A-Ap. 43) (quoting *United States v. Crews*, 445 U.S. 463, 474 n.20 (1980) and *Matta-Ballesteros v. Henman*, 896 F.2d 255, 262 (7th Cir. 1990)).

The circuit court noted that other courts have nearly universally rejected the notion that such conduct by police necessarily taints the integrity and fairness of court proceedings: "[T]he consensus among courts across the country today is that illegalities that take place before the lawsuit begins can and should be dealt with separately and that the lawsuit stands on its own two feet, which means prefiling illegalities do not require cases to be dismissed" (93:11; A-Ap. 44). In light of that consensus, the circuit court here declined to find persuasive *United States v. Toscanino*, 500 F.2d 267, 275-76 (2d Cir. 1974), an "outlier" case advanced by Muniz-Munoz in which one federal court of appeals concluded that authorities' kidnapping and forcible extradition of Toscanino to the United States to face charges required the dismissal of charges on due process principles (93:13-14; A-Ap. 46-47).

The circuit court's reasoning amply supported its discretionary decision to deny Muniz-Munoz's discovery request. And the court correctly concluded that there was no controlling or persuasive law that would have endorsed dismissal of the charges against Muniz-Munoz based on pre-trial misconduct by authorities. The so-called *Ker-Frisbie* doctrine provides that "the power of a court to try a person for crime is not impaired by the fact that he has been brought within the court's jurisdiction by reason of 'forcible abduction.'" *Frisbie v. Collins*, 342 U.S. 519, 522 (1952) (invoking *Ker v. Illinois*, 119 U.S. 436 (1886)); *see also State v. Smith*, 131 Wis. 2d 220, 237, 388 N.W.2d 601 (1986) (acknowledging continuing vitality of t" \s "WSFTA_45b44d91c59e4a7c8862f17eeb83c44d" \c 3 *State v. Smith*, 131 Wis. 2d 220, 237, 388 N.W.2d 601 (1986) (acknowledging continuing vitality of the *Ker-Frisbie* doctrine), *abrogated on other grounds by State v. Felix*, 2012 WI 36, ¶41, 339 Wis. 2d 670, 811 N.W.2d 775. With very limited exceptions, that doctrine has continued force for federal and Wisconsin courts in holding that governmental misconduct in bringing a suspect

within a court's jurisdiction cannot bar the proceedings themselves.[9]

On appeal, Muniz-Munoz again argues that *Toscanino* urges a different result, and that due process principles require dismissal of charges to remedy excessive force by authorities in apprehending a suspect-fugitive (Muniz-Munoz's br. at 14-15). But the circuit court correctly described *Toscanino* as an outlier decision and declined to find its reasoning persuasive. Indeed, since the Second Circuit's decision in *Toscanino*, that circuit subsequently limited its applicability to the extreme egregiousness of the facts in that case, *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 66 (2d Cir. 1975); acts by United States officials and their agents, *United States v. Lira*, 515 F.2d 68, 70 (2d Cir. 1975); and acts committed against persons abducted to be brought within the court's jurisdiction, not fugitives, *United States v. Reed*, 639 F.2d 896, 902 n.2 (2d Cir. 1981). Furthermore, other courts considering similar challenges have more or less unanimously rejected *Toscanino*'s reasoning.[10] Moreover, no Wisconsin courts have adopted the *Toscanino* exception.

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[9] *See I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1039-40 (1984) ("The 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred."); *United States v. Crews*, 445 U.S. 463, 474 (1980) ("respondent is not himself a suppressible 'fruit,' and the illegality of his detention cannot deprive the Government of the opportunity to prove his guilt through the introduction of evidence wholly untainted by the police misconduct"); *Stone v. PowelI*, 428 U.S. 465, 485 (1976) (holding that judicial integrity is not enough to mandate a retreat "from the proposition that judicial proceedings need not abate when the defendant's person is unconstitutionally seized").

[10] *See, e.g.*, *United States v. Best*, 304 F.3d 308, 312-13 (3d Cir. 2002) (doubting soundness of *Toscanino* exception); *United States v. Pelaez*, 930 F.2d 520, 525-26 (6th Cir. 1991) (noting other circuits' rejection of *Toscanino* and distinguishing it); *Matta-Ballesteros v. Henman*, 896 F.2d 255, 263 (7th Cir. 1990) ("We therefore conclude that *Toscanino*, at least as far as it creates an

(continued on next page)

And even if the *Toscanino* exception remains vital, the circuit court appropriately exercised its discretion in declining to adopt it and apply it to Muniz-Munoz for two additional reasons. First, Muniz-Munoz, unlike Toscanino, had jumped his bail in 2004 and was a fugitive subject to an arrest warrant as of his 2010 recapture. *See Reed*, 639 F.2d at 902 n.2 (distinguishing between the recapture of a fugitive and a defendant's initial capture for applicability of *Toscanino*).

Second, Muniz-Munoz's allegations do not approach the egregious abuse described in *Toscanino*, which involved Toscanino being knocked out, kidnapped at gunpoint, and tortured for seventeen days with sleep deprivation, starvation, forced walking, being kicked and beaten, having his finger pinched with metal pliers, having alcohol and other fluids flushed into his eyes and other orifices, and electrocution through his earlobes, toes, and genitals. 500 F.2d at 270. Here, as the circuit court noted, Muniz-Munoz claims that authorities choked him and punched him repeatedly in the face, causing his mouth to bleed and pain in his jaw that lasted over twelve weeks (93:4; A-Ap. 37). Those acts, even if they may have been excessive under the circumstances, simply do not rise to *Toscanino* levels of violence. *See Lujan*, 510 F.2d at 66 (holding that "absent a set of incidents like that in *Toscanino*," only similarly egregious violations by police require dismissal of charges).

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exclusionary rule, no longer retains vitality and therefore decline to adopt it as the law of this circuit."); *United States v. Darby*, 744 F.2d 1508, 1531 (11th Cir. 1984) (questioning continued vitality of *Toscanino* in light of subsequent Supreme Court law); *United States v. Herrera*, 504 F.2d 859, 860 (5th Cir. 1974) (declining to adopt reasoning from *Toscanino*); *cf. United States v. Matta-Ballesteros*, 71 F.3d 754, 763 (9th Cir. 1995) (noting that Ninth Circuit had adopted *Toscanino* but explaining that subsequent Supreme Court cases have cut short expansion of due process rights developed in that case).

As the circuit court correctly stated, that pre-trial conduct by authorities cannot relieve Muniz-Munoz of having to answer for his involvement in the shooting that killed Lara and injured another victim. The circuit court soundly exercised its discretion in denying Muniz-Munoz's discovery motion.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this court (1) affirm the judgment of conviction but (2) remand the matter to the circuit court with instructions to correct clerical errors in that document. *See* note 1 *supra*.

Dated this 1st day of June, 2015.

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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 6289 words.

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Dated this 1st day of June, 2015.

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