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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2017AP680-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DARRIN L. MALONE,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE LLOYD V. CARTER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Wisconsin Attorney General

JEFFREY J. KASSEL
Assistant Attorney General
State Bar #1009170

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 266-9594 (Fax)
kasseljj@doj.state.wi.us

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ISSUES PRESENTED

1. Did the circuit court erroneously exercise its discretion when it admitted other-acts evidence of an armed robbery committed in Brookfield three days before the Waukesha felony murder/armed robbery charged in this case?

Noting the "remarkable similarities" between the two armed robberies, the circuit court held that the other-acts evidence was admissible under the three-step test established in *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998).

This Court should hold that the circuit court properly exercised its discretion.

2. Was trial counsel for defendant-appellant Darrin Malone ineffective at the hearing on the other-acts motion and at trial for failing to introduce a security video that, Malone asserts, shows that the second Brookfield robber was white?

The circuit court held that counsel was not ineffective because it was not possible to determine the race of the second robber from that video.

This Court should affirm the circuit court's ruling.

3. Is Malone entitled to a new trial in the interest of justice?

The circuit court held that Malone is not entitled to a new trial in the interest of justice.

This Court should affirm the circuit court's ruling and should decline to exercise its own authority to grant a new trial in the interest of justice.

4. Did the State violate Malone's due process right to a fair trial because a detective omitted from the video shown at trial the portion of the Brookfield robbery that shows the second robber's hand and testified that no activity was edited out?

The circuit court denied Malone's postconviction motion in total but did not expressly address this claim.

This Court should hold that Malone forfeited his right to raise this claim directly because he did not object at trial and that Malone's trial counsel was not ineffective for failing to object.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication.

INTRODUCTION

Malone was convicted following a jury trial of felony murder for his participation in an armed robbery of a Waukesha Citgo station in which one of his accomplices fatally shot the clerk. All of the issues he raises on appeal concern evidence that was or was not presented at trial.

Malone argues that the circuit court erred when it admitted evidence of an armed robbery of a Brookfield 7-Eleven committed three days earlier. This Court should reject that claim because the record demonstrates that the circuit court properly exercised its discretion to admit that evidence based on its determination that there were "remarkable similarities" between the two armed robberies.

All of Malone's other issues are based on a portion of security video of the Brookfield robbery showing the second

robber's hand. Malone asserts that the video shows that the second robber's hand was white. He claims that his trial counsel was ineffective for not presenting that video clip at the other-acts motion hearing and at trial. He also claims that the State violated his right to due process because a detective omitted that clip from the video compilation shown at trial and testified that no activity was edited out of that video. And he seeks a new trial in the interest of justice because the jury did not see that clip.

All of those claims fails for a common reason. Although Malone contends that the video clip shows that the second robber was white, the circuit court made a factual finding that it was not possible to determine the race of the second robber in that video clip. And Malone concedes that the skin tone of the second robber's face, which was visible in the portion of the video that the jury did see, appears to be the same as that of the hand that they did not see. In closing argument, Malone's attorney stated that the jurors had a good look at that part of the second robber's face, a characterization that Malone does not challenge on appeal. Regardless of the legal theory Malone advances, he is not entitled to a new trial based on inconclusive evidence that is cumulative of the evidence presented at trial.

STATEMENT OF THE CASE

Criminal complaint. Malone was charged with felony murder as a party to a crime. (R. 7:1, A-App. 1:1.) According to the criminal complaint, two men robbed a Citgo gas station in Waukesha at 10:40 p.m. on January 13, 2015. (R. 7:3, A-App. 1:3.) One of the men shot and fatally wounded an employee of the station, Saeed Sharwani, after he confronted them. (R. 7:3–4, A-App. 1:3–4.)

Security video showed that both men were wearing masks and gloves; one wore a hat and the other a hooded

sweatshirt. (*Id.*) Detectives identified Malone as the robber who did not fire the shot through interviews with a number of witnesses, including codefendant Kenneth Thomas, who was the other robber, and codefendant Jerica Cotton, who drove the men to and from the Citgo station. (R. 7:5–10, A-App. 1:5–10.)

Other-acts motion. Prior to trial, the State filed a motion to admit evidence regarding the armed robbery of a 7-Eleven in the Town of Brookfield committed three days before the robbery in this case. (R. 29:1–4, A-App. 2:1–4.) The State asserted that Malone's conduct in the Brookfield robbery was highly similar to his conduct in this case. (R. 30:2, A-App. 3:2.) The State noted that in both cases, Malone "travelled to the location in a vehicle driven by Jerica Cotton and in the company of Kenneth Thomas; Cotton parked nearby and waited while Thomas and Malone committed the robbery; Thomas and Malone concealed their identities by wearing headwear, masks and gloves; the same .9 mm handgun was used in both events; shots were fired from the gun at the clerk in both events; [and] following the robbery Malone and Thomas ran back to Cotton's vehicle and she drove them away." (*Id.*) The State said that it was offering the evidence to establish identity, intent, and plan. (*Id.*)

The circuit court granted the motion following a non-evidentiary hearing. (R. 87:32, A-App. 4:32.) The court first determined that the State was offering the evidence for the proper purposes of identity, intent, and plan. (R. 87:15, A-App. 4:15.) The court next determined that the evidence was relevant because the "remarkable similarities" (R. 87:20, A-App. 4:20) between the two robberies "[a]bsolutely" tended to make Malone's "involvement in the armed robbery in Waukesha more probable or less probable than it would be without the [Brookfield] evidence" (R. 87:21, A-App. 4:21). Finally, the court determined that the Brookfield evidence

would not confuse the issues at trial and that any potential danger that the jury would use that evidence for propensity purposes would be satisfactorily addressed by a curative instruction. (R. 87:21–23, A-App. 4:21–23.) The court concluded that "in conducting that [*Sullivan*] analysis, going through that step by step, . . . it is appropriate for the Court to rule that the State be able to utilize that evidence in the fashion that [the State] proposed here today." (R. 87:23, A-App. 4:23.)

The trial. Officer Steven Cizinsky testified that on January 13, 2015, at 10:46 p.m., he was dispatched to a Citgo gas station in the City of Waukesha. (R. 89:215–16, 220.)[1] Officer Cizinsky found a man lying by the front doors of the gas station with an apparent gunshot wound to his chest. (R. 89:217.) The man was unable to speak, but when Cizinsky asked him if he was shot, he nodded yes. (R. 89:218.) Cizinsky asked him how many people were involved, and the victim raised two fingers. (*Id.*)

The victim, Saeed Sharwani, worked at the Citgo station. (R. 89:228–29.) Mr. Sharwani died from the gunshot wound. (R. 92:14.)

The morning after the Waukesha Citgo robbery, officers from the West Allis and Milwaukee police departments executed a search warrant at an apartment in West Allis. (R. 89:239–40.) The apartment that was searched, apartment 2, was one of three apartments above a tavern. (R. 89:239.) Kenneth Thomas was the target of that search warrant. (R. 89:240.)

[1] Citations to the trial transcripts are to the page numbers on the electronically filed version of the transcripts. In the transcript of day four of the trial, those page numbers do not match the page numbers provided by the court reporter.

During the search, officers found clothing and masks that matched the description of items worn by the individuals in the Waukesha robbery that night. (R. 89:254–55.) Thomas and the five other people in the apartment were arrested. (R. 89:244–46.) None of the men who were arrested had a bald head. (R. 89:246.) As police were executing the search warrant, they observed Malone, who was bald, standing in apartment 3 across the hall. (R. 89:265, 267.)

Kenneth Thomas testified that he and Malone robbed the Waukesha Citgo station and that Jerica Cotton was their driver. (R. 91:37–38, A-App. 6:37–38.) Thomas testified that he and Malone discussed robbing a store that evening. (R. 91:46–47, A-App. 6:46–47.) They brought Halloween masks and gloves with them, (R. 91:49–50, A-App. 6:49–50.) According to Thomas, they "didn't have any more gloves because they was all used up, so we just took what we could." (R. 91:50, A-App. 6:50.) Thomas said that he grabbed a "hospital glove" and a winter glove and that Malone wore hospital gloves. (*Id.*) Thomas said that he wore a hat and that Malone wore a hoodie. (R. 91:51, A-App. 6:51.) Thomas brought a nine millimeter gun and Malone had a .357. (R. 91:50, 56–57, A-App. 6:50, 56–57.)

Thomas testified that Malone got Cotton from the neighboring apartment to be their driver. (R. 91:52–53, A-App. 6:52–53.) When they got to the store they planned to rob, it was closed, so they drove around until they came upon a Citgo station that was closing, where Thomas saw a man counting money. (R. 91:54–55, A-App. 6:54–55.) Cotton drove up the block and dropped the men off. (R. 91:55–56, A-App. 6:55–56.)

Malone and Thomas put on their masks and gloves and went into the station. (R. 91:57–58, A-App. 6:57–58.) Thomas testified that as he walked towards the clerk, Malone left the station. (R. 91:58, A-App. 6:58.) Thomas said

that when he went to jump over the counter, the clerk attacked him and that Thomas's gun went off during the struggle. (R. 91:59, A-App. 6:59.) The clerk ran out of the store. (*Id.*) Thomas grabbed some money and ran back to the car. (R. 91:59–60, A-App. 6:59–60.) Malone was already in the car with Cotton and the three of them drove back to Thomas's home. (R. 91:60–61, A-App. 6:59–60.)

Cotton testified that she drove Malone and Thomas to Waukesha and dropped them off several houses up the street from the Citgo station. (R. 90:172, 175, 179, 181–82, A-App. 5:172, 175, 179, 181–82.) Malone returned to the car after about five minutes and Thomas a minute or two later. (R. 90:183, A-App. 5:183.) She drove them back to Thomas's building. (R. 90:184–85, A-App. 5:184–85.)

The tavern/apartment building where Thomas lived had exterior security cameras, including a camera that showed the back door that tenants in apartments 2 and 3 use to get to those apartments. (R. 90:40–41.) Investigators obtained the security videos from the evening of January 13, 2015, and prepared still shots from the video of the rear hallway entrance. (R. 90:40–41, 73–77.)

Cotton identified herself, Thomas, and Malone in the still images from video recorded when they left the apartment building together and when they returned from the Citgo station. (R. 90:176, 187–89, A-App. 5:176, 187–89.) The video shows them leaving at about 10:15 p.m. and returning around 11:00 p.m. (R. 91:175–76.) The robbery occurred around 10:45 p.m. (R. 89:220.) One of the men in the security video appears to have a bald head. (R. 43:15.)

Thomas's sister, Shakendra Thomas, testified that Malone, whose name she did not know at the time, was in Thomas's apartment the night of January 13, 2015, that he left alone, and that she did not remember Thomas leaving

the apartment. (R. 90:137, 141–42.) She acknowledged, however, that she signed a statement to the police in which she said that after she had taken a shower around 9:00 to 10:00 p.m., "Kenneth and the bald guy left to go to the store." (R. 90:149.) In that statement, she also said that when they came back, "the bald guy had a lot of money with him." (R. 43:22 (uppercasing omitted); 90:18.)

Mandy Love testified that she lived in apartment 3, that Malone was her boyfriend and sometimes stayed in her apartment, and that she is Cotton's friend. (R. 90:156–59.) Love testified that Malone and Cotton were at her apartment on January 13, 2015, that Malone asked Cotton to give someone a ride, that Cotton and Malone left together "towards the middle of the night," and that Cotton and Malone later returned together to her apartment. (R. 90:161–62.)

Love testified that Malone did not go across the hall to apartment 2 after returning. (R. 90:162.) In a statement she gave to a detective, however, Love said that when Cotton returned to her apartment, she heard the door to apartment 2 across the hall close at the same time. (R. 90:218–19.) Malone returned to Love's apartment about 15 minutes later. (R. 90:219.)

Thomas and Cotton also testified about the Brookfield 7-Eleven robbery they committed with Malone three days before the Waukesha Citgo robbery. (R. 90:195–99, A-App. 5:195–99; 91:67–75, A-App. 6:65–75.) Cotton testified that she drove Malone and Thomas to a motel in Brookfield, that she told them to call her when they were ready to get picked up, and that they walked off. (R. 90:195–96, A-App. 5:195–96.) She then received a text from Malone telling her to drive

to a location behind a restaurant. (R. 90:196, A-App. 5:196.)[2] She drove there and, after about five minutes, Malone and Thomas came running through the parking lot and got in her car. (R. 90:197–98, A-App. 5:197–98.) As they drove back to the apartment, Cotton testified, Thomas was upset and said to Malone, "you almost shot me." (R. 90:198, A-App. 5:198.)

Thomas testified that he and Malone hid their appearance by placing ripped shirts around their faces and drawing up their hoodies. (R. 91:69, A-App. 6:69.) Thomas testified that the clerk gave them some cash and lottery tickets and that he fired a shot at the clerk to scare him because the clerk was stalling. (R. 91:71–72, A-App. 6:71–72.) Thomas then gave Malone the gun so that Thomas could pick up the cash and tickets. (R. 91:72–73, A-App. 6:72–73.)

Thomas testified that as they ran from the store, the clerk ran after them. (R. 91:73–74, A-App. 6:73–74.) Malone, who was running ahead of Thomas, turned and fired shots at the clerk, one of which went through Thomas's coat. (*Id.*) After they got back into Cotton's car, Thomas asked Malone if Malone had tried to shoot him. (R. 91:74, A-App. 6:74.)

Detective David Feyen compiled security videos from the Waukesha Citgo, the Brookfield 7-Eleven, the restaurant next door to the 7-Eleven, and the tavern where Thomas lived. (R. 90:68–84, A-App. 5:68–84.) Detective Feyen testified that he did not alter the 7-Eleven video other than to cut some of it where there was no activity. (R. 90:82, A-App. 5:82.)

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[2] Cotton's phone records showed that she received two calls around 9:14 p.m. but that those calls came from a TracFone for which the police were unable to identify the subscriber. (R. 90:246, 256.)

During cross-examination of Detective Feyen, defense counsel played the video from the 7-Eleven and paused it at a point where the robber's eyes and bridge of his nose were visible. (R. 90:109–10, A-App. 5:109–10.) Defense counsel asked the detective whether it would be fair to say "that that person has a Caucasian complexion in that photograph." (R. 90:110, A-App. 5:110.) Feyen answered, "I wouldn't make any determination of race on that picture." (*Id.*)

Malone did not testify at trial and the defense presented no witnesses. (92:11, 17.)

In its final instructions, the circuit court gave the jury a limiting instruction regarding the other-acts evidence. (R. 92:98–99, A-App. 7:62–63.) The court told the jury that evidence had been presented regarding the armed robbery of the Brookfield 7-Eleven for which Malone was not on trial and instructed the jury that if it found that this conduct did occur, it "should consider it only on the issue of intent, plan, and identity" and that it "may not consider this evidence to conclude that the defendant has a certain character or a certain character trait and that the defendant acted in conformity with that trait or character with respect to the offense charged in this case." (*Id.*)

In his closing argument, defense counsel told the jury, "Remember I had them freeze that one portion in the [Brookfield] video where in the upper left hand corner you had a good look at the face area of that second suspect, and it certainly looked Caucasian to me." (R. 92:139, A-App. 7:103.) He asked the jury to "determine what that person looked like, whether that person was African-American like Mr. Malone or whether it was a white person." (R. 92:140, A-App. 7:104.) Counsel argued that "the answer is pretty clear." (*Id.*)

During deliberations, the jury asked to see the images from the tavern security video, and the court sent those pictures back to the jury. (R. 92:150–51, A-App. 7:114–15.) The jury also asked to view the security videos from the two stores that were robbed, and the court allowed the jury to view them on the large screen in the courtroom without being in the jury box so they could get a better view of the videos. (R. 92:158–64, A-App. 7:122–28.)

The jury found Malone guilty of felony murder. (R. 92:166.) At sentencing, Malone told the court that he had been a hardworking man like Mr. Sharwani but that he strayed and asked the court to have mercy on him. (R. 85:28–29.) The court noted that Malone committed the Citgo robbery less than four months after he was released from prison on an armed robbery sentence and that he had been "on the run" until February 2015, when a United States Marshall's task force found him. (R. 85:35–37.) The court imposed a 35-year sentence, consisting of 25 years of initial confinement and ten years of extended supervision, consecutive to any other sentence. (R. 85:43–44.)

Postconviction motion. Malone filed a motion for postconviction relief under Wis. Stat. § (Rule) 809.30 in which he argued that he should be granted a new trial on four grounds:

1) Because "[e]vidence and testimony relating to the robbery of the Brookfield 7-11 should not have been admitted as 'other acts' evidence" (R. 68:3, A-App. 8:3);

2) "In the interests of justice on the grounds that the real controversy was not fully tried and a miscarriage of justice occurred" because "Mr. Malone is black and the jury was denied the opportunity to see video and still images showing that the second suspect in the Brookfield robbery was white" (R. 68:4, 7; A-App. 8:4, 7);

3) Because trial counsel "provided ineffective assistance by failing to introduce video evidence showing that the second suspect in the Brookfield 7-11 robbery was white" at the other-acts motion hearing and at trial and for "fail[ing] to object to the State's use of prejudicially edited video of the Brookfield 7-11 robbery at trial" (*id.*); and

4) Because "[t]he State's conduct in editing exculpatory footage out of Exhibit 11" that purportedly showed that the second Brookfield robber was white and "its false assertion that no activity was omitted from the video violated Mr. Malone's right to due process." (*Id.*)

The circuit court held a *Machner*[3] hearing at which Malone's trial counsel, Douglas Bihler, was the only witness. (R. 83:5–25, A-App. 11:5–25.) Bihler testified that he received copies of the original security videos in discovery, including the videos of the Brookfield robbery, and had reviewed them before the hearing on the State's other-acts motion. (R. 83:7–8, A-App. 11:7–8.)

Malone's postconviction attorney played a clip of the security video of the Brookfield robbery. (R. 83:10, A-App. 10.) Bihler testified that it appeared that the video showed the bare hand of one of the robbers and that the hand appeared to be white. (R. 83:11, A-App. 11:11.) Bihler testified that he had seen that clip before the other-acts motion hearing, that there was no reason that he did not use that clip at the hearing, and that the clip would have supported his argument against the admission of the other-acts evidence. (*Id.*)

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[3]*State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Bihler also testified that he did not play that clip at trial, that he had no reason not to, and that he believed that he should have. (R. 83:13, A-App. 11:13.) He further testified that he did not object to the lack of inclusion of that clip in the video played by the State at trial because he did not think there was a basis for doing so. (R. 83:14, A-App. 11:14.) He testified that, in hindsight, he did not think there was a basis for objecting because he could have used that part of the video in cross-examination or during the defense case. (*Id.*)

On cross-examination, the prosecutor asked Bihler, based on the image displayed on the courtroom screen, what time of day the robbery occurred. (R. 83:17, A-App. 11:17.) Bihler said that he did not recall but that it "[a]ppears to be the daytime." (*Id.*) Bihler then acknowledged that the robbery had occurred at night, but agreed with the prosecutor that "it appears to be daytime by looking just at this photograph." (R. 83:18, A-App. 11:18.) He also testified that he believed that the portion of the face visible in the video that was shown at trial appeared to be a white person. (R. 83:19–20, A-App. 11:19–20.)

At the conclusion of the hearing, the circuit court orally denied the postconviction motion in total. (R. 83:37, A-App. 11:37.) The court first said that it would not revisit its pretrial other-acts ruling. (R. 83:31, A-App. 11:31.) The court then addressed Malone's other claims, all of which depended on Malone's assertion that the portion of the Brookfield 7-Eleven video not played at trial showed that the second robber was white. (R. 83:31–35, A-App. 11:31–35.)

The circuit court said that it had viewed the video and found that it appeared "washed out" and that "even brighter than normal daylight." (R. 83:31, 33–34, A-App. 11:31, 33–34.) The court said that it did not think that a reasonable person or a reasonable juror could make a determination of

the second robber's race based on the video. (R. 83:34–35, A-App. 11:34–35.)

The circuit court said that it was aware at the time of the other-acts motion hearing that the robbery occurred at night. (R. 83:33, A-App. 11:33.) Because the video appears brighter than normal daylight and the whites in the video were "washed out," the court ruled, the presence or absence of the video clip would have had "absolutely no impact whatsoever on the Court's decision" on the motion. (*Id.*)

The circuit court further held that defense counsel was not ineffective for failing to show the clip at trial or for not objecting to the video that the State presented. (R. 83:32–34, A-App. 11:32–34.) The court noted that counsel had cross-examined Detective Feyen on whether the second robber was white based on the video shown at trial and that Feyen had testified that he wouldn't reach that conclusion. (R. 83:35, A-App. 11:35.) The court said that based on its review of the video, it did not think that "any reasonable juror could reach that conclusion either." (*Id.*) The court said that "[a]nyone can give an opinion or impression of the race of an individual from that, but I don't think it's definitive that somebody can reach the conclusion absolutely and conclusively that the individual was one race or the other based upon what was depicted in that video." (*Id.*) "So," the court held, "the lack of existence of that particular clip . . . in front of the jury I don't believe was of any substantial impact, looking at the totality of all the other evidence, the cross examination and the attack that Attorney Bihler launched into with respect to the credibility of the other witnesses and the ability to identify off the video." (*Id.*)

The circuit court said that it "would not be in a position to find that Mr. Bihler's performance as adversary counsel here was deficient" and that it did not believe that "there was any prejudice to Mr. Malone in any respect with

respect to how the trial was conducted." (R. 83:35–36, A-App. 11:35–36.) The court concluded that "the defense has not met its burden . . . under a *Strickland* analysis of ineffective assistance of counsel or on a basis of whether or not there was a miscarriage of justice that would entitle Mr. Malone to a new trial based on the totality of the circumstances." (R. 83:36, A-App. 11:36.)

ARGUMENT

I. The circuit court properly exercised its discretion when it admitted other-acts evidence of a similar armed robbery.

A. Standard of review.

This Court reviews the circuit court's decision to admit other-acts evidence under the erroneous exercise of discretion standard. *See Sullivan*, 216 Wis. 2d at 780.

B. Applicable legal standards.

In *Sullivan*, the supreme court established a three-step analysis to determine the admissibility of other-acts evidence. *See id.* at 771–72. First, the evidence must be "offered for an acceptable purpose under Wis. Stat. § 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* at 772. Second, the evidence must be relevant, which means that it must "relate[ ] to a fact or proposition that is of consequence to the determination of the action" and have "a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence." *Id.* And third, the probative value of the evidence must not be "substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the

jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." *Id*. at 772–73.

"The party seeking to admit the other-acts evidence bears the burden of establishing that the first two prongs are met by a preponderance of the evidence." *State v. Marinez,* 2011 WI 12, ¶ 19, 331 Wis. 2d 568, 797 N.W.2d 399. "Once the proponent of the other-acts evidence establishes the first two prongs of the test, the burden shifts to the party opposing the admission of the other-acts evidence to show that the probative value of the evidence is substantially outweighed by the risk or danger of unfair prejudice." *Id*.

C. The other-acts evidence was offered for proper purposes.

The circuit court determined that the State offered the evidence of the Brookfield robbery for the purposes of identity, intent, and plan. (R. 87:15, A-App. 4:15.) Those are proper purposes for the admission of other-acts evidence. *See Sullivan*, 216 Wis. 2d at 772. Malone does not argue otherwise. (*See* Malone's Br. 16–20.)

D. The other-acts evidence was relevant.

The probative value of other-acts evidence "depends on the other incident's nearness in time, place and circumstances to the alleged crime or to the fact or proposition sought to be proved." *See Sullivan*, 216 Wis. 2d at 786. "The greater the similarity, complexity and distinctiveness of the events, the stronger is the case for admission of the other acts evidence." *Id.* at 787.

In this case, the State sought admission of evidence of the Brookfield robbery because of its many similarities to the charged Waukesha armed robbery (R. 30:2, A-App. 3:2.) In both cases, Malone "travelled to the location in a vehicle driven by Jerica Cotton and in the company of Kenneth

Thomas; Cotton parked nearby and waited while Thomas and Malone committed the robbery; Thomas and Malone concealed their identities by wearing headwear, masks and gloves; the same .9 mm handgun was used in both events; shots were fired from the gun at the clerk in both events; [and] following the robbery Malone and Thomas ran back to Cotton's vehicle and she drove them away." (*Id.*)

Noting the "remarkable similarities" between the Brookfield robbery and the charged Waukesha robbery, the circuit court held that the other-acts evidence was relevant. (R. 87:20, A-App. 4:20.) The court determined that the Brookfield robbery evidence "[a]bsolutely" had a tendency to make Malone's "involvement in the armed robbery in Waukesha more probable or less probable than it would be without the [Brookfield] evidence." (R. 87:21, A-App. 4:21.)

Malone does not dispute that there were a substantial number of similarities between the two robberies. (*See* Malone's Br. 16.) But, he argues, "aside from the evidence that the same two co-defendants were involved in the same roles and the evidence linking the gun to both crimes (which was not used), all of those similarities are extremely common facets of armed robbery." (*Id.* at 17.) Malone argues that "[n]one of the similarities uniquely identify Mr. Malone such that it can be said that they 'constitute the imprint of the defendant.'" (*Id.* at 17–18 (quoting *State v. Gray*, 225 Wis. 2d 39, 51, 590 N.W.2d 918 (1999).)

There are two problems with that argument. First, the supreme court held in *Gray* that "[w]hether there is a concurrence of common features is generally left to the sound discretion of the trial courts." *Gray*, 225 Wis. 2d at 51; *see also State v. Franklin*, 2004 WI 38, ¶ 30, 270 Wis. 2d 271, 677 N.W.2d 276 ("Determining whether or not evidence is relevant lies within the discretion of the circuit court."). But Malone does not argue that the circuit court erroneously

exercised its discretion; he argues relevance as though it were a matter for this Court to decide in the first instance. (*See* Malone's Br. 16–20.)

Second, the similarities between the armed robberies in this case are comparable to those in *State v. Murphy*, 188 Wis. 2d 508, 524 N.W.2d 924 (Ct. App. 1994), a case in which this Court concluded that there were sufficient similarities to demonstrate "the imprint of the defendant." *Id.* at 519. In *Murphy*, the circuit court admitted evidence of armed robberies the defendant committed in 1987 at his trial for armed robberies committed or attempted in 1992. *See id.* at 518. The locations of the offenses were similar: the 1987 crimes occurred in Brookfield, Waukesha, Delafield, and New Berlin, and "[b]oth of the 1992 charged offenses were in Brookfield, the same general geographic location as the 1987 crimes." *Id.* at 519.

This Court noted a number of similarities between 1987 crimes and the 1992 charged offenses. "[A]ll occurred at small business establishments while they were open to the public." *Id.* at 519. "Like the robbery offenses in this case, four of the 1987 crimes occurred at dry cleaning businesses." *Id.* at 519–20. "In nine of the 1987 crimes, only one clerk was visible when Murphy entered the business, similar to the January 1992 attempted robbery." *Id.* at 520.

In all of the 1987 crimes to which Murphy had confessed, "he was the sole robber and did not harm any of the employees." *Id.* "Similarly, both of the 1992 charged offenses involved a lone perpetrator who did not harm the employees." *Id.* "In the 1987 crimes, when Murphy displayed a weapon, it was a knife," and "in the March 1992 charged offense, a knife was the weapon used." *Id.*

This Court noted that "[w]hen evidence of other acts is being offered to prove a defendant's identity, there should be

such a concurrence of common features and so many points of similarities between the crimes charged that it can be said that the other acts and the present act constitute 'the imprint of the defendant' before it is admissible." *Id*. at 518–19 (citation omitted). The Court concluded that "[g]iven these similarities between the 1987 crimes and the charged offenses, the trial court had a reasonable basis for concluding that evidence of the 1987 crimes was admissible to establish Murphy's identity as the perpetrator of the 1992 alleged offenses." *Id*. at 520.

The types of similarities between the Brookfield and Waukesha robberies in this case are comparable to those in *Murphy*. As in *Murphy*, the robberies in this case took place in nearby locations. In *Murphy*, all of the robberies occurred at small business establishments while they were open to the public; here, the robberies occurred at gas station/convenience stores at about the same time.[4] In *Murphy*, the defendant was the sole robber in all of the crimes; here, there were two robbers in both crimes. In *Murphy*, the defendant used a knife in some of the other-acts crimes and one of the charged offenses but did not harm anyone; here, in both robberies, one of the robbers was armed with a nine-millimeter handgun and fired that gun at the clerk. As it did in *Murphy*, this Court should conclude that the circuit court properly exercised its discretion when it determined that there were sufficient similarities between the robberies to establish that evidence relating to the other-acts robbery was relevant in the trial of the charged robbery.

[4] The Brookfield robbery occurred at 9:20 p.m. and the Waukesha robbery at about 10:45 p.m. (R. 7:1–2, A-App. 1:1–2.)

E. The probative value of the other-acts evidence was not substantially outweighed by the danger of unfair prejudice.

Malone bears the burden of showing that the probative value of the other-acts evidence is substantially outweighed by the risk or danger of unfair prejudice. *See Marinez,* 331 Wis. 2d 568, ¶ 19. Yet his brief devotes just a single sentence to that prong of the *Sullivan* analysis. After arguing that the evidence was not relevant, he asserts that "the [circuit] court's rationale that a curative instruction would dissuade any prejudice because juries are presumed to understand and follow the instructions would render it impossible for the danger of unfair prejudice to ever substantially outweigh the probative value of the evidence because a curative instruction would *always* be sufficient." (Malone's Br. 20.)

There are two problems with that argument. First, although Malone criticizes the circuit court's rationale, he does not explain why, in this case, the probative value of the other-acts evidence was substantially outweighed by the danger of unfair prejudice. This Court does not consider undeveloped arguments. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

Second, Malone's critique of the circuit court's rationale ignores well-established law in Wisconsin that "[l]imiting instructions substantially mitigate any unfair prejudicial effect" of other-acts evidence. *State v. Hurley*, 2015 WI 35, ¶ 89, 361 Wis. 2d 529, 861 N.W.2d 174. "A reviewing court 'presume[s] that juries comply with properly given limiting and cautionary instructions, and thus consider this an effective means to reduce the risk of unfair prejudice to the party opposing admission of other acts evidence.'" *Id.* ¶ 90 (citation omitted). "'Because [§ 904.04] provides for exclusion only if the evidence's probative value is substantially outweighed by the danger of unfair

prejudice, "[t]he bias, then, is squarely on the side of admissibility."" *Id*. (citation omitted; brackets in original).

The circuit court in this case gave the jury an appropriate limiting instruction. It told the jury that evidence had been presented regarding the armed robbery of the Brookfield 7-Eleven for which Malone was not on trial. (R. 92:98–99, A-App. 7:62–63.) The court instructed the jury that if it found that this conduct did occur, it "should consider it only on the issue of intent, plan, and identity" and that it "may not consider this evidence to conclude that the defendant has a certain character or a certain character trait and that the defendant acted in conformity with that trait or character with respect to the offense charged in this case." (R. 92:99, A-App. 7:63.)

The circuit court additionally instructed the jury that the evidence "was received on the issue of intent, that is, whether the defendant acted with the state of mind that is required for the offense charged"; that the evidence "was received on the issue of plan, that is, whether other conduct of the defendant was part of a design or scheme that led to the commission of the offense charged"; and that the evidence "was received on the issue of identity, that is, whether the prior conduct of the defendant is so similar to the offenses charged that it tends to identify the defendant as the one who committed the offense charged." (*Id*.) The court further instructed the jury that it "may consider this evidence only for the purposes I have described, giving it the weight you determine it deserves," and that "[i]t is not to be used to conclude that the defendant is a bad person and for that reason is guilty of the offense charged." (R. 92:99–100, A-App. 7:63–64.)

Malone has not shown that the circuit court erroneously exercised its discretion when it determined that the probative value of the other-acts evidence was not

substantially outweighed by the risk or danger of unfair prejudice. "Simply put, the circuit court's decision regarding the prejudicial effect was *not* a decision that no reasonable judge could make." *Hurley*, 361 Wis. 2d 529, ¶ 92. Because the evidence was admitted for a proper purpose, was relevant, and its probative value was not substantially outweighed by the danger of unfair prejudice, the circuit court properly exercised its discretion in admitting the other-acts evidence. *See id.*

II. Malone's counsel was not ineffective.

Malone contends that his trial lawyer was ineffective at the other-acts motion hearing and at trial for not introducing the video clip of the Brookfield security video showing the second robber's hand, which Malone asserts shows that the second Brookfield robber was white, and for not objecting at trial when a detective testified that the Brookfield video was complete and accurate. This Court should reject those claims because Malone has not carried his burden of demonstrating that he was prejudiced by counsel's allegedly deficient performance.

A. Standard of review.

Whether a lawyer rendered ineffective assistance is a mixed question of law and fact. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The circuit court's findings of fact will be upheld unless they are clearly erroneous. *Id*. Whether the defendant's proof satisfies either the deficient performance or the prejudice prong is a question of law that an appellate court reviews without deference to the circuit court's conclusions. *Id.* at 128.

B. Legal standards governing claims of ineffective assistance of counsel.

A defendant claiming ineffective assistance of counsel must prove both that his lawyer's representation was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Steinhardt*, 2017 WI 62, ¶ 42, 375 Wis. 2d 712, 896 N.W.2d 700. The *Strickland* standard establishes a "high bar" for defendants. *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. To demonstrate prejudice, the defendant must affirmatively prove that the alleged defect in counsel's performance actually had an adverse effect on the defense. *Strickland*, 466 U.S. at 693. When "assessing prejudice under *Strickland,* the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently." *Harrington*, 562 U.S. at 111. *Strickland* requires that "[t]he likelihood of a different result must be substantial, not just conceivable." *Id.* at 112.

If the court concludes that the defendant has not proven one prong of this test, it need not address the other. *Strickland*, 466 U.S. at 697. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.*

C. Counsel was not ineffective at the hearing on the other-acts motion.

In its oral ruling denying Malone's postconviction motion, the circuit court said that it had viewed the video clip that had not been presented at the other-acts motion hearing. (R. 83:31, A-App. 11:31.) The court found that the video appeared "washed out" and that it "appears even brighter than normal daylight." (R. 83:33–34, A-App. 11:33–34.)

The circuit court said that it was aware at the other-acts motion hearing that the Brookfield robbery occurred at night. (R. 83:33, A-App. 11:33.) Because the video appears brighter than normal daylight and the whites in the video were "washed out," the court ruled, the presence or absence of the video clip would have had "absolutely no impact whatsoever on the Court's decision" on the motion. (*Id.*)

Because "it is easier to dispose of [Malone's] ineffectiveness claim on the ground of lack of sufficient prejudice," *Strickland*, 466 U.S. at 697, the State will focus its argument on the prejudice prong of the *Strickland* test. It does so because regardless of whether counsel performed deficiently, Malone has not demonstrated that he was prejudiced by counsel's failure to introduce the hand evidence at the other-acts hearing. Indeed, he has not even attempted to demonstrate that he was prejudiced at the other-acts hearing—his prejudice argument addresses only the effect of the omitted evidence at trial. (*See* Malone's Br. 34–38.)

It is Malone's burden to demonstrate prejudice. *See Strickland*, 466 U.S. at 687; *State v. Prineas*, 2012 WI App 2, ¶ 22, 338 Wis. 2d 362, 809 N.W.2d 68. Given the circuit court's determination that the omitted video clip would have had "absolutely no impact whatsoever" on its ruling on the

other-acts motion and Malone's failure to make a contrary argument, this Court should conclude that his lawyer was not ineffective at the other-acts motion hearing.

D. Counsel was not ineffective at trial.

The State likewise will focus its argument regarding counsel's alleged ineffectiveness at trial on Malone's failure to carry his burden of proving prejudice. Malone argues that he was prejudiced at trial because counsel failed to "introduce stronger exculpatory evidence when the jury was already questioning Mr. Malone's identity as a suspect." (Malone's Br. 37.) The flaw in that argument is that Malone has not demonstrated that the video clip of the second robber's hand provides better information about that person's race than what the jury saw when it viewed the image of the second robber's face.

In his closing argument, defense counsel told the jury that they "had a good look at the face area of that second suspect." (R. 92:139, A-App. 7:103.) Malone does not argue that his lawyer was wrong about that. (*See* Malone's Br. 13–50.) Counsel argued that the person's face looked white (R. 92:139–40, A-App. 7:103-104), and he testified at the *Machner* hearing that he believed that the exposed face appeared to be that of a white person, just as he believed that the exposed hand appeared to be white (R. 83:11, 20, A-App. 11:11, 20).

In his brief, Malone states that "[t]he visible portion of the suspect's face appears to have a skin tone matching that of the exposed hand." (Malone's Br. 4.) But if, as Malone tacitly concedes, the jury "had a good look at the face area of that second suspect," and if, as he explicitly concedes, the skin tone of the face matches that of the hand, the video of the hand would have provided only cumulative evidence. Counsel is not ineffective for failing to present cumulative

evidence. *See Mertz v. Williams*, 771 F.3d 1035, 1042–43 (7th Cir. 2014); *see also State v. Honig*, 2016 WI App 10, ¶ 33, 366 Wis. 2d 681, 874 N.W.2d 589 (holding that defendant was prejudiced by counsel's failure to present exculpatory evidence because that evidence "was not merely cumulative").

The absence of prejudice is reinforced by the circuit court's finding that it was not possible for a reasonable juror to tell the race of the suspect based on the video clip showing the robber's hand. (R. 83:35, A-App. 11:35.) To establish prejudice under *Strickland*, Malone must show that "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington*, 562 U.S. at 112. Given the inconclusive nature of the omitted video, Malone cannot show that there is a substantial likelihood that the jury would have reached a different verdict had it seen that video.

In addition, Malone's prejudice argument ignores the security video from the tavern/apartment building taken the night of the Waukesha robbery. Cotton identified herself, Thomas, and Malone in still images from that video as they left the apartment building together at about 10:15 p.m. and when they returned from the Citgo station around 11:00 p.m. (R. 90:175–76, 187–89, A-App. 5:175–76, 187–89.) The robbery occurred around 10:45 p.m. (R. 89:220.) Malone does not argue, much less point to any evidence, that he is not the person shown in that video leaving and returning with Thomas and Cotton.

Malone's prejudice argument also ignores the statement that Thomas's sister, Shakendra Thomas, gave to police. Shakendra testified that Malone, whose name she did not know at the time, was in that apartment the night of January 13, that he left alone, and that she did not remember Thomas leaving the apartment. (R. 90:137, 141–

42.) But she acknowledged that she gave a statement to the police the day after the Waukesha robbery in which she said that after she had taken a shower around 9:00 to 10:00 p.m., "Kenneth and the bald guy left to go to the store" and that when they came back, "the bald guy had a lot of money with him." (R. 43:22 (uppercasing omitted); 90:18, 149–50.) None of the men present in Thomas's apartment when the police executed a search warrant the next morning were bald. (R. 89:246.) Malone, who was across the hall, was bald. (R. 89:265–67.)

Malone's theory that the second Brookfield robber was a white man faced another hurdle that had nothing to do with the video. In his opening argument, defense counsel argued that Thomas and Cotton falsely identified Malone "because they don't want to implicate whoever the real person was." (R. 89:212.) So who was it that Thomas and Cotton were protecting? Thomas testified that his oldest brother, Deyontae Stinson, had obtained the masks that he and Malone wore in the Waukesha robbery. (R. 91:36–37, 48, A-App. 6:36–37, 48–49.) Both Deyontae Stinson and Thomas's other brother, Lavontae Stinson, were present when the police searched Thomas's apartment (R. 89:244–45.) In his closing argument, defense counsel argued that Thomas's brothers had no apparent reason to be buying Halloween masks that time of year and suggested that Thomas was protecting them. (R. 92:134, A-App. 7:98.)

Both Deyontae Stinson and Lavontae Stinson are black men. (R. 90:36, 119.) Even if Thomas and Cotton did not want to implicate Thomas's brothers, Malone did not offer the jury and has not offered this Court any reason that they falsely identified Malone as the second robber to protect some unknown white man.

Malone has not carried his burden of proving that he was prejudiced at trial by counsel's failure to use the video

clip showing the second robber's hand. This Court should conclude, therefore, that counsel was not ineffective.

III. Malone is not entitled to a new trial in the interest of justice.

Malone asks this Court to review the circuit court's decision not to grant a new trial in the interest of justice and to exercise its own authority under Wis. Stat. § 752.35 to grant a new trial in the interest of justice. It is not clear how Malone benefits from appellate review of the circuit court's discretionary decision to deny a new trial in the interest of justice when this Court has the power to exercise its own discretion to do so.

"Discretion implies not only the grant of a wide scope of decision to a trial judge, but also an awareness that, on review, the appellate court will accord the trial judge 'a limited right to be wrong' and within these limits will not reverse his determination, even if it disagrees with his ruling." *Gonzalez v. City of Franklin*, 128 Wis. 2d 485, 501–502, 383 N.W.2d 907 (Ct. App. 1986) (citation omitted). If this Court were to disagree with the circuit court's ruling, it need not decide whether the circuit court erroneously exercised its discretion, as it could exercise its own discretion to order a new trial in the interest of justice. As the State explains below, Malone is not entitled to a new trial in the interest of justice because the real controversy was fully tried and there has been no miscarriage of justice.

A. Standard of review.

An appellate court reviews a circuit court's ruling on a postconviction motion for a new trial in the interest of justice for an erroneous exercise of discretion. *See Hurley*, 361 Wis. 2d 529, ¶ 30.

B. Applicable legal standards.

Under Wis. Stat. § 752.35, the court of appeals may order a new trial in the interest of justice on either of two grounds: "that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." *State v. Cleveland*, 2000 WI App 142, ¶ 21, 237 Wis. 2d 558, 614 N.W.2d 543. Malone seeks a new trial on both grounds. (*See* Malone's Br. 22–28, 45–50.)

The real controversy has not been fully tried when "the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case" or "when the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried." *State v. Hicks*, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996). A court may grant a discretionary reversal for a miscarriage of justice if there is "a substantial probability of a different result on retrial." *State v. Wery*, 2007 WI App 169, ¶ 21, 304 Wis. 2d 355, 737 N.W.2d 66.

Reversals in the interest of justice "are rare and reserved for exceptional cases." *State v. Kucharski*, 2015 WI 64, ¶ 41, 363 Wis. 2d 658, 866 N.W.2d 697 (footnote omitted). "The power to grant a new trial in the interest of justice is to be exercised 'infrequently and judiciously.'" *State v. Avery*, 2013 WI 13, ¶ 38, 345 Wis. 2d 407, 826 N.W.2d 60 (citation omitted). Accordingly, Wisconsin courts "approach[] a request for a new trial with great caution." *Id*. (citation omitted).

C. The real controversy was fully tried.

Malone argues that the real controversy was not fully tried because the jury did not see the portion of the Brookfield video that showed the second robber's hand and because Detective Feyen testified that the video shown to

the jury was complete. (*See* Malone's Br. 23–26, 46–47.) And, in direct contradiction of that argument, he also argues that the real controversy was not fully tried because the evidence regarding the Brookfield robbery should not have been admitted and that evidence clouded the identification issue. (*See id*. at 25.)

Malone's contention that the real controversy was not tried because the jury did not see the portion of the video showing the robber's hand rests on his contention that the omitted video "show[s] the suspect to be white when Mr. Malone is black." (*Id*. at 23.)[5] He argues that "[t]he trial court's finding that it was impossible to tell the race of the suspect in the omitted video clip was clearly erroneous." (*Id*. at 48.) This Court should reject that argument.

"[W]hen evidence in the record consists of disputed testimony and a video recording, [this Court] will apply the clearly erroneous standard of review when [it is] reviewing the trial court's findings of fact based on that recording." *State v. Walli*, 2011 WI App 86, ¶ 17, 334 Wis. 2d 402, 799 N.W.2d 898. Under the clearly erroneous standard, "'factual findings will be upheld as long as they are supported by any credible evidence or reasonable inferences that can be drawn therefrom.'" *Insurance Co. of North America v. DEC Int'l*, Inc., 220 Wis. 2d 840, 845, 586 N.W.2d 691 (Ct. App. 1998) (citation omitted). "[E]ven though the evidence would permit a contrary finding, findings of fact will be affirmed on appeal

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[5] In his Statement of the Case, Malone also asserts that he "has tattoos on his hands and the suspect in the video does not" (Malone's Br. 4–5), an assertion he made in his postconviction motion (R. 68:3, A-App. 8:3). But he does not provide a record citation to any evidence that supports that assertion. This Court "will not consider arguments that are not supported by appropriate references to the record." *State v. Lass,* 194 Wis. 2d 591, 604–05, 535 N.W.2d 904 (Ct. App. 1995).

as long as the evidence would permit a reasonable person to make the same finding." *Reusch v. Roob*, 2000 WI App 76, ¶ 8, 234 Wis. 2d 270, 610 N.W.2d 168 (citation omitted).[6]

The circuit court in this case said that it had viewed the video and found that it appeared "washed out." (R. 83:31, 33, A-App. 11:31, 33.) Even though the robbery occurred at night, the court said, "[t]he video in question appears even brighter than normal daylight." (R. 83:33, A-App. 11:33.) The court also noted that Detective Feyen had testified that he could not tell the second robber's race based on the video shown at trial, which showed part of the robber's face. (R. 83:34–35, A-App. 11:34–35.) For those reasons, the court found, it did not think that a reasonable person or a reasonable juror could determine the second robber's race based on the video. (R. 83:35, A-App. 11:35.)

Malone argues that the circuit court's finding that it is impossible to tell the race of the suspect was clearly erroneous because "there are dark colored items depicted in the video," including "the black door frames, the black rug or floor mat, and the clothing of the suspects," and the "lighting in the video did not cause any of those objects to change from dark colored to light." (Malone's Br. 48.) He argues that "[i]t was only the skin of the second suspect that supposedly appeared lighter because of the 'washed out' video." (*Id.*)

But just because some objects appear dark in the video does not mean that all dark objects appear dark in the video.

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[6] "[P]ut more colorfully," factual findings are clearly erroneous "if they 'strike us as wrong with the force of a five-week-old, unrefrigerated dead fish.'" *In re Disciplinary Proceedings Against Boyle*, 2015 WI 110, ¶ 41, 365 Wis. 2d 649, 872 N.W.2d 637 (quoting *United States v. Di Mucci,* 879 F.2d 1488, 1494 (7th Cir. 1989)).

There is simply no way to know whether some dark objects appear lighter in the video than they would under better lighting or video exposure conditions.

The test is not whether this Court agrees with Malone's assessment of the robber's skin color. This Court has no authority to make factual findings when the facts are in dispute. *See Wurtz v. Fleischman,* 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980). The test is whether the circuit court's factual finding is "supported by any credible evidence or reasonable inferences that can be drawn therefrom." *Insurance Co. of North America*, 220 Wis. 2d at 845. The circuit court's explanation for its finding readily satisfies that standard.

Malone places great emphasis on the fact that the deliberating jury asked to view the video "up close." (Malone's Br. 43.) But, as the State has discussed, Malone does not dispute that the video of the Brookfield robbery that the jury saw "up close" during deliberations provided, in defense counsel's words, "a good look at the face area of that second suspect." (R. 92:139, A-App. 7:103). And he concedes that "[t]he visible portion of the suspect's face appears to have a skin tone matching that of the exposed hand" (Malone's Br. 4).

Malone complains that "[t]he State did not have any kind of video expert testify as to how or whether the lighting affected the appearance of the suspect, and there is no reason to believe that the video does not depict what it appears to depict." (Malone's Br. 48.) But Malone does not explain why the State was under any obligation to present expert evidence about the video. Because he alleged that his lawyer was ineffective for not presenting that video clip, he bore the burden of proof. *See Strickland*, 466 U.S. at 687.

When a defendant argues that he is entitled to a new trial in the interest of justice because his trial counsel's deficiencies prevented the real controversy from being fully tried, the appropriate analytical framework is provided by *Strickland*. *See State v. Mayo*, 2007 WI 78, ¶ 60, 301 Wis. 2d 642, 734 N.W.2d 115. That is the case here, and the State has explained why Malone's counsel was not ineffective at trial. *See supra*, pp. 25–28.

Malone argues in the alternative that "[t]he video and testimony regarding the Brookfield robbery was also improperly before the jury (because it did not identify Mr. Malone) and it 'so clouded' the crucial issue of identification that it can be fairly said the real issue was not tried." (Malone's Br. 25.) Malone does not attempt to resolve the tension between his argument that the real controversy was not fully tried because the jury improperly received evidence about the Brookfield robbery and his argument that the real controversy was not fully tried because the jury should have received *more* evidence about the Brookfield robbery.

In any event, Malone's argument fails for two reasons. First, he does not develop an argument as to why the Brookfield robbery evidence "so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried." *Hicks*, 202 Wis. 2d at 160. This Court does not consider undeveloped arguments. *See Pettit*, 171 Wis. 2d at 646. Second, this branch of the "real controversy not fully tried" standard applies only "when the jury had before it evidence not properly admitted." *Hicks*, 202 Wis. 2d at 160. As the State has discussed, the circuit court properly exercised its discretion when it admitted the Brookfield other-acts evidence. *See supra*, pp. 15–22.

D. There has been no miscarriage of justice.

"In order to grant a discretionary reversal for a miscarriage of justice, there must be a substantial probability of a different result on retrial." *Wery*, 304 Wis. 2d 355, ¶ 21. Malone argues that a miscarriage of justice occurred here because "a new trial—either absent the other acts evidence or including the full video from the Brookfield 7-11—would likely produce a different result." (Malone's Br. 26.)

Malone does not explain why there is a substantial probability of a different result at a new trial at which the jury does not hear the Brookfield robbery evidence. On that basis alone, this Court should reject that argument. *See Pettit*, 171 Wis. 2d at 646. Moreover, Malone does not attempt to square that contention with his claim that "[t]he omitted video would have powerfully undermined [the codefendants'] testimony" identifying him as one of the Waukesha robbers. (Malone's Br. 49.)[7]

Nor has Malone shown that there is a substantial likelihood of a different result at a trial if the jury were to see the portion of the Brookfield security video that showed the second robber's hand. He argues that that video clip "would have been far more effective" in assisting the jury than the video it did see. (*Id.*) But, as the State has pointed out, the jury had "a good look at the face area of that second

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[7] Malone asserts that his codefendants "did not know Mr. Malone." (Malone's Br. 49.) He is mistaken. Thomas testified that he first met Malone a couple of months before the robberies and that he and Malone hung out together at Thomas's apartment. (R. 91:44–45, A-App. 6:44–45.) Cotton testified that she met Malone through her friend Mandy Love at the beginning of 2015 when she went to Love's apartment and Malone was at that apartment. (R. 90:169–70, A-App. 5:169–70.)

suspect" (R. 92:139, A-App. 7:103) and Malone acknowledges that "[t]he visible portion of the suspect's face appears to have a skin tone matching that of the exposed hand" (Malone's Br. 4). Malone has not identified any basis in the record for this Court to conclude that omitted video clip would more effectively have demonstrated that the second robber was white than the video shown at trial.

Malone argues that "[i]f the trial court was truly unable to determine the race of the suspect after viewing the omitted video clip then there is a reasonable doubt that the man in the clip was black." (Malone's Br. 49.) He contends that "[a] reasonable doubt that he was black equates to a reasonable doubt that the suspect was Mr. Malone." (*Id.*) Again, the flaw in that argument is Malone's concession that the skin tone shown in the video shown at trial is the same as that in the video clip that was not shown. The jury already has had an opportunity to determine whether the man in the video was black or white and was able to determine Malone's guilt beyond a reasonable doubt.

Malone quotes the circuit court's statement that it did not "think it's definitive that somebody can reach the conclusion absolutely and conclusively that the individual was one race or the other based upon what was depicted in that video." (R. 83:35, A-App. 11:35.) He argues that he "was not required to meet that standard to show a substantial probability of a different outcome on retrial as part of his miscarriage of justice argument." (Malone's Br. 47.)

The State agrees that a court need not determine with absolute certainty that the hand showed a white person to determine that justice has miscarried. However, the State reads the circuit court's statement as a comment on the evidence, not as a statement of the legal standard it was applying.

Moreover, after criticizing the circuit court's purported legal standard for being too demanding, Malone errs in the opposite direction. He quotes the harmless error standard for determining whether there is a "reasonable probability" of a different outcome. (Malone's Br. 47–48 (quoting *State v. Harvey*, 2002 WI 93, ¶ 41, 254 Wis. 2d 442, 647 N.W.2d 189).) To establish a miscarriage of justice, however, Malone must do more than demonstrate a "reasonable" probability of a different outcome; he must show a "substantial" probability of a different result on retrial. *Wery*, 304 Wis. 2d 355, ¶ 21.

Malone has not shown that there is a substantial probability of a different result at retrial if the Brookfield other-acts evidence were omitted entirely or if a second jury saw the portion of the Brookfield security video that the first jury did not see. This Court should conclude, therefore, that no miscarriage of justice occurred in this case.

This is not a "truly exceptional case." *Avery*, 345 Wis. 2d 407, ¶ 57. Accordingly, this Court should deny Malone's request for a new trial in the interest of justice.

IV. Malone forfeited his right to direct review of his due process claim because he failed to make a contemporaneous objection.

Malone argues that the State violated his due process right to a fair trial because Detective Feyen omitted from the video shown at trial the portion of the Brookfield 7-Eleven robbery that shows the second robber's hand and falsely testified that no activity was edited out. (Malone's Br. 41.) He argues that issue as though it had been preserved for appellate review. (*See id.* at 38–44.) But because he did not object at trial (*see id.* at 33), he did not preserve the issue for review.

A. Standard of review.

An appellate court independently reviews whether a party has forfeited the right to raise an issue on appeal. *See City of Eau Claire v. Booth*, 2016 WI 65, ¶ 6, 370 Wis. 2d 595, 882 N.W.2d 738.

B. Malone has forfeited his due process claim.

"Wisconsin courts have 'continuously emphasized the importance of making proper objections as a prerequisite to assert, as a matter of right, an alleged error on appeal.'" *State v. Saunders*, 2011 WI App 156, ¶ 30, 338 Wis. 2d 160, 807 N.W.2d 679 (citation omitted). "Without an objection, even an error based upon an alleged violation of a constitutional right may be waived." *State v. Hansbrough*, 2011 WI App 79, ¶ 25, 334 Wis. 2d 237, 799 N.W.2d 887. "The absence of any objection warrants that [the court] follow 'the normal procedure in criminal cases,' which 'is to address waiver within the rubric of the ineffective assistance of counsel.'" *State v. Carprue*, 2004 WI 111, ¶ 47, 274 Wis. 2d 656, 683 N.W.2d 31 (quoted source omitted).

Malone acknowledges that his trial counsel "fail[ed] to object to the State's use of the prejudicially edited video" and argues that counsel was ineffective for that failure. (Malone's Br. 33.) He further argues that counsel was ineffective for failing to object to Detective Feyen's testimony that the video shown at trial "was a complete and accurate portrayal of the Brookfield robbery." (*Id*. at 38.)

The State has explained why defense counsel was not ineffective in this regard. This Court should hold that Malone has forfeited his right to direct review of this claim and should address the claim under an ineffective assistance rubric.

CONCLUSION

For the reasons stated above, this Court should affirm the judgment of conviction and the order denying postconviction relief.

Dated this 9th day of October, 2017.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

JEFFREY J. KASSEL
Assistant Attorney General
State Bar #1009170

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 266-9594 (Fax)
kasseljj@doj.state.wi.us

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 10,773 words.

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JEFFREY J. KASSEL
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 9th day of October, 2017.

____
JEFFREY J. KASSEL
Assistant Attorney General