COURT OF APPEALS
DECISION
DATED AND RELEASED

September 12, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 95-2160-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN A. JACOBUS,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Crawford County: KENT C. HOUCK, Judge. *Affirmed*.

Before Eich, C.J., Vergeront and Roggensack, JJ.

EICH, C.J. Brian Jacobus appeals from a judgment convicting him of the first-degree murder of his wife and sentencing him to prison for life. He claims that the trial court improperly denied his motions to suppress various items of evidence, including a confession, and a motion to change venue. He also challenges several of the trial court's evidentiary rulings, the manner in

which the jury panel was selected and the court's refusal to instruct on a claimed lesser-included offense.

We reject his arguments and affirm the judgment.

In September 1994, Jacobus, a resident of Boscobel, Wisconsin, reported to the Crawford County sheriff's department that his wife, Terri, was missing. The report gave rise to a well-publicized search in the Boscobel area, near the borders of Richland, Grant and Crawford counties. Jacobus was taken into custody for questioning when Terri's body was found in the Wisconsin River. Shortly after the questioning began Jacobus confessed, admitting that he had killed Terri with a hammer and thrown her weighted body into the river. He also gave his consent for deputies to search his house and property.

At about the time the search began, Jacobus's brother called an attorney who, being unable to get through to the sheriff's office, informed the district attorney's office by telephone that Jacobus had retained him and they were to cease questioning or trying to obtain evidence from him. This information did not reach the sheriff's deputies until after the search had been completed.

Jacobus moved to suppress his confession and the evidence seized as a result of the search on grounds that his interrogators coerced both the confession and his consent to the search. The trial court denied the motions.

Jacobus then moved to change venue from Crawford County, basing his motion on the media coverage of the search for, and discovery of, his wife's body. The trial court, citing the publicity, granted the motion and ordered the trial to be held in Richland County. Jacobus filed a second motion to change venue, citing the same reasons as in the first. The court denied the motion.

Prior to trial, the court advised counsel that the jury panel would be selected by a computer, as was the practice in Richland County. Jacobus

objected, claiming that such a procedure would deny his right to be present during the selection process. This motion, too, was denied by the court.

During the trial, Jacobus unsuccessfully objected to several of the court's evidentiary rulings, among them one excluding expert psychiatric testimony that his obsession with his wife's marital infidelities may have overcome his reason to the extent that he acted on impulse, rather than intention, in killing her. Jacobus also unsuccessfully objected to (1) statements by one or more witnesses that Terri had told them Jacobus had threatened to kill her; (2) the court's refusal to allow the jury to hear tape recordings Jacobus had secretly made of his conversations with Terri and Terri's telephone conversations with another man; and (3) the admission into evidence of an audiotape of his confession.

Finally, the trial court denied Jacobus's motion to instruct the jury on the claimed lesser-included offense of first-degree reckless homicide.

Jacobus renews all his objections and challenges on appeal, and we consider them *seriatim*.[1]

I. Standard of Review

Whether Jacobus's confession, or his consent to the search, were "coerced"—or, stated differently, whether he understood and validly waived his constitutional rights in these respects—is a question of mixed fact and law. It is the State's obligation to prove voluntariness and/or waiver by a preponderance of the evidence. ***Colorado v. Connelly***, 479 U.S. 157, 168 (1986); ***State v. Esser***, 166 Wis.2d 897, 904-06, 480 N.W.2d 541, 544-45 (Ct. App. 1992). And our assessment of that proof is governed by the familiar rule that, while we will not

[1] Risking summary rejection of his appeal for violation of RULE 809.19(1)(e), STATS., Jacobus has not set forth citations to the record in the course of his arguments. *See* ***Lechner v. Scharrer***, 145 Wis.2d 667, 676, 429 N.W.2d 491, 495 (Ct. App. 1988) (arguments unsupported by appropriate record citations may be disregarded). Such an omission, as the State points out, needlessly complicates both the State's response and our review of the issues.

overturn the trial court's findings of evidentiary or historical fact unless they are clearly erroneous, we will independently apply the controlling legal and constitutional principles to those facts. ***Esser***, 166 Wis.2d at 903-04, 480 N.W.2d at 543-44; ***State v. Owens***, 148 Wis.2d 922, 926, 436 N.W.2d 869, 871 (1989).

Whether to change venue is a decision committed to the sound discretion of the trial court, ***McKissick v. State***, 49 Wis.2d 537, 544-45, 182 N.W.2d 282, 285-86 (1971), as are rulings on objections to the admission, rejection or limitation of evidence. ***State v. Alsteen***, 108 Wis.2d 723, 727, 324 N.W.2d 426, 428 (1982). "We will not reverse a discretionary determination by the trial court if the record shows that discretion was ... exercised and we can perceive a reasonable basis for the court's decision." ***Prahl v. Brosamle***, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987) (citation omitted). The term "discretion" contemplates a reasoning process that considers the applicable law and the facts of record, leading to a conclusion a reasonable judge could reach. ***Schneller v. St. Mary's Hosp. Medical Ctr.***, 155 Wis.2d 365, 374, 455 N.W.2d 250, 254 (Ct. App. 1990), *aff'd*, 162 Wis.2d 296, 470 N.W.2d 873 (1991). "[A]nd while it may be that we would have decided the motion differently, that is not the test; it is enough that a reasonable judge could have so concluded ...." ***Id***. at 376, 455 N.W.2d at 255.

Finally, whether to instruct on a lesser-included offense—whether the evidence reasonably supports giving the instruction—is a question of law which we review de novo. ***State v. Lohmeier***, 196 Wis.2d 432, 441, 538 N.W.2d 821, 824 (Ct. App. 1995), *petition for review granted*, ___ Wis.2d ___, 542 N.W.2d 154 (1995). Even when there is an instructional error, however, we will not order a new trial unless the error is prejudicial: there must be a "probability and not just a possibility that the jury was misled thereby...." ***Id***. at 441-42, 538 N.W.2d at 824.

II. Suppression of the Confession

Jacobus claims first that he did not understand his ***Miranda***[2] rights before he signed the form waiving them during his interrogation by two

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

Crawford County sheriff's deputies. He also asserts that the officers coerced his confession by "engag[ing] in psychological pressures, promises and wrongful inducements."

A. The *Miranda* Waiver

Miranda v. Arizona, 384 U.S. 436 (1966), requires that Jacobus be advised of his right to remain silent, that any statements may be used against him and that he has the right to the presence of an appointed or retained attorney during his interrogation. ***Id***. at 444. He may, of course, voluntarily, knowingly and intelligently waive those rights. ***Id***.

> [T]he relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception.... [T]he waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the ***Miranda*** rights have been waived.

Moran v. Burbine, 475 U.S. 412, 421 (1986) (quoted source omitted).

Jacobus argues that his ***Miranda*** waiver should be held invalid because the record shows he did not understand his rights before signing the form. He bases the argument on a statement he made to the officers indicating that he did not understand his rights after they had been orally explained to him by the officers. That is true: when the officers, after reading the rights, asked whether he understood them, he responded no, and asked to read the card the officers had been reading from. Then, after reading the card, he was asked again whether he understood his rights. He responded that he did and proceeded to sign the waiver form.

If a suspect, who having been advised of his or her rights under ***Miranda***, acknowledges that they are understood and is willing to make a statement, the State has made a *prima facie* case of proper waiver which, in the absence of countervailing evidence, renders the resulting statement admissible. ***State v. Lee***, 175 Wis.2d 348, 360-61, 499 N.W.2d 250, 255 (Ct. App. 1993). We agree with the State that ***Lee*** is satisfied in this case.

There is no question that Jacobus acknowledged that he understood his rights before signing the waiver, and we do not believe this acknowledgement is negated by the uncertainty he expressed moments earlier, before he had read the document. We think this is especially true in light of his subsequent actions: he proceeded to respond to the officer's questions, asking none of his own and making no request for counsel or giving any indication that he did not understand his rights.

Because we have not been referred to any evidence in the record sufficient to rebut the State's *prima facie* showing, we conclude that Jacobus's ***Miranda*** waiver was constitutionally valid.

B. Coercion

Jacobus cites the following "circumstances" in support of his argument that his confession was coerced by the officers: (1) the officers' reference to his membership in the Methodist Church and whether he agreed that "[w]e have all got to make things right with our maker"; (2) their statement that what had happened to Terri may have been a "mistake," and that they were there to "help" him and would not "judge [him] for what happened"; and (3) their statement that they were talking to him "man to man," and that they "kn[e]w something happened in the house that night" and that he "knew what [they] kn[e]w."[3]

Jacobus's position, we think, is aptly summarized in his brief—that, after he had confessed, "these so-called friends, who promised to help

[3] Jacobus lists twenty-four such "circumstances" in his brief which he believes indicate coercion. They are, for the most part, repetitive and center on the matters we have listed above.

[him], who gave their word, who professed their respect for him, who gave him a meal, beverages and ... cigarettes, and who questioned him on a simple man-to-man basis, turned around and charged him with first-degree murder."

Jacobus does not suggest that the officers engaged in any type of physical coercion. He was not handcuffed or otherwise restrained; he asked for and received cigarettes and was given lunch—indeed, the questioning took place not in a police interrogation room but around a kitchen table in the county's emergency government center. Rather, Jacobus claims he was coerced by the officers' friendly, conversational attitude toward him and their reference to "religion."

There is, of course, "[n]othing in our Constitution or our morality [that] precludes the police, within limits, from trying to outsmart the suspect and to increase the pressure ... to tell the truth." Joseph D. Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 84 MICH. L. REV. 662, 689 (1986). As the Court of Appeals for the Seventh Circuit said in ***United States v. Rutledge***, 900 F.2d 1127 (7th Cir.), *cert. denied*, 498 U.S. 895 (1990), the police do not stand in a fiduciary relationship to the suspect, but

> are allowed to play on a suspect's ignorance, his anxieties, his fears, and his uncertainties; they just are not allowed to magnify those fears [and] uncertainties ... to the point where rational decision becomes impossible....
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> ....
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> [T]he law permits the police to pressure and cajole, conceal material facts, and actively mislead—all up to limits not exceeded here.

Id. at 1130-31; *see also* ***Miller v. Fenton***, 796 F.2d 598, 605 (3d Cir.) ("[I]t is generally recognized that the police may use some psychological tactics in eliciting a statement from a suspect."), *cert. denied,* 479 U.S. 989 (1986).

It is only when the tactics employed by the questioners make it impossible for the suspect to weigh the pros and cons and make a rational choice whether to make a statement that the questioning will be held improper.

United States v. Washington, 431 U.S. 181, 187-88 (1977); ***Rutledge***, 900 F.2d at 1129; ***Miller***, 796 F.2d at 605. We see no such result here. The questioning was not protracted—Jacobus confessed after the first fifteen minutes of a one-hour interrogation.[4] And the tactics used by the officers were the same or very similar to those found acceptable by courts in other states and in the federal system. *See*, *e.g.*, ***United States v. Ornelas-Rodriguez***, 12 F.3d 1339, 1348 (5th Cir.), *cert. denied*, 114 S. Ct. 2713 (1994) (suggestions that defendant would benefit by cooperating with police); ***United States v. Eide***, 875 F.2d 1429, 1437 (9th Cir. 1989) (police "touched sympathetic chords" in the defendant by focusing his attention on a point likely to elicit an emotional response); ***Barrera v. Young***, 794 F.2d 1264, 1271 (7th Cir. 1986) (references to defendant's religious affiliation and beliefs);[5] ***Martin v. Wainwright***, 770 F.2d 918, 925-26 (11th Cir. 1985), *cert. denied*, 479 U.S. 909 (1986) (police acted as "good guys," expressing sympathy to the defendant).

We conclude that none of the tactics of which Jacobus complains, considered together or separately, were "so offensive to a civilized system of justice that they must be condemned." ***Miller v. Fenton***, 474 U.S. 104, 109 (1985). Jacobus's confession was not the product of either actual coercion or improper pressures, and we are satisfied that the trial court did not err in denying his suppression motion.

III. Fruits of the Search

Jacobus argues that his consent to the search of his home and property was, like his confession, coerced by the officers during his

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[4] We note in this regard that, after denying several times that he had "hurt" Terri, the officers asked him why, during the search for her, he "kept going back down to the river." They noted that he had gone to the river several times and asked whether there was some reason for that—whether he thought the river "would be the best place to find her." A few minutes later, after the officers said that "everybody would feel better" if he would tell them "what we're asking as a man to man conversation," Jacobus said simply, "I killed my wife," and proceeded to explain in considerable detail how he had struck her with the hammer and disposed of her body in the river.

[5] In ***Barrera v. Young***, 794 F.2d 1264, 1270 (7th Cir. 1986), the court noted, and we agree, that in police interrogations "a rhetorical device does not become illegitimate just because it is effective."

interrogation. As a result, he claims that any evidence gained in the course of the search was improperly admitted. As the State points out, however, he never identifies in his brief the evidence of which he complains. Without such a showing it is practically impossible to ascertain whether he was prejudiced by the trial court's action. We cannot construct his arguments for him. *See* ***State v. Pettit***, 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992) (court of appeals cannot act as both advocate and judge and will decline to consider undeveloped arguments).

The State posits that because two officers involved in the search testified that they saw what appeared to be bloodstains on the floor in Jacobus's house, that is the evidence he seeks to suppress. Despite the cursory nature of Jacobus's argument, we elect to consider the merits of his claim.

The trial court, after hearing Jacobus's motion, concluded that his consent to the search was voluntary "for the same reasons that [his] statement was voluntary,"[6] and we have upheld the validity of his confession. After Jacobus admitted his guilt and discussed the details of the crime at some length—telling the officers he wanted them to see various items in his home relating to Terri's infidelities—they responded that they needed his consent to go to his house and look for these items (and others) and gave him a consent-to-search form to sign. They read the form to him—the same form he apparently had signed the day before to authorize police to search "around [his] house"—and explained that he had a right to refuse to sign it. Jacobus then read the form himself, stating that while he did not recognize it as the same form he had signed the preceding day, "the information sounds the same." He then signed the form and asked whether he could make a list of things he particularly wanted the officers to take. He did so, telling the officers where each item was located in the house.[7] Again, we agree with the State that nothing in the record suggests that the trial court's finding that Jacobus had voluntarily consented to the search was erroneous.

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[6] Indeed, the court noted: "The defendant[,] in fact, told the officers where to search for various items that were in [his] house."

[7] Among other things, Jacobus told the officers there were audiotapes and several letters and "personal thoughts" in a safe, which he wanted them to see. He told them where to find the key to the safe, as well as the keys to his car—which they said they also wanted to search—and where various other personal possessions were located.

Jacobus also argues that any consent he may have given was revoked by his lawyer prior to the search. As indicated above, Jacobus's brother telephoned an attorney after Jacobus had been taken into custody. The attorney, getting a busy signal in his attempt to telephone the sheriff's office, called the district attorney's office to request that no further questioning or evidence-gathering take place. Despite the fact that the attorney made the call only a few minutes before the search was to begin, Jacobus claims this revoked his consent.

The trial court found as a fact that the officers conducting the search were unaware of the attorney's telephone call to the district attorney's office. It also found the attorney lacked authority to act on Jacobus's behalf because no attorney-client relationship existed between them. The trial court said: "[T]here had to be at least some contact between the defendant and [the] Attorney ... or at least some indicati[on] by the defendant that he considered [him] as his attorney." Because Jacobus does not offer any legally supported argument that the trial court's findings and rulings with respect to the absence of an attorney-client relationship were erroneous, we do not disturb them. ***M.C.I., Inc. v. Elbin***, 146 Wis.2d 239, 244-45, 430 N.W.2d 366, 369 (Ct. App. 1988).

IV. Change of Venue

Jacobus was initially charged in Crawford County, where he resided. He moved to change venue, citing widespread newspaper, radio and television coverage of the charges against him and the search for his wife's body. Noting the publicity—including that surrounding the accidental death of a member of the search party—the trial court granted the motion and changed venue to Richland County.

Jacobus filed a second change-of-venue motion, arguing that there was little difference between media coverage of these events in either county and the same factors warranting a change from Crawford County applied to Richland. The trial court denied the motion after considering each of the state and area news sources carrying information about the murder and search and concluded that, with one or two exceptions, none had much circulation in Richland County. In so ruling, the court noted that the best test of whether a defendant can have a fair trial in a specific location "is when we start selecting

the jury," and said that if it appeared at that time that Richland County was indeed an inappropriate venue, "the Court can change the place of trial at that point."

We have already discussed the general principles governing our review of a trial court's discretionary rulings. Although our review is deferential to the trial court's ruling, with specific reference to motions to change venue, we will independently evaluate the circumstances of the case[8] "to `determine whether there was a reasonable likelihood of community prejudice prior to, and at the time of, trial and whether the procedures for drawing the jury evidenced any prejudice on the part of the prospective or impaneled jurors.'" ***State v. Messelt***, 178 Wis.2d 320, 327-28, 504 N.W.2d 362, 364-65 (Ct. App. 1993) (quoting ***Hoppe v. State***, 74 Wis.2d 107, 111, 246 N.W.2d 122, 125-26 (1976)), *aff'd*, 185 Wis.2d 254, 518 N.W.2d 232 (1994).

Jacobus, emphasizing the publicity and describing it as "permeat[ing] Richland County," acknowledges that each of the jurors who was aware of the publicity indicated during *voir dire* that such exposure would not affect his or her ability to render an impartial verdict in the case. Jacobus discounts the juror's sworn statements in this regard, arguing that the existence of the publicity itself is enough to establish that the trial court erroneously exercised its discretion in denying his motion. He claims that the jurors'

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[8] Among other things, we look to

> "[t]he inflammatory nature of the publicity; the degree to which the adverse publicity permeated the area from which the jury panel would be drawn; the timing and specificity of the publicity; the degree of care exercised, and the amount of difficulty encountered, in selecting the jury; the extent to which the jurors were familiar with the publicity; and the defendant's utilization of the challenges, both peremptory and for cause, available to him on *voir dire*. In addition, the courts have also considered the participation of the state in the adverse publicity as relevant, as well as the severity of the offense charged and the nature of the verdict returned."

State v. Messelt, 178 Wis.2d 320, 327, 504 N.W.2d 362, 364 (Ct. App. 1993) (quoting ***McKissick v. State***, 49 Wis.2d 537, 545-46, 182 N.W.2d 282, 286 (1971)), *aff'd*, 185 Wis.2d 254, 518 N.W.2d 232 (1994).

declarations of impartiality were "questionabl[e]," but offers no support in the record for such an assertion.

We assume all would acknowledge the practical impossibility of coming up with a pristine panel of jurors in a case that, because of its sensational aspects, garnered considerable attention in the media. But Jacobus has not pointed us to any case indicating that the existence of widespread publicity in a given area—or a prospective juror's exposure to that publicity—in itself raises the specter of an unfair trial. Indeed, in ***State v. Sarinske***, 91 Wis.2d 14, 33, 280 N.W.2d 725, 733 (1979), the supreme court recognized that even a panelist who, during voir dire, expressed a predetermined opinion as to the defendant's guilt was not disqualified per se. The court said, "If the person can lay aside his or her opinion and render a verdict based on the evidence ... then he or she can qualify as an impartial [juror]," and it emphasized that "[t]he decision `as to the subjective sincerity' of the prospective juror `in expressing his [or her] final view of fairness is a matter within the discretion of the trial court.'" ***Id***. at 33, 280 N.W.2d at 733-34 (quoted sources omitted).[9]

Jacobus has not persuaded us that press and media coverage of the crime in Crawford County raises a reasonable likelihood of "community prejudice" that carried over to prospective or impaneled members of the jury. ***Messelt***, 178 Wis.2d at 327-28, 504 N.W.2d at 364-65. It follows that the trial court did not err in denying his second motion to change venue.

V. Evidentiary Rulings

A. Limitation of Psychiatric Testimony

The crux of Jacobus's defense was provocation—that he was provoked into attacking his wife because of her infidelities.[10] A court-

[9] We agree that deference to the trial court's assessment of juror impartiality is warranted because the circuit judge, being "on-the-spot," is in a much better position to understand and evaluate what occurred in the courtroom than is an appellate court working from a cold trial transcript. ***Schultz v. Darlington Mut. Ins. Co.***, 181 Wis.2d 646, 657, 511 N.W.2d 879, 883 (1994).

[10] Under § 939.44(2), STATS., "Adequate provocation is an affirmative defense ... to first-degree intentional homicide and mitigates that offense to 2nd-degree intentional

appointed psychiatrist, Dr. Frederick Fosdal, who initially was retained to evaluate the possibility of a special plea, was deposed on more general matters after that issue was abandoned. Concerned that portions of Fosdal's testimony might be inadmissible, the State moved, in limine, to exclude any expert opinion evidence relating to the existence of provocation as a mitigating circumstance in the case.

The particular testimony sought to be excluded concerned Fosdal's view of Jacobus's preoccupation with Terri's infidelities, and how that preoccupation escalated prior to the murder as a result of his listening to her taped telephone conversations with another man and finding evidence of their written correspondence. According to Jacobus's counsel, the "ultimate question" he would ask Fosdal was in the nature of a hypothetical question: "[I]f Mr. A had A, B, C, D, E, and F happen to him, whether he would be provoked or what would be his state of mind ...?"[11]

The trial court treated the proffered testimony as testimony on the existence of "adequate provocation" under § 939.44(2), STATS., *supra* note 10, considering it the equivalent of testimony on Jacobus's capacity to form an intent to kill, which is uniformly held to be inadmissible. *See* ***State v. Flattum***, 122 Wis.2d 282, 292-93, 361 N.W.2d 705, 711 (1985).[12] Jacobus, renewing his

(..continued)
homicide."

[11] According to his brief, Jacobus also sought admission of statements in Fosdal's deposition expressing the view that the cumulative effect of all these events was to "precipitate" Terri's murder: "that multiple blows by a hammer reflected a certain greater degree of anger, exasperation, and loss of control ...." Fosdal stated in his deposition that, in his view, the killing was "one of those spur of the moment type things" precipitated by the stresses of Jacobus's marital life and that he "didn't plan on killing her."

[12] In ***State v. Flattum***, 122 Wis.2d 282, 286, 361 N.W.2d 705, 708 (1985), the defendant was charged with strangling and stabbing a woman to death. A defense psychiatrist was asked whether a chronic alcoholic (which the defendant was), with a psychiatric history similar to the defendant's, who had consumed a prodigious amount of intoxicants on a particular day would be able to form the mental purpose to take the life of another person.

Upholding the trial court's rejection of such testimony, the supreme court concluded that it lacked the degree of trustworthiness and reliability essential to admission, stating:

arguments on appeal, claims this was error because Fosdal's testimony, unlike the testimony in ***Flattum***, did *not* relate to intent. We disagree.

Boiled down to its essentials, Jacobus's claim is that he should not have been convicted of intentional homicide because, according to Fosdal, his psychological/psychiatric makeup was such that this "provocation" caused him to lose all control over his actions.[13] We see little difference between such evidence and "intent" evidence of the type discussed in ***Flattum*** and similar cases.

There is another reason why his argument fails. The ***Flattum*** court suggested that psychiatric evidence might also be ruled inadmissible "because it is not based on scientific knowledge, and that therefore the witness' conclusion is based on the same factors which the jury is free to use in reaching its [own] conclusion." ***Id***. at 306, 361 N.W.2d at 717-18. Section 907.02, STATS., states that expert testimony is admissible if the witness's specialized knowledge "will assist the trier of fact to understand the evidence or to determine a fact in issue." And we agree with the State that Fosdal's testimony would not assist the

(..continued)

> Perhaps the most fundamental problem with the admission of psychiatric opinion evidence on the question of the defendant's capacity to form the requisite intent when that opinion is based on the defendant's mental health history is the inconsistency between the law's conception of intent and the psychiatric community's understanding of the term....
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> "Mental health personnel are likely to use the word `intent' in a different sense than the substantive criminal law uses it. Their tendency is to use it to describe the drive or impulse underlying and `causing' the state of mind and the behavior rather than the state of mind itself...."

Id. at 291, 361 N.W.2d at 710 (quoted source omitted).

[13] According to Jacobus, the rejected evidence would establish, by expert testimony, that the repeated hammer blows to his wife's head were the result of "anger, exasperation and .... an emotional distress kind of loss of control." It was evidence, Jacobus says, supporting his defense that he was so provoked by his wife's actions that his ability to reason was so "overcome by emotion" as to cause him to "react[]" to that provocation by killing her.

jury, which "was fully capable of reaching its own conclusions on the ... provocation issue, unassisted by the psychiatrist's testimony." "Put another way," the State says, "Fosdal would not have been able to do anything that the jurors were not capable of doing, *i.e.*, examine all of the facts and circumstances leading up to and surrounding the fatal assault to determine whether adequate provocation exited as a matter of fact."

Cases from other jurisdictions bear out the State's assertions: "[P]sychiatric testimony on adequacy of provocation is inadmissible [because] ... the adequacy of provocation is not a subject sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." ***People v. Czahara,*** 250 Cal. Rptr. 836, 842 (Cal. Ct. App. 1988); *accord* ***People v. Ambro*** 505 N.E.2d 381, 386 (Ill. App. Ct. 1987), *overruled on other grounds*, 544 N.E.2d 942 (Ill. 1989); ***Taylor v. State***, 452 So. 2d 441, 448 (Miss. 1984). And in ***Hass v. Abrahamson***, 910 F.2d 384 (7th Cir. 1990), the court ruled that a Wisconsin circuit court correctly excluded expert psychiatric testimony offered to support a heat-of-passion defense, stating such evidence

> "constitutes no more than lay opinion of an ultimate fact to be determined by the jury. Its vice is that it is clothed with the seeming scientific knowledge of an expert and thus deceives the jury into believing that it is entitled to deference in consideration which is unsupported and unwarranted."

Id. at 399 n.15 (quoting ***State v. Dalton***, 98 Wis.2d 725, 731, 298 N.W.2d 398, 401 (Ct. App. 1980)).

The trial court in this case did not ground its decision on these considerations, but it is a well-established rule of appellate practice that a judgment or verdict will not be overturned where the record reveals that the trial court's decision was right, whatever its stated reasoning, ***State v. Alles***, 106 Wis.2d 368, 391, 316 N.W.2d 378, 388 (1982); and that is the case here. Jacobus was entitled to, and received, a fair opportunity to present the facts bearing on his provocation defense. The definition of "provocation" is simple and straightforward—something the defendant believes the victim has done "which causes the defendant to lack self-control completely" at the time of the

killing[14]—and there was considerable testimony on Terri's actions and behavior, and their effect on Jacobus. The court's ruling simply prevented the presentation of expert psychiatric testimony that was excludable under the law. It was not error.

B. Hearsay

Jacobus contends that the trial court improperly allowed two witnesses to testify that Terri told them he had threatened to kill her. We reject his claim because (1) the testimony of one of the witnesses to that effect was elicited by Jacobus himself; and (2) the second witness never testified as to any such threat.

When the first witness, Brian Daniels, a friend of Terri's, was asked whether he had conversations with her in the weeks prior to her death, Jacobus's attorney interposed a timely hearsay objection. In an offer of proof taken outside the jury's presence, it was indicated that Daniels was prepared to testify that Terri told him a short time before her death that Jacobus had once threatened to kill her. Extensive argument ensued and the trial court eventually ruled that the testimony would be admissible as the "perception of a recent ... event" under § 908.045(2), STATS.[15]

The State decided, however, not to recall Daniels and rested its case. Jacobus's attorney objected, indicating that he wished to question Daniels on the testimony he gave prior to the objection. The trial court granted the request and, prior to beginning his examination, counsel stated to the court (again outside the jury's presence) that, "relying on the court's previous order ... that it's going to get in anyway," he intended to have Daniels testify as to Terri's statement about the death threat. Correcting him, the court said, "I think [there is a] mistake in what you're saying. The Court did not order [that] it's going to get in. The Court ruled it's admissible, but it's up to one counsel or the other to put it in." The jury returned to the courtroom and when Jacobus's attorney

[14] § 939.44(1)(b), STATS.

[15] Section 908.045(2), STATS., creates an exception to the hearsay rule for a statement "which narrates, describes, or explains an event or condition recently perceived by the declarant, made in good faith ... and while the declarant's recollection was clear."

asked Daniels about the conversation, he responded that Terri told him that Jacobus told her, "`If he couldn't have her, nobody could have her or he would kill her.'"

We agree with the State that if, as Jacobus claims, it was error to allow the evidence—which we do not here decide—he invited the error himself and will not be heard to complain about it. "A defendant cannot create his own error by deliberate choice of strategy and then ask to receive benefit from that error on appeal." ***Vanlue v. State***, 87 Wis.2d 455, 460-61, 275 N.W.2d 115, 118 (Ct. App. 1978) (citation omitted), *rev'd on other grounds*, 96 Wis.2d 81, 291 N.W.2d 467 (1980). At the time Jacobus decided to bring out this evidence, the jury had not yet heard it; the State had excused the witness without ever getting into the subject. The invited-error rule invalidates Jacobus's argument with respect to Brian Daniels's testimony.

Jacobus argues that the court also allowed "similar testimony" from another witness and friend of Terri's, Mary Neisius. However, the only reference in his brief to Neisius's testimony is a bare citation to twenty-two pages of the trial transcript. We examined those pages and found no testimony from Neisius as to any conversation with Terri in which she said Jacobus had threatened to kill her. All we find in the cited portions of the record is a statement by Neisius that Terri told her she was afraid to go home, that she "c[ould]n't live with that sexual abuse and that verbal abuse," and that she was afraid Jacobus would be "abusive" to their children if she left him. The only reference in Neisius's testimony to any "threat" to kill Terri occurred when she was testifying outside the jury's presence in connection with an offer of proof.[16]

Jacobus concentrates his argument on the "death threat,"[17] and does not challenge or otherwise explain why the admission of the only portions

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[16] In order to satisfy ourselves that the page references in Jacobus's brief were not in error, we read the entire transcript of Neisius's testimony. The only place we found any testimony coming before the jury relating to a threat to Terri is in Jacobus's attorney's cross-examination of Neisius in which, after bringing out the fact that Jacobus had taken out a $250,000 life insurance policy on Terri's life, he twice asked Neisius whether, in conversations with Jacobus after Terri was reported missing, she had ever told him about Terri's stating that he had "threatened her."

[17] He begins his argument on the point, for example, by stating that the gravamen of the court's rulings was that they "permitted two different witnesses to testify that Terri

of Neisius's testimony actually heard by the jury—the testimony about Terri's fear of him and her statements about an abusive relationship—should be considered reversible error. Indeed, we do not see how it can be. We have rejected Jacobus's claim that Brian Daniels's particularized testimony relating to Jacobus's threat to Terri's life was erroneously admitted into evidence. In light of that testimony, together with Jacobus's own confession to the crime and the extensive evidence, discussed later in this opinion, bearing on his intent to kill Terri, we are satisfied that admission of Neisius's brief testimony on the point—even if it could be considered error—was harmless because there is no reasonable possibility it contributed to Jacobus's conviction. ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 232 (1985).

C. Refusal to Play Taped Conversations to the Jury

Jacobus secretly recorded several conversations he had with Terri in their home concerning her relationship with another man, Jay Fagner, as well as telephone conversations between Terri and Fagner in which they expressed affection for each other. He sought to have the tapes admitted into evidence (and played to the jury) as bearing on his "provocation" defense—his unbalanced state of mind resulting from Terri's conduct.

The trial court refused to allow the tapes to be played to the jury but permitted Jacobus to testify to the fact that he had made them and listened to them, their general subject matter, and how they made him feel. In so ruling, the court, balancing the probative value of the evidence against the danger of possible prejudice, struck the balance against admission, noting first that both tapes were made at a time remote from the murder and concluding that they presented the possibility of diverting the trial to an inquiry into Terri's character: "whether or not Terri Jacobus was a nice person or not, whether she did bad things or not." In the court's view, the danger of "side tracking the jury onto the issue that somehow the homicide was justified because Terri was a bad person or because she was doing something bad" outweighed the slight probative value of the evidence—especially in light of the fact that the court was

(..continued)
Jacobus told them that Brian Jacobus threatened to kill her," and he states repeatedly that the court erred in ruling "that Terri Jacobus's accusatory voice from the grave [is] admissible."

prepared to allow Jacobus to introduce evidence about his feelings about his wife and what was on the tapes.[18]

Earlier in this opinion, we discussed the general standards governing our review of discretionary trial court rulings. Applying those standards in a particular case,

we look first to the court's on-the-record explanation of the reasons underlying its decision. And where the record shows that the court looked to and considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable judge could reach and (b) consistent with applicable law, we will affirm the decision even if it is not one with which we ourselves would agree.

> It need not be a lengthy process. While reasons must be stated, they need not be exhaustive. It is enough that they indicate to the reviewing court that the trial court "undert[ook] a reasonable inquiry and examination of the facts" and "the record shows that there is a reasonable basis for the ... court's determination." Indeed, "[b]ecause the exercise of discretion is so essential to the trial court's functioning, we generally look for reasons to sustain discretionary decisions."

Burkes v. Hales, 165 Wis.2d 585, 590-91, 478 N.W.2d 37, 39 (Ct. App. 1991) (citations omitted) (footnote omitted).

We are satisfied that the trial court's rulings on the tapes meet those standards and we reject Jacobus's challenges to their disallowance.[19]

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[18] The court permitted Jacobus to testify, for example, that: (1) he had made the tapes; (2) their contents "dr[ove] him crazy"; (3) as a result of listening to them, he became obsessed with Terri's affair with Fagner; and (4) he listened to the tapes in the days and hours before the murder.

D. The Tape of Jacobus's Confession

After one of the interrogating officers testified about Jacobus's confession, the State sought introduction of a tape recording of the confession and Jacobus objected, arguing that playing the tape would be cumulative and would unfairly prejudice his defense. The trial court overruled the objection, stating:

> It is in the sound discretion of the Court what is cumulative and what is wasting ... time. Quite frankly, the confession of the defendant is very central to the State's case, and if I think the evidence is becoming repetitive and cumulative and wasting the jury's time, I can ... exclude the evidence. We're far from reaching that point so your motion is denied.

Jacobus renews his argument on appeal, claiming that permitting the jury to hear the tape after the officer's narrative description of the confession would place undue emphasis on the confession and give it greater weight in comparison to the other evidence in the case. The argument need not detain us long for it, too, is undeveloped: it goes no further than that, other than an unexplained citation to ***State v. Mainiero***, 189 Wis.2d 80, 525 N.W.2d 304 (Ct. App. 1994), a case involving neither admission of a confession nor any claim of improper admission of cumulative evidence. *See* ***Pettit***, 171 Wis.2d at 646, 492 N.W.2d at 642.

(..continued)

[19] With respect to the taped telephone conversations, the trial court also concluded they were inadmissible as violating § 968.31(2)(c), STATS., which generally prohibits interception of wire, electric or oral communications unless the "interceptor" was a party to the communication or, if not, one of the parties consented to the interception. Jacobus's only argument against the statute's application is that the telephone Jacobus tapped was his own. It is an undeveloped argument which does not explain in any manner how Jacobus's ownership of one of the telephones negates the interception prohibitions in the statute. *See* ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) (declining to review arguments supported by only general statements and not "developed themes reflecting ... legal reasoning").

Even so, the trial court explained the reasons for its ruling, and given, as the court noted, the confession's central position in the case—and the vigorous cross-examination of the interrogating officer about the manner in which it was obtained—we cannot say the result reached by the court was unreasonable. It was an appropriate exercise of discretion under the rules we have discussed above.

VI. Selection of the Jury Pool

Citing § 971.04(1)(c), STATS., which states that "the defendant shall be present ... at all proceedings when the jury is being selected," Jacobus argues that the court's use of a computer program to prepare the list of potential jurors was illegal and requires reversal of his conviction. He also claims that using the computer carries no guarantee that the selection process is "random," as required by § 756.096(2)(b).

We do not consider Jacobus as advancing a constitutional claim;[20] and § 805.18(2), STATS., applies a harmless-error rule to errors in the jury selection process. It provides that no judgment may be reversed "on the ground of drawing, selection or misdirection of jury," unless the trial court determines that the error complained of has affected the substantial rights of the complaining party. As the State points out, Jacobus did not develop the record in a manner that would allow the court to make that determination. Nor has Jacobus—who argues only that statutory irregularities in the selection process existed because he was not "present" when the jury-pool list was compiled, and because use of a computer to select the pool carries no observable guarantee of random selection—persuaded us that there is any ground for reversal because a computer program, rather than a card-filled tumbler was used in the process.

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[20] While Jacobus suggests that this is a "due process" argument, he points to no constitutional authority for the proposition. "Simply to label a claimed error as constitutional does not make it so,... and we need not decide the validity of constitutional claims broadly stated but never specifically argued." ***State v. Scherreiks***, 153 Wis.2d 510, 520, 451 N.W.2d 759, 763 (Ct. App. 1989) (citations omitted).

We also note, as the State points out, that, whether statutory or constitutional in dimension, a claimed violation of a defendant's right to be present at certain criminal proceedings is subject to a harmless-error analysis. ***Rushen v. Spain***, 464 U.S. 114, 117-19 (1983); ***State v. Bjerkaas***, 163 Wis.2d 949, 957-58, 472 N.W.2d 615, 618 (Ct. App. 1991).

In ***State v. Coble***, 100 Wis.2d 179, 211, 301 N.W.2d 221, 236 (1981), the supreme court said that "irregularities in the [jury selection] process are immaterial unless it appears probable that there has been prejudice." Jacobus has offered nothing to indicate the existence—or probable existence—of prejudice arising from the court's use of the computer program—or from the fact that he was not present when the program was run.

VII. Instructional Error

The jury was instructed on the charged crime of first-degree intentional murder and also on second-degree murder, with "adequate provocation" as the mitigating factor.[21] Jacobus argues that the trial court erred in refusing to instruct the jury on the lesser-included offense of (nonintentional) first-degree reckless homicide.

As the State acknowledges, first-degree reckless homicide is a lesser-included offense of first-degree intentional homicide. *See* § 939.66(2), STATS. (crime which is a less serious type of homicide than the one charged is a lesser-included offense). Submission of a lesser-included offense to the jury, however, is proper only when there are reasonable grounds in the evidence for both acquittal on the greater charge and conviction on the lesser. ***State v. Kramar***, 149 Wis.2d 767, 791-92, 440 N.W.2d 317, 327 (1989). And while, in applying this test, the evidence is to be reviewed in the light most favorable to the defendant, ***Hawthorne v. State***, 99 Wis.2d 673, 683-84, 299 N.W.2d 866, 871 (1981), "[t]he key word in the rule is `reasonable.'" ***State v. Bergenthal***, 47 Wis.2d 668, 675, 178 N.W.2d 16, 20 (1970), *cert. denied*, 402 U.S. 972 (1971). The trial court is not required to give a lesser-included-offense instruction that is not reasonable in light of the evidence elicited at trial. ***Ross v. State***, 61 Wis.2d 160, 170, 211 N.W.2d 827, 832 (1973).

Jacobus argues that the reckless homicide instruction was proper because there were grounds in the evidence for acquitting him on the first- and second-degree intentional homicide charges. He claims there was ample evidence "tend[ing] to negate the element of intent"—primarily his own

[21] As we noted above, *supra* note 10, when the defendant can establish "adequate provocation" for causing another's death, the offense of first-degree intentional homicide is "mitigate[d] ... to 2nd-degree intentional homicide."

testimony that he was under stress and acting impulsively when he killed Terri, and also the "provocation" evidence: the tape recordings and other evidence of his reaction to her infidelities.

We do not believe that this evidence, when considered with the other evidence adduced at trial, is sufficient to justify giving the requested instruction. The evidence of Terri's relationship with Fagner provided a motive to intentionally kill her, and proof of motive has been held to bear upon the defendant's intent to commit the charged crime. ***State v. Johnson***, 121 Wis.2d 237, 253, 358 N.W.2d 824, 832 (Ct. App. 1984). There was also Jacobus's confession describing a premeditated act of murder and the deliberate concealment of Terri's body by tying cement blocks to it and dropping it in the river—and the fact that he filed a missing person report with the police claiming that she had simply disappeared. *See* ***State v. Bettinger***, 100 Wis.2d 691, 698, 303 N.W.2d 585, 589 (1981) (evidence of acts intended to obstruct justice or avoid punishment are probative of consciousness of guilt). There was forensic evidence that Terri was killed by either multiple blows to the head or by a single extremely violent blow with the murder weapon—a hammer. *See* ***State v. Stanton***, 106 Wis.2d 172, 183, 316 N.W.2d 134, 140 (Ct. App. 1982) (savage or vicious nature of the assault can disclose an intent to kill); ***State v. Dix***, 86 Wis.2d 474, 482-83, 273 N.W.2d 250, 254, *cert. denied*, 444 U.S. 898 (1979) (defendant who commits assault with deadly weapon is presumed to intend to kill the victim).

Balancing this evidence against that relied on by Jacobus in support of his argument—which he summarizes as "evidence ... about the Jacobus[e]s['] troubled marriage and the effect it had on [him]—we are satisfied that there were no reasonable grounds for his acquittal on either of the intentional homicide charges, and that the trial court did not err in declining to give the requested instruction.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.