COURT OF APPEALS
DECISION
DATED AND FILED

March 23, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 2004AP2923-CR
2004AP2924-CR

Cir. Ct. Nos. 2002CF1528
2002CF2243

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANNY E. PREUSS,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Rock County: MICHAEL J. BYRON, Judge. *Affirmed*.

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 LUNDSTEN, P.J. Danny Preuss appeals judgments of the trial court convicting him of one count of burglary of a building or dwelling and one count of battery by a prisoner as a habitual criminal. Preuss first seeks specific

performance on a pretrial plea agreement that he alleges included the dismissal of his battery charge. We reject that argument and, therefore, address several arguments Preuss makes relating to his battery trial. Preuss argues that he was denied his constitutional right to a unanimous verdict, that the evidence was insufficient to support his conviction under an aider-and-abettor theory, that it was error for the trial court to give the party-to-a-crime instruction, that during closing arguments the prosecutor's argument improperly suggested the existence of facts not supported by the evidence, and that the party-to-a-crime statute is unconstitutionally overbroad as applied in this case. We reject each of these arguments, and affirm.

Background

¶2 In June 2002, while on parole relating to a prior conviction, Preuss was charged with burglary and misdemeanor theft. A parole hold was placed and Preuss was incarcerated in the Rock County Jail. On August 2, 2002, while still in jail, Preuss was charged with battery by a prisoner in connection with an incident that occurred at the jail.

¶3 The burglary/theft case and the battery case were assigned to different Rock County prosecutors. This split assignment led to a plea and sentencing hearing where one of the prosecutors accepted as accurate a recitation of a plea agreement by Preuss's attorney which, in turn, led the trial court to accept Preuss's plea to burglary, dismiss the theft and battery charges, and impose what appeared to be a joint sentencing recommendation on the burglary conviction. In the discussion section below, we detail the events before, during, and after this hearing. For now, it is sufficient to say that the trial court subsequently vacated Preuss's burglary plea and vacated the dismissal of Preuss's

battery charge. Following this, Preuss pled guilty to the reinstated burglary charge and went to trial on the battery charge.

¶4 At Preuss's battery trial, the prosecutor presented evidence showing that Preuss personally battered another jail inmate. The victim testified that Preuss beat him because the victim was in jail for harming his child. The victim testified that Preuss came into his cell, wrapped a sheet around his neck, put his knee in his back, and choked him. The victim testified that, a short time later, Preuss again came to his cell, this time accompanied by three other inmates. He said Preuss and two of the men entered his cell, while the other stood in the doorway. The victim testified that Preuss grabbed him by the ankles and pulled him off of his bunk, ripping his shirt. He said that Preuss dragged him by his ankles to the toilet, lifted him up, and stuck his head in the toilet. Preuss then let the victim down on the floor and some of the other inmates punched him in the stomach. Preuss and the others left the cell, but then came back again and told the victim he would have to do the other inmates' laundry. This time as they were leaving, Preuss put a bar of soap in the victim's mouth, "closed [the victim's] mouth shut," and slapped him across the face.

¶5 A jail guard also testified. Deputy Ueland, who was on duty the night of the beating, testified that he received a note from an inmate saying there were things going on. Ueland then started monitoring the unit. He was able to see the door to the victim's cell and "saw a bunch of inmates standing there, a big inmate named Washington standing in the doorway." Ueland saw people leaving the cell and saw Preuss come out. When Ueland later questioned Preuss, Preuss denied being in the victim's cell. When Ueland told Preuss he had seen him out in the day room and up and down the stairs a few times during the times he was monitoring the section, Preuss indicated he had noticed water on the floor and was

going to mop it up. Preuss said he was on the upper tier, which is where the victim's cell was located. Preuss's own testimony at trial indicates that he was the last one in the cell with the victim and the victim's cellmate.

¶6 Preuss testified, and his account was markedly different than the victim's. Although Preuss acknowledged being in the victim's cell, he denied any physical involvement in the beating. Preuss admitted only that he was present and said: "Mother fucking baby killer, you deserve … whatever you get."

¶7 The jury convicted Preuss of battery by a prisoner as a party to the crime.

¶8 With respect to his burglary conviction, Preuss was sentenced to a term of three years of initial confinement and five years of extended supervision consecutive to the sentence Preuss was presently serving on his parole revocation. This is different than the burglary sentence the court initially imposed: two years of initial confinement and five years of extended supervision. With respect to his battery conviction, the court imposed five years of initial confinement and three years of extended supervision to run concurrent with the burglary sentence but consecutive to Preuss's parole revocation sentence. Thus, the result of the trial court's decision to reopen the burglary and battery cases is that Preuss was convicted of felony battery by a prisoner and he received a total sentence substantially longer than the sentences initially imposed.

Discussion

I. Specific Performance

¶9 Preuss argues that, regardless of the true plea agreement reached prior to his November 18, 2002 hearing, the State should be bound to specifically

perform on the terms of the agreement recited by his attorney at the November 18 hearing because the prosecutor present agreed that Preuss's attorney accurately recited the agreement. Preuss asks this court to restore him to the place he was in after he entered his plea to burglary, was sentenced on that charge, and his theft and battery charges were dismissed, but before the circuit court effectively reopened both his burglary and battery cases. We first summarize the pertinent facts and then more specifically describe and reject Preuss's supporting arguments.

A. Facts Relating To Preuss's Specific Performance Argument

¶10 Preuss's burglary and theft case, circuit court case no. 2002CF1528, was assigned to Rock County ADA Anne Nack. The battery case, circuit court case no. 2002CF2243, was assigned to Rock County ADA Gerald Urbik.

¶11 On November 4, 2002, a short status conference was held in the burglary and theft case. The court called only the burglary/theft case number. ADA Nack was present, but ADA Urbik was not. Preuss's counsel, Attorney Jack Hoag, stated that he and Nack had reached an agreement "on this case," calling for a recommended sentence of "two and five for a total of seven concurrent with his probation [sic] revocation." It is and was undisputed that Attorney Hoag was effectively stating that the parties agreed Preuss would enter a plea to the burglary charge and the State would move to dismiss the theft charge. Attorney Hoag did not assert that dismissal of the battery charge was a part of the agreement. Rather, he added: "However, there's a battery [by an] inmate case that there's got to be victim notification because we're going to seek its dismissal, and I'm going to ask you to set this for the 18th." ADA Nack stated: "That's correct and no objection." The trial court asked about the battery case: "Is that other case mine … too?"

Preuss's counsel responded by saying he did not know.[1] The court set the burglary case for a plea hearing on November 18, 2002.

¶12 For reasons not reflected in the record, on November 18, 2002, Preuss, Attorney Hoag, and ADA Urbik, but not ADA Nack, appeared on both the burglary case and the battery case. Attorney Hoag summarized his understanding of a plea agreement that covered both the burglary and battery cases. Hoag said Preuss had agreed to enter a plea to the burglary charge with a joint sentencing recommendation of two years of initial confinement and five years of extended supervision, to run concurrent with the sentence Preuss was currently serving because of his parole revocation. Attorney Hoag also said that the State had agreed to move for dismissal of the theft and battery charges. ADA Urbik responded: "That appears to be the agreement." At the same hearing, the parties and the court proceeded to act on the agreement recited by Attorney Hoag. Preuss entered his plea to the burglary charge, the court dismissed the theft and battery charges, and Preuss was sentenced in accordance with the "joint recommendation."

¶13 Four days later, on November 22, 2002, ADA Urbik moved the trial court to "reopen" the proceedings. Urbik told the court that, at the prior hearing, he had relied on Attorney Hoag's assertion of the terms of the plea agreement, believing that ADA Nack had entered into a plea agreement covering the battery charge. ADA Urbik told the court that after the hearing he asked Nack "about

[1] In his appellate brief, Preuss repeatedly suggests that this exchange indicates that ADA Nack is expressing some sort of agreement that she engaged in plea negotiations involving the battery case. We disagree. Nothing Nack says indicates agreement that their negotiations covered the battery charge.

that," and she said she had not included the battery charge in her plea agreement offer. Attorney Hoag stated that it was his understanding that Nack was not asserting that their agreement excluded the battery charge, but rather that she did not recall. Hoag said it was his recollection that the battery charge was a part of his agreement with Nack. Hoag argued that the plea agreement he recounted was not only appropriate, but "it went through," and he opposed reopening the cases. Urbik argued that there had been a misunderstanding, that reopening the case would not prejudice Preuss, and that the court should set the matter for an evidentiary hearing. Hoag suggested that Nack be brought into the hearing.

¶14 After a break, ADA Nack appeared. The court offered to put Nack under oath, but Hoag declined the offer. Instead, Nack simply stated that she did not recall talking to either Hoag or Urbik about the battery charge. Nack said she did not write anything in her file and "so I don't know if I did or I didn't." The transcript does not show that the trial court resolved, as a factual matter, whether Nack agreed to the dismissal of Preuss's battery charge. Rather, the court responded to Nack's lack of memory by saying simply: "on that state of the record, the Court's going to allow or reopen the dismissal." Attorney Hoag made no further argument regarding enforcement of the agreement, either after ADA Nack spoke or after the trial court ordered reopening. For all the record shows, the trial court decided to reopen the battery case simply because ADA Nack *might* not have agreed to dismiss the charge.

¶15 After the court ordered the battery charge reinstated, the discussion immediately shifted to whether Preuss wanted to withdraw his burglary plea and start over on all charges. Hoag explained that Preuss preferred to leave his burglary conviction and sentence in place and go forward with a plea and sentencing on the battery charge. The court addressed Preuss personally, and

Preuss affirmed that desire. Preuss then entered his plea to the battery and the trial court ordered a presentence report.

¶16 In June 2003, Preuss, now represented by Attorney Jon LaMendola, filed a motion to withdraw his battery plea and moved for dismissal of the battery charge pursuant to the "plea agreement." The written motion is cursory and does not contain developed argument.

¶17 A hearing on Preuss's motion was held on August 27, 2003. At that hearing, Attorney LaMendola explained that he was seeking specific performance on the plea agreement terms set forth by Attorney Hoag at the November, 18, 2002 hearing. Stated differently, LaMendola was asking the court to restore the status of the burglary and battery cases to what it was immediately before the court ordered the battery case reopened. LaMendola argued that the trial court did not have all of the facts before it when it reopened the case.[2] In effect, LaMendola asked that the court revisit the question of whether Attorney Hoag had accurately recounted the plea agreement terms at the November 18 hearing. LaMendola did not, however, make the arguments Preuss's appellate counsel makes. Rather, LaMendola argued that the transcript of the November 4 status conference, with ADA Nack appearing, and the transcript of the November 18 plea hearing, with ADA Urbik appearing, supported the factual inference that Hoag accurately recited the agreement. Apparently the trial court disagreed because it proceeded to take testimony on the topic.

[2] Attorney LaMendola argued, in the alternative, that Preuss be permitted to reconsider his November 22, 2002 decision to enter a guilty plea to the battery charge. It is unclear whether Attorney LaMendola was asking that Preuss be allowed to also withdraw his burglary plea, but ultimately the circuit court vacated both pleas. Regardless, Preuss does not complain that the trial court improperly forced him to choose between withdrawing both pleas or neither plea.

¶18 ADA Nack, Attorney Hoag, and Preuss testified. For our purposes, it is sufficient to say (1) that Nack gave testimony supporting a finding that Hoag was in error when he asserted that the plea agreement involved dismissal of the battery charge, (2) that Hoag gave testimony lending support to both the State's view and Preuss's view of the negotiations, and (3) that Preuss gave testimony supporting a finding that Hoag did reach an agreement with Nack regarding the battery charge.

¶19 At the close of testimony, Attorney LaMendola effectively dropped his request that the trial court make a factual finding as to whether Hoag accurately recited the plea agreement at the November 18 hearing. LaMendola also effectively dropped his request that the court conclude, as a matter of law, that Preuss was entitled to specific performance on the agreement recited by Hoag. Following testimony, LaMendola said only that he did not want to "waive that prior objection." The readily apparent reason the trial court did not make any decision regarding the alleged plea agreement is that, immediately following the testimony, LaMendola redirected the court's attention to whether Preuss should be allowed to withdraw his plea to the battery charge. Consequently, at the end of the hearing the trial court resolved that question by vacating Preuss's battery and burglary pleas, thereby leaving Preuss in the position he was in prior to plea negotiations.

¶20 On appeal, Preuss's arguments are directed solely at the reopening of his battery case.

B. Discussion Of Preuss's Specific Performance Argument

¶21 Preuss's specific performance argument is based on four undisputed facts: (1) at the November 18 hearing, Attorney Hoag stated the terms of a plea

agreement which included the State moving to dismiss the battery charge; (2) the prosecutor representing the State at that hearing, ADA Urbik, agreed that Hoag's summary of the agreement was correct; (3) Preuss entered his plea under the belief that the plea agreement stated by Hoag was the true agreement; and (4) Preuss was sentenced in accordance with that agreement with the reasonable expectation that his sentence was final.

¶22 Preuss tacitly acknowledges that the trial court made no factual finding regarding the true terms of the plea agreement reached between Attorney Hoag and ADA Nack prior to the November 18 hearing. Instead, Preuss argues that, regardless of the true agreement, the State should be bound by the terms recited by Hoag and, therefore, we should restore this case to the posture it was in after Preuss entered his plea to burglary, was sentenced on that charge, and his theft and battery charges were dismissed. More specifically, Preuss argues as follows.

¶23 Preuss contends that, absent fraud by a defendant, once a plea is entered and accepted pursuant to a plea agreement, the plea and the agreement are binding on the State and the defendant is entitled to specific performance. This is true, Preuss argues, because, when more than one prosecutor is involved in negotiations, the prosecutor who participates in presenting plea agreement terms to a judge is obligated to learn what another prosecutor did or did not offer before agreeing with a defense attorney's statement of the agreement. In support, Preuss primarily relies on ***Santobello v. New York***, 404 U.S. 257 (1971). Applying this legal argument here, Preuss asserts that because the plea agreement recited by Attorney Hoag included the dismissal of Preuss's battery charge, and because ADA Urbik accepted that recitation as correct, Preuss was entitled to specific performance.

¶24 Second, Preuss makes a double jeopardy argument. He asserts that specific performance of the "agreement" executed on November 18 is required because the touchstone of double jeopardy law is the expectation of finality, and there is no dispute that Preuss had a reasonable expectation that his plea and sentencing on November 18 was the final disposition on all charges.

¶25 Finally, Preuss argues that when the State moved to reopen his battery case, the prosecutor supported that request *only* with the assertion that he made a *unilateral mistake*. Preuss contends that, as a matter of law, a unilateral mistake by the State is an insufficient reason to vacate a plea against the wishes of a defendant.[3]

¶26 We do not, however, address the merits of these arguments because they have been waived. When Preuss's trial counsels opposed the reopening of his battery case, neither made the arguments Preuss's appellate counsel now makes. Our detailed description of the relevant proceedings shows that neither Attorney Hoag nor Attorney LaMendola made the arguments that are made in Preuss's

[3] The State spends the first part of its appellate brief arguing that there was no agreement to dismiss the battery charge. This effort is misguided. First, although Preuss frequently uses language in his brief geared toward persuading us that ADA Nack in fact agreed to move for dismissal of the battery charge, Preuss does not argue that we should reverse on that basis. That is, Preuss does not argue that reversal is required because the trial court erred in making a factual finding that there was no agreement on the battery charge. Thus, the State's extended discussion of evidence supporting such a trial court finding may respond to some statements in Preuss's appellate brief, but it does not respond to the actual arguments Preuss makes in support of reversal.

More troubling, the State writes that the trial court "essentially concluded that the parties had never agreed to include the battery as part of the plea agreement on the burglary." The State does not support its assertion with record cites, and our review of the record discloses no such finding, either express or implied. It may be that Attorney Hoag, and later Attorney LaMendola, thought it a foregone conclusion that, if pressed, the trial court *would* find that there was no agreement on the battery charge. But the trial court neither made nor "essentially" made such a finding.

appellate brief.[4] "The general rule is that issues not presented to the circuit court will not be considered for the first time on appeal." ***State v. Caban***, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997). The supreme court explained:

> The necessity of lodging an adequate objection to preserve an issue for appeal cannot be overstated. We have written on numerous occasions that in order to maintain an objection on appeal, the objector must articulate the specific grounds for the objection unless its basis is obvious from its context. This rule exists in large part so that both parties and courts have notice of the disputed issues as well as a fair opportunity to prepare and address them in a way that most efficiently uses judicial resources.

State v. Agnello, 226 Wis. 2d 164, 172-73, 593 N.W.2d 427 (1999) (citations omitted). We know of no reason why this rule does not apply here. In particular, we know of no reason why general waiver principles would not apply to Preuss's double jeopardy argument. *See* ***State v. Koller***, 2001 WI App 253, ¶44 n.5, 248 Wis. 2d 259, 635 N.W.2d 838 (listing examples of waived double jeopardy claims).[5]

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[4] We have considered statements by Attorney LaMendola that might be read as supporting arguments that Preuss's counsel makes on appeal. For example, at one point Attorney LaMendola, referring to the November 18 hearing, argues: "[ADA Urbik has] got the file in front of him, and he accepts [Attorney Hoag's assertion]. So I don't know what the problem is." However, at best, Attorney LaMendola made only isolated assertions, not arguments recognizable as those made on appeal.

We also note that the State's appellate brief, under its guilty-plea-waiver-rule heading, does make a brief *general* waiver argument, noting that one of Preuss's trial counsels, Hoag, failed to make the arguments made on appeal. Preuss does not respond to this general waiver argument. For that matter, Preuss does not respond to the State's guilty-plea-waiver argument. Neither appellate counsel addresses Attorney LaMendola's failure to make the arguments Preuss makes on appeal.

[5] The State asks us to apply the guilty-plea-waiver rule, arguing that Preuss's plea to the battery on November 22, 2002, waived Preuss's "ability to challenge the court's decision to vacate" dismissal of his battery charge. The guilty-plea-waiver rule may apply to most of Preuss's arguments, but we question whether it covers his double jeopardy claim. Although a guilty or no contest plea generally waives all nonjurisdictional defects and defenses, including
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¶27 In sum, the reasons behind the general waiver rule apply here, and we deem the arguments Preuss makes on appeal in favor of specific performance waived.[6]

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alleged constitutional violations occurring prior to the plea, *see* ***State v. Riekkoff***, 112 Wis. 2d 119, 123, 332 N.W.2d 744 (1983), we have recognized that "double jeopardy is an exception to the guilty-plea-waiver rule." ***State v. Hubbard***, 206 Wis. 2d 651, 655, 558 N.W.2d 126 (Ct. App. 1996). The State does not mention this exception and, therefore, does not discuss whether it applies to Preuss's double jeopardy argument.

The State, relying on ***State v. Williams***, 2000 WI App 123, ¶¶7-13, 237 Wis. 2d 591, 614 N.W.2d 11, also argues that Preuss waived his arguments because he did not seek interlocutory review. We do not, however, read ***Williams*** as creating a blanket rule applying to all disputes involving plea agreements where a defendant could have, but failed to, seek interlocutory review. There are factors before us suggesting that we should not follow ***Williams*** here. For example, unlike the defendant in ***Williams***, Preuss asserts that reopening his case violated his double jeopardy rights. Also, unlike ***Williams***, where we discussed the uncertainty of what would have occurred, ***id.***, ¶10, here we know exactly what would have happened because in this unusual case it did happen. At a minimum, extending ***Williams*** is something that must be done with care, and the State's discussion on this topic is insufficient to give us confidence that ***Williams*** should be applied.

[6] While we dispose of Preuss's arguments on waiver grounds, we do not mean to suggest that Preuss's factual and legal arguments have merit. For example, we disagree with Preuss's factual assertion that ADA Urbik moved to reopen the battery case based solely on the ground that Urbik made a mistake. Urbik did not say he made a mistake. Rather, he asserted there had been an "honest misunderstanding," with no prejudice to Preuss. ADA Urbik sought either an agreement to reopen the battery case or factual resolution by the court as to the actual terms of the agreement with ADA Nack. Preuss's appellate counsel is certainly free to characterize Urbik's conduct at the November 18 hearing as a "mistake." But it is readily apparent that Urbik himself took the position that he *reasonably* relied on the defense attorney's representation, not that he made a mistake.

Similarly, we question whether Preuss's left-hand/right-hand argument has merit. Preuss argues that, under ***Santobello v. New York***, 404 U.S. 257 (1971), ADA Urbik, one "hand," was obligated to learn what ADA Nack, the "other hand," had agreed to before Urbik acquiesced to Attorney Hoag's recitation of the agreement. Preuss's reliance on ***Santobello*** presupposes that Hoag inaccurately recited the agreement. If Hoag accurately recited the agreement, there would be no left-hand/right-hand problem; Urbik would have affirmed the true agreement. This context casts serious doubt on the applicability of ***Santobello***. In that case, the "mistake" was entirely the fault of the prosecutors. One prosecutor entered into a plea agreement requiring that the government refrain from making a sentencing recommendation and a second prosecutor violated that agreement by recommending the maximum sentence. ***Id.*** at 258-59. The defense attorneys in ***Santobello*** played no role in the mistake, but instead immediately objected. ***Id.*** It is far from apparent that the ***Santobello*** Court would have reached the same result if the prosecutor at

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II. Arguments Directed At Preuss's Liability As An Aider And Abettor

¶28 Preuss makes a series of related arguments under the following headings: "Was Mr. Preuss Denied His Constitutional Right To A Unanimous Jury Verdict When The Jury Was Confused Between Two Conceptually Distinct Methods As To How The Crime Could Be Committed As The Result Of Improper Prosecutorial Argument?" and "When The Jury Appears To Have Convicted Based Upon His Exercise Of His First Amendment Rights Was Mr. Preuss Impermissibly Convicted In Violation Of The First Amendment?" Under these headings, Preuss makes five distinct arguments. We address and reject each.

A. Unanimity

¶29 Preuss argues that he was denied his constitutional right to a unanimous verdict. In particular, he argues that being a direct actor in a battery and being a person who has party-to-a-crime liability because he aids and abets by giving assistance with words are conceptually distinct means of committing battery. According to Preuss, because the jury instructions and verdict forms do not show that Preuss's jury unanimously agreed on one of these distinct means, he was denied a unanimous verdict. This argument is a non-starter. As the State points out, if the evidence is sufficient to support both party-to-a-crime theories, jurors need not unanimously agree whether a defendant is guilty because he directly committed the crime or because he aided and abetted a direct actor. ***State***

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sentencing made his mistake because he had been misled innocently or intentionally by a defense attorney.

v. Hecht, 116 Wis. 2d 605, 619, 342 N.W.2d 721 (1984); ***State v. Simplot***, 180 Wis. 2d 383, 401, 509 N.W.2d 338 (Ct. App. 1993).[7]

B. Sufficiency Of The Evidence

¶30 Preuss challenges the sufficiency of the evidence. He argues that his jury may have found him guilty based solely on his admission that he was present and made a verbal statement and, therefore, based solely on an aider and abettor theory of liability unsupported by the trial evidence. Preuss contends the trial evidence permitted just two alternative findings: either Preuss was a direct actor who beat the victim, or Preuss was a mere bystander. Preuss asserts that proof of his liability as an aider and abettor consisted solely of evidence that he was present at the beating and at some point said, in reference to the victim, "Mother fucking baby killer, you deserve … whatever you get." Preuss argues that there was no

[7] The State argues that Preuss waived his unanimity claim by failing to object to the jury instruction and verdict forms. The parties dispute whether unanimity claims are subject to waiver. The State asserts that, although prior decisions have determined that unanimity claims are subject to waiver, a more recent decision of this court, ***State v. Green***, 208 Wis. 2d 290, 304, 560 N.W.2d 295 (Ct. App. 1997), holds that unanimity claims can be waived. We, like Preuss, question the State's reliance on ***Green***. As Preuss points out, in ***State v. Heitkemper***, 196 Wis. 2d 218, 538 N.W.2d 561 (Ct. App. 1995), a decision pre-dating ***Green***, we rejected a unanimity waiver argument, stating:

> The State preliminarily contends that because Heitkemper did not object at the time, move to strike, move for a mistrial *or object to the jury instructions*, he waived any right to review any alleged unanimity problem arising from the prosecutor's rebuttal. We disagree. The supreme court has held that "[t]he right to a unanimous verdict ... is so fundamental that it cannot be waived."

Heitkemper, 196 Wis. 2d at 228-29 n.3 (emphasis added) (quoting ***Holland v. State***, 87 Wis. 2d 567, 597-98, 275 N.W.2d 162 (Ct. App. 1979), and misidentifying it as a supreme court opinion). However, we need not resolve this issue because we choose to reject Preuss's unanimity claim on its merits.

evidence indicating how loudly he made the statement, no evidence that anyone else heard him, and no evidence that he intended the statement to affect anyone's behavior. Preuss argues that this absence of context evidence means the jury could have, at most, found that Preuss's statement was an expression of his personal opinion, unheard by the direct actors. This argument is unpersuasive because it fails to view the evidence in a light most favorable to the verdict.

¶31 The State bears the burden of proving all elements of a crime beyond a reasonable doubt. ***State v. Sartin***, 200 Wis. 2d 47, 53, 546 N.W.2d 449 (1996). This court may not reverse a conviction "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). If any possibility exists that the jury could have drawn the appropriate inferences from the trial evidence to find guilt, this court may not overturn the verdict. ***Id.*** at 507. Viewed in this manner, the evidence is sufficient to support finding Preuss guilty as an aider and abettor.

¶32 It is true that Preuss did not testify that he spoke loudly enough to be heard by the direct actors, that he intended to encourage them, or even that he made the statement during the time the victim was being battered, but these are all reasonable inferences from the evidence.

¶33 Preuss testified that three men, not including himself, beat the victim. When Preuss's attorney asked him if he took an active part in the "physical abuse," Preuss answered: "Not in the physical abuse, no." His attorney then asked him if he said some things and Preuss testified: "Yes, I did." In response to the prosecutor's questions, Preuss related his "baby killer" statement.

It is apparent from the context of Preuss's testimony that he was attempting to persuade the jury that he did not actively participate in the battery, but merely expressed his approval of the beating in strong words to those present, including the direct actors. It is disingenuous for Preuss to now suggest that the jury could infer from his testimony *only* that he said "Mother fucking baby killer, you deserve … whatever you get" so quietly that the direct actors could not hear him. Not surprisingly, his trial attorney did not even suggest this view of the evidence to the jury.

¶34 Further, on its face Preuss's "baby killer" statement is one intended to communicate a message to the victim. Thus, it is reasonable to infer that it was said loudly enough for the victim and those near the victim to hear it. And, the inculpatory timing is apparent from Preuss's use of the word "get," a present tense verb. Finally, the statement provides evidence of Preuss's criminal intent. Declaring that a person is a "Mother fucking baby killer" who deserves "whatever" he gets, in the presence of people who are beating or menacing that person, is strong evidence that the speaker is encouraging, supportive of, and ready to assist the direct actors. We conclude, therefore, that the trial evidence is sufficient to support Preuss's conviction as an aider and abettor to the crime of battery.

C. The Decision To Give The Party-To-A-Crime Instruction And The Prosecutor's Closing Argument

¶35 Our sufficiency of the evidence discussion in subsection B above also disposes of two very closely related arguments made by Preuss. Preuss asserts that it was error for the trial court to give the party-to-a-crime instruction

because the evidence was insufficient to support a jury finding that he was liable, except as a direct actor. Preuss also argues as follows:

> When [the prosecutor] argued in his closing argument that others had heard Mr. Preuss's comments, and by implication that the comments became the reason why [the victim] was beaten, there was no evidence to support his argument and the argument was improper.

These arguments fail because both are based on the flawed proposition that there was insufficient evidence from which the jury could infer that Preuss was an aider and abettor, the topic put to rest in subsection B.

D. Overbreadth

¶36 Finally, Preuss argues that his conviction violates his First Amendment rights. He recites overbreadth law providing that a statute may be facially invalid if it "'is so sweeping that its sanctions may be applied to constitutionally protected conduct which the state is not permitted to regulate.'" ***State v. Janssen***, 219 Wis. 2d 362, 374, 580 N.W.2d 260 (1998) (quoting ***Bachowski v. Salamone***, 139 Wis. 2d 397, 411, 407 N.W.2d 533 (1987)). Preuss then says he is challenging his conviction "as applied in these particular factual circumstances" because the jury may have convicted him for nothing more than being geographically near the crime and expressing his opinion.

¶37 Preuss misapprehends the case law he relies on. That law provides an analytical framework for deciding whether to strike down a statute because its existence impermissibly chills constitutionally protected activities. A successful challenge under this law results in the statute itself being declared unconstitutional. Preuss, however, fails to follow through with a developed argument as to why the party-to-a-crime statute is overbroad, instead arguing that

the party-to-a-crime statute is unconstitutional as applied to him. We decline to address the merits of his argument further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶38 Moreover, even if Preuss did provide a developed argument on appeal, we would decline to address it because he failed to make the argument before the trial court. The argument is raised for the first time on appeal and is, therefore, waived. *See* ***Caban***, 210 Wis. 2d at 604.

Conclusion

¶39 For the reasons above, we reject all of Preuss's arguments and affirm the trial court.

By the Court.—Judgments affirmed.

Not recommended for publication in the official reports.