COURT OF APPEALS DECISION DATED AND RELEASED

March 27, 1997

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NOTICE

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No. 95-3037-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PENNY L. BRUMMER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed*.

Before Vergeront, Roggensack and Deininger, JJ.

VERGERONT, J. Penny Brummer appeals the judgment of conviction for first-degree intentional homicide while armed contrary to §§ 940.01(1) and 939.63, STATS. She contends that: (1) the trial court's denial of her motion to strike a juror for cause violated her constitutional right to a fair and impartial jury; (2) the trial court erroneously exercised its discretion in not granting a mistrial because of certain testimony elicited by the prosecutor;

(3) the trial court erroneously exercised its discretion in denying Brummer's request for a theory of defense instruction; (4) the trial court erroneously exercised its discretion in permitting James Foseid to testify and in denying a new trial because of misconduct and improper rebuttal by the prosecution; (5) there was insufficient evidence to support the verdict; (6) the trial court erroneously exercised its discretion in allowing the State to introduce as adoptive admissions nonverbal conduct of Brummer and to introduce evidence that Brummer declined requests to submit to hypnosis; and (7) a new trial should be granted in the interests of justice. For the reasons explained in the opinion, we affirm the judgment of conviction.

BACKGROUND

Brummer was charged with the murder of Sarah Gonstead, whose body was found on April 9, 1994, in a wooded area north of Mineral Point Road approximately two miles west of Pine Bluff, Wisconsin. The cause of death was a single shot in the back of the head at close range. The pathologist performing the autopsy detected no other signs of injury to the body below the level of the head. Based on the fact that Gonstead was last known to be alive on March 14, 1994, and certain weather data, the pathologist determined that the time of death was sometime between March 14 to March 20, 1994.

Gonstead had been the longtime friend of Glenda Johnson. Johnson and Brummer met at their place of employment and developed a sexual relationship, but that relationship broke up in mid-February 1994. On March 14, 1994, Johnson saw Brummer at their place of employment and saw Brummer leave work that evening. The next day Brummer told Johnson that she and Gonstead had gone out barhopping the night before and that afterward Gonstead got out of Brummer's vehicle at the 3054 Club in Madison and started to walk to Johnson's apartment, which was nearby.

According to Gonstead's mother, Gonstead left their residence with Brummer about 8:00 p.m. on March 14, 1994, and was not at home when her mother returned from work on March 15. After calling Johnson and learning that Gonstead was not there and that Johnson had not seen her, Gonstead's mother reported her daughter's missing status to the police and also called Brummer. Brummer told Gonstead's mother that she had last seen

Gonstead when she dropped Gonstead off between 11:00 p.m. and 11:30 p.m. on March 14 and Gonstead said she was going to walk to Johnson's.

The prosecution's theory was that Brummer shot Gonstead because she was either jealous of the friendship between Gonstead and Johnson or angry at Gonstead because she thought Gonstead was encouraging Johnson to resume having relationships with men. The defense theory was that someone else shot Gonstead.[1]

JUROR BIAS

Brummer contends that the trial court erroneously exercised its discretion in denying her motion to strike juror Jay Olsen for cause. Olsen is employed as a news photographer by a local television station. He indicated on his jury questionnaire that from his job he was quite aware of the case and some of the facts and details. He edited a videotape of Brummer's preliminary hearing. When asked on the questionnaire whether he had expressed an opinion about Brummer's guilt and, if so, what opinion, Olsen checked "yes" and wrote: "[A]fter hearing facts and stories about the case, I feel the defendant may be guilty." To the next question--whether if he had an opinion he was able to set it aside and base his verdict on the evidence presented at court--Olsen checked "yes," as opposed to "no" or "not certain."

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[1] The specific evidence presented by the defense of another person who might have murdered Gonstead related to Brett Turner, Johnson's former boyfriend. A witness who lived near the area where Gonstead's body was found testified that on the evening of March 16, 1994, while traveling east bound on Mineral Point Road, he saw a sport utility-type vehicle parked on the north side of the roadway. He saw a male standing in front of the right passenger door wearing a baseball cap who appeared to be 5'8" to 5'10", possibly 150 pounds and in his twenties. He also saw a pink object by the vehicle door which appeared to be similar to a photograph of the jacket Gonstead was found wearing. The vehicle looked similar to Turner's vehicle and to the vehicle owned by Turner's father. Turner was twenty-two years old, approximately 5'8" and 130 pounds and was known to frequently wear baseball caps. The defense stated in its closing argument that it was not accusing Turner but was making the point that others besides Brummer had the opportunity to kill Gonstead.

Referring to Olsen's questionnaire, the trial court began by asking Olsen if he would be able to put out of his mind what he had heard and read about the case and decide the case only on the evidence he hears in court, according to the court's instruction. Olsen answered: "I'm not a hundred percent positive of that" and went on to describe that he had heard something about Brummer's military service and remembered seeing on the videotape of the preliminary hearing someone get upset and run out of the room crying. In response to the court's next question, Olsen answered that he did understand that everything he had been exposed to was not evidence. The court asked again whether Olsen could put that out of his mind and decide the case based only on what he heard in court:

AI would -- I would like to think so. I'm not a hundred percent positive of that. I know you're innocent till proven guilty and nothing not in the courtroom is not evidence. But making sure that that -- you know, to keep that distinction. I've never been on a jury before, so I'm not really sure how that would affect my judgment.

QAll right. Let's put it another way. Let's assume you're on the jury. You're deliberating. Obviously, those proceedings are secret. Would you understand that your obligation as a juror, when you're involved in the discussions, you can only discuss evidence and law?

AYes.

QAnd would you be able to avoid bringing up, for instance, the tape that you edited?

AI think I could avoid bringing it up. It would still be in my mind. I would know, if it's not brought up in court, that kind of stuff, that it's not admissible, and I don't think I'd have a problem with not bringing it up to the other jurors.

QDo you realize that the tape you edited -- first of all, you were not there when the tape was taken?

ANo, I did not actually shoot the videotape.

QAnd do you understand that that is not evidence?

ARight.

QAnd that one person's reaction to the situation may be different than another person's reaction?

AAbsolutely.

QAnd that the only reaction that really matters to a juror is based upon what they hear in court?

ARight.

QKnowing the obligation of a juror, knowing that both sides are entitled to a fair trial, do you think you could give both sides a fair trial?

AI think so. I mean, you know, not being ever in the process before, I'm not sure. I mean, I mean, I know you're not supposed to form opinions. That kind of thing. The business I'm in, I've been in court a lot of times shooting through the glass and attended a lot of hearings and, you know, how that plays in the long run, I'm not really sure, not having gone through the process. It's impossible for me to say, you know, yes, no, distinctly.

I understand how it's supposed to work, and I feel that I could probably put it aside. I'm just, you know, not a hundred percent positive.

QBut do you feel you could follow your oath as a juror?

AYes.[2]

(Footnote added).

After the prosecutor and defense counsel asked Olsen questions unrelated to this appeal, defense counsel established that Olsen had not heard anything about the results of pretrial motions in the case and had no knowledge of the legal activities that had occurred during the last two to three weeks. In response to defense counsel's question whether Olsen could refrain from telling fellow jurors about evidence he knew of that was prohibited by the court, Olsen stated:

A.I think so. I don't think that I would have a problem, you know, keeping what I know to myself that's not supposed to be said to anyone.

In response to defense counsel's question whether Olsen believed in the concept that evidence that was judicially ruled illegal should not be considered, Olsen answered:

AI understand that. I think I could put that aside, although, like I said, I'm not sure. Some of the things I know, you know, if they're not entered into evidence, how they would play into my mind.

In response to the defense counsel's questions about the opinion Olsen referred to in his questionnaire, Olsen stated that he realized and believed

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[2] The oath was administered to the jurors before voir dire:

> Do you and each of you swear (or affirm) that you will well and truly try the issues joined between ____________________, plaintiff, and ________________, defendant, and, unless discharged by the court, a true verdict give, according to law and the evidence in court, so help you God.

Section 756.098(1), STATS.

that people are innocent until proven guilty. When asked by defense counsel whether he could put aside any opinion he had and listen to the evidence before the jury fairly and objectively and make his decision of guilt or innocence based only on that, and not on any preconceived attitude, Olsen answered:

AOnce again, I think I could. When it comes down to the eleventh hour, I don't know if I would be sitting there the whole time, well, I know this and that. Not being through the process before this end of it, I'm not really sure, you know, what the mind, how the mind plays that.

The court then continued examination of Olsen:

QThat's the situation for everybody that's ever been a juror. Let me put it this way. You fulfill your obligation, again, when you follow the court's instructions, based on the evidence you hear in court. There is no right or wrong verdict from the standpoint of a juror. There's only one that's correct based on what you've heard in court and what you've heard in court alone. So you fulfill your obligation as a juror as long as you're fair and impartial, deciding the facts based upon the law and nothing more. Do you understand?

AUm-hum.

QDo you feel you could do that?

AI think so. Definitely, I don't know if I can say yes or not with a definite -- I think I could. Can I add something? I'm just -- my only hesitation comes in the fact that I feel that everyone deserves a fair trial, and that's the only thing that I think, you know, if something comes in, whether it will play in the back of my mind. Not that I would go against the rules that were

> set up. I know the jury instructions and I know what a jury is supposed to do. I just am not sure if I'm a hundred percent positive to give the defendant a fair trial because of it. I don't think there would be a problem, but --

QAre you telling us you believe you can follow your oath?

AI think I can follow my oath, yes.

The defense counsel followed with this last question:

QBut you're telling us you're not sure?

AWell, yeah, I'm not a hundred percent positive.

Defense counsel moved immediately to strike Olsen for cause on the ground that "... he's saying he cannot follow his oath, he's not sure of it...." The court denied the motion, stating:

> Well, as I recall his answer, he indicated he was not a hundred percent sure. I'm not sure anybody could answer that with that degree of certainty. When I look at his questions, the responses to his questions on the questionnaire, I find them to be consistent. He indicated he has expressed an opinion, that after hearing facts, that the defendant may be found guilty. But he also indicates, in response to the final question, that he read and heard a lot about this case when it happened, but that he thinks he could set those aside and be fair. I think every answer he gave orally today was consistent with that. And he has indicated he will follow his oath.

On appeal, Brummer argues that in spite of the court's effort to "rehabilitate" Olsen, he continued to express his doubts about whether he could be fair and impartial.

A defendant in a criminal case is entitled to an impartial jury under both the Sixth Amendment to the United States Constitution and under Article I, Section 7 of the Wisconsin Constitution. ***Hammill v. State***, 89 Wis.2d 404, 407, 278 N.W.2d 821, 822 (1979). An impartial juror is one "who says he can and will give the defendant the presumption of innocence; who can and will disregard any opinion he may have formed or expressed as to his guilt or innocence, and who can and will try him impartially and upon the evidence given in court and upon that alone." ***Id.*** at 414, 278 N.W.2d at 825. A juror is not to be considered biased solely because he or she has information about specific facts of the case. ***Hoppe v. State***, 74 Wis.2d 107, 112, 246 N.W.2d 122, 126 (1976). The expression of a predetermined opinion as to guilt does not disqualify a juror per se. ***Hammill***, 89 Wis.2d at 414, 278 N.W.2d at 825.

The question of whether a juror is biased and should be dismissed for cause is within the trial court's discretion. ***State v. Louis***, 156 Wis.2d 470, 478, 457 N.W.2d 484, 487 (1990). The trial court must be satisfied that it is more probable than not that the juror is biased. ***Id.*** The determination of juror impartiality rests heavily on the demeanor of the potential juror during voir dire and is particularly within the province of the trial judge." ***Hammill***, 89 Wis.2d at 415-16, 278 N.W.2d at 826. A determination by the trial court that a prospective juror can be impartial should be reversed only where bias is "manifest." ***Louis***, 156 Wis.2d at 478-79, 278 N.W.2d at 488.

Brummer relies on our decision, ***State v Zurfluh***, 134 Wis.2d 436, 397 N.W.2d 154 (Ct. App. 1986), in arguing that we should reverse the trial court's determination of impartiality. In ***Zurfluh***, a juror stated that her stepson's involvement with drugs might cause her to be biased against the defendant, who was charged with delivery of a controlled substance. The juror's words were that she felt she "might not be able to be fair." ***Id.*** at 439, 397 N.W.2d at 155. When the court explained to her the duties of a juror, she said she understood. When the court then asked whether she would have a problem in making a fair and impartial determination of the evidence, she replied: "I don't know. I might. I'm afraid I might. I wouldn't want to have; but I'm afraid I might. I'm just being honest." ***Id.*** The trial court refused to dismiss this juror for cause, concluding that she had expressed only her distaste for the crime. In the trial court's view, the juror's difficulties were "simply a reflection of her awareness of the crime's seriousness and would not interfere with her ability to decide the case on the evidence." ***Id.***

Our decision in ***Zurfluh*** that the trial court had erroneously exercised its discretion was based on that trial court's failure to ask the juror further questions to clarify whether it had correctly characterized her problem. ***Id.*** The record did not provide a basis for the trial court's interpretation of the juror's difficulties.

In contrast, in this case the trial court followed up the responses of Olsen that could be considered ambiguous or ambivalent, by repeating and rephrasing questions to take into account and clarify Olsen's answers, in this way arriving at answers that satisfied the court of Olsen's impartiality. ***Zurfluh*** does not aid us in the question we must decide: whether the trial court erroneously exercised its discretion in concluding, based on all of Olsen's responses, that Olsen was an impartial juror. More precisely, does Olsen's qualification of "I think so" by "I'm not one hundred percent positive" in the context of all his responses, show manifest bias requiring reversal. We conclude that it does not.

Olsen volunteered much information and in more detail than the questions necessarily called for. The phrases that Brummer considers evidence of uncertainty about his ability to be fair can also be reasonably interpreted as a desire to be scrupulously honest and complete in answering questions so as not to mislead or overstate. The trial court was in the best position to assess and interpret such nuances. The trial court noted the consistency of Olsen's responses on his questionnaire and those he gave during voir dire. Olsen stated that he thought he could be fair, thought he could follow the rules and thought he could follow his oath. We agree with the trial court that Olsen's qualification that "he was not one hundred percent positive" did not in itself require dismissal because most likely nobody could answer with one hundred percent certainty. Based on all the information Olsen provided, the court could reasonably conclude that Olsen would be able to set aside any information or preconceptions and be an impartial juror.

DENIAL OF MISTRIAL--THREAT TO DERRICK

Brummer argues that the court erred in refusing to grant a mistrial because the prosecutor elicited testimony from a witness, Iris Derrick, about a threat Brummer made to her. Derrick testified that when she denied a rumor that she had had a relationship with Johnson, Brummer told Derrick that if she,

Brummer, found out Derrick was lying, she would kill Derrick. Derrick testified that she did not take Brummer seriously at the time. Defense counsel objected to this testimony and a hearing was held outside the presence of the jury.

Defense counsel argued to the trial court that the testimony was inadmissible under § 904.04(2), STATS., which makes evidence of other wrongs or acts inadmissible to prove the character of a person or that the person acted in conformity therewith but does not exclude the evidence when offered for other purposes, including motive. Defense counsel also argued that the testimony was not admissible under § 904.03, STATS., which provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Finally, defense counsel argued that the State should have known Derrick's testimony was inadmissible because the court had earlier ruled that evidence that Brummer wanted to kill a woman, Laurie Berrang, who had become romantically involved with Brummer's girlfriend, Anna Hansen, was inadmissible under §§ 904.04(2) and 904.03.

The prosecutor's position was that she did not consider Derrick's testimony to be evidence of a real threat, and therefore it was not an "other wrong or act" governed by § 904.04(2), STATS. Rather, the threat was an expression of Brummer's jealousy over Johnson. The trial court first determined that there was no evidence that the State had acted in bad faith and violated the pretrial ruling on the other acts evidence concerning Berrang. The court then ruled that since Derrick testified she did not take the threat seriously, her testimony did not have sufficient probative value to go to the jury as to Brummer's motive, and any probative value the testimony did have was outweighed by the danger of unfair prejudice. The court denied defense counsel's motion for a mistrial because it considered the testimony insignificant in the context of the five and one-half days and the forty witnesses already constituting the State's case. The court gave defense counsel the option of a curative instruction, which the defense elected.

As soon as the jury was reconvened, the court gave the instruction proposed by the defense:

> Members of the Jury: Evidence has been received that the defendant stated, "I hope I don't find out about this later. I'd have to kill you."
>
> Such evidence is not to be considered by you and is stricken. It is not probative of any issue in this case. Such comments are made in the course of common conversations and are not meant as serious death threats. You are not to consider the testimony as evidence of the propensity of the defendant to commit any crime or as evidence of a violent character. The testimony is stricken and you are not to consider it for any purpose.

At the close of trial, the court reminded the jury to disregard any evidence that had been struck.

The decision whether to grant a mistrial lies within the discretion of the trial court. ***State v. Pankow***, 144 Wis.2d 23, 47, 422 N.W.2d 913, 921 (Ct. App. 1988). The trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial. The denial of a motion for mistrial will be reversed only on a clear showing of erroneous exercise of discretion. A trial court properly exercises its discretion when it considers the relevant facts of record, applies the correct legal standard, and reaches a conclusion, through a process of logical reasoning, that a reasonable judge could reach. ***State v. Robinson***, 146 Wis.2d 315, 330, 431 N.W.2d 165, 170 (1988).

When an instruction is given for a jury to disregard certain testimony, we presume the jury followed the instruction and the instruction cured any prejudice. *See* ***Pankow***, 144 Wis.2d at 47, 422 N.W.2d at 921-22. Although there may be cases where the risk of prejudice from material put before a jury is so great that an instruction will not adequately protect the defendant's rights, *see* ***State v. Hilleshiem***, 172 Wis.2d 1, 20, 492 N.W.2d 381, 389 (Ct. App. 1992), we do not consider this to be such a case. Derrick's testimony that she did not take the threat seriously at the time, coupled with the court's instruction--to not only disregard the testimony but that such comments are made in the course of common conversation and are not meant as serious death threats--significantly reduces any risk of prejudice. The trial court properly

considered the potential for prejudice of Derrick's testimony in light of all the evidence the State presented. Its conclusion--that the testimony coupled with the curative instruction was not sufficiently prejudicial to warrant a mistrial--was a reasonable one.

THEORY OF DEFENSE INSTRUCTION

Defense counsel proposed two variations of a theory of defense instructions. Both stated that Brummer asserted that someone else killed Gonstead, Brummer had no burden to prove who caused Gonstead's death, and Brummer should not be convicted of killing Gonstead simply because she had not proved that no one else did.[3] The trial court declined to give either alternative because it concluded that other instructions adequately covered the defense's concern with burden of proof, and that the proposal inappropriately highlighted or commented on the evidence. Brummer argues on appeal that she was entitled to either one of the proposals because they instructed on a valid theory of defense and there was a grave danger that the jurors might improperly convict Brummer if they were unconvinced by the evidence she introduced to show that another person killed Gonstead.

A trial court has wide discretion in presenting instructions to the jury. ***State v. Amos***, 153 Wis.2d 257, 278, 450 N.W.2d 503, 511 (Ct. App. 1989). If the instruction given adequately covers the law applied to the facts, we do not find error even if the refused instructions were not erroneous. ***Id.*** A defendant is entitled to an instruction on a valid theory of defense but not to one that merely highlights evidentiary factors. ***Id.***

We conclude the trial court did not erroneously exercise its discretion in declining to give the defense's proposed instructions. The trial court instructed the jury that Brummer pleaded not guilty to killing Gonstead, that the State was therefore required to prove beyond a reasonable doubt that Brummer caused Gonstead's death, that Brummer was entitled to an acquittal if the State failed to prove she killed Gonstead, that Brummer was not required to prove she was not present at the scene of the crime, that Brummer was not

[3] We are not able to locate the text of the proposed instructions in the record. However, the parties' description of the contents are consistent, and we base our discussion on that.

required to prove her innocence, and that Brummer was to be given the benefit of every reasonable doubt about her guilt. Brummer does not identify what legal theory the court failed to instruct on, beyond her concerns that the jury would misunderstand the allocation of the burden of proof. The instructions given adequately instructed the jury that Brummer did not have to prove that she did not kill Gonstead and that the State had to prove beyond a reasonable doubt that she did. The court could properly decline to give additional instructions that simply repeated this, perhaps in a way more favorable to Brummer.

FOSEID'S TESTIMONY

James Foseid, a witness who first came to the attention of the State and the defense during the trial, testified that one night in late winter he had been drinking at the Echo Tavern in Madison and had a conversation there with a woman, whom he later identified as Brummer, and her female companion. Brummer was talking to her companion, appeared to be angry, and blurted out: "That fat ugly bitch." When Foseid asked who she was talking about, Brummer said it was a person who was trying to break up a relationship that she had with another woman. Referring to the woman who was trying to break up the relationship, Brummer said: "She's trying to talk her into going straight." After more conversation on the topic, Brummer said: "I know what I'm going to do, I'm going to waste her." Foseid asked if she meant she was going to kill her, and when Brummer said: "You heard me right," he tried to get her to see how absurd that was. He was shocked. When he asked who she was talking about, she did not answer and left.

Foseid testified that about two weeks later, he saw Brummer's picture in the paper in connection with her arrest and realized it was the woman he had talked to at the Echo Tavern. He did not report it then because he did not want to get involved. He changed his mind the Friday before his testimony when he was having dinner with a friend and the topic of Brummer's trial came up. The friend said he knew someone Foseid could talk to, and Foseid said he would do that.

On appeal, Brummer argues that Foseid should not have been permitted to testify because he was a surprise witness, his testimony had a prejudicial impact, and his testimony was not relevant. In order to address

these contentions, we need to provide more detail about what occurred in the trial court from the time the State became aware of Foseid.

At the noon recess on Saturday, September 24, 1994,[4] one of the prosecuting attorneys advised the court and defense counsel that during the preceding night an assistant district attorney had advised the other prosecuting attorney that a friend of his had learned of a person who had information regarding Brummer. Arrangements were made to identify that person--Foseid--and to have him come to the district attorney's office for an interview. Foseid had been interviewed that morning. The prosecuting attorney presented a written summary of the interview to the court and defense counsel. Defense counsel stated that he would like to interview Foseid and do a background check. The prosecutor said that she did not intend to call Foseid as a witness that day and that she would make Foseid available for an interview before calling him. Defense counsel stated that since the State was not going to call Foseid that day, and the defense had access to Foseid, he did not see a big problem. The court noted that in appropriate cases it could grant a recess or continuance.

There was no trial the next day, Sunday. When the trial continued on Monday, the prosecutor informed the court of the steps taken to make Foseid available for an interview by the defense. Defense counsel informed the court that a defense investigator had interviewed Foseid that morning but there had not yet been time for a complete investigation. Defense counsel asked that Foseid not be called until the afternoon. The prosecutor provided defense counsel with interviews of two witnesses related to Foseid and provided the information on Foseid's criminal record, which consisted of a misdemeanor battery conviction in 1983.

That afternoon, the defense moved to exclude Foseid's testimony on the ground that it was prejudicial and lacked credibility because of inconsistencies and the delay in coming forward. In the alternative, defense counsel asked for a two-day continuance to do further investigation, citing information that Foseid had sued a bank and obtained a million dollar verdict, which was overturned. Defense counsel stated that people involved with that incident might have evidence on Foseid's credibility.

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[4] This was the fifth day of trial and the State was still presenting its case-in-chief.

The court denied the motion. The court ruled that credibility was not a basis for excluding testimony but was a matter for the jury, and that, although the testimony was prejudicial in the sense that it favored the State, it was not unfairly prejudicial under § 904.03, STATS. With respect to a continuance, the court first noted that there was no allegation of bad faith on the part of the State and it found there was no bad faith. The court stated that it did not see how the civil lawsuit was probative or related to Foseid's credibility and that, beyond the general assertion of more time needed to investigate credibility, the defense had not shown a particularized need for a continuance. The court gave defense counsel an opportunity to explain the need for a continuance with more particularity, but counsel was unable to do so. The court ascertained that there were two defense investigators working on the case and looking into Foseid's civil suit.

In denying the request for a continuance, the court explained that the prosecution's case was still proceeding and that the two defense investigators should be able to begin now to follow up on the civil lawsuit if the defense thought that important. The court made clear that when the time approached for the defense's case, the court would consider a renewed motion for a continuance. However, it would expect defense counsel to show good faith efforts to follow through on the civil suit investigation and to provide more concrete information about relevant evidence the defense still needed to obtain.

The next day defense counsel moved to exclude Foseid's testimony as irrelevant and as inadmissible "other acts" under § 904.04(2), STATS., but it did not renew a motion for a continuance. The evidentiary motions were denied. Foseid testified and was cross-examined on the reasons he had not come forward sooner and his inconsistent or unclear recollection of the day of his conversation with Brummer.

A request for a continuance is addressed to the trial court's discretion. ***Angus v. State***, 76 Wis.2d 191, 195, 251 N.W.2d 28, 31 (1977). There is no dispute here that the defense was surprised by the sudden appearance of Foseid as a witness. However, that does not automatically entitle Brummer to a continuance. We do not consider a trial court's denial of a continuance based on surprise to be an erroneous exercise of discretion unless, in addition to surprise, the party seeking a continuance shows that impeaching testimony could probably be obtained within a reasonable time and that denial, in fact,

prejudiced that party. ***Id.*** at 196, 251 N.W.2d at 31. Brummer had failed to make either showing.

Brummer did not show to the trial court any impeaching evidence that probably could be obtained beyond information about Foseid's civil suit. Although the defense had some time to investigate that, and was clearly informed by the court that the request for a continuance could be renewed if more time was needed, the defense did not renew its request. On appeal, Brummer still presents no specifics about the impeaching evidence it could probably have obtained. Brummer's argument about prejudice is concerned solely with the damaging nature of Foseid's testimony. But the relevant prejudice here is prejudice caused by the denial of the continuance. *See* ***id.*** at 196, 251 N.W.2d at 31. Brummer does not show how the denial of a continuance caused prejudice beyond general assertions that she was not able to find unspecified impeachment witnesses.

We also reject Brummer's argument that Foseid's testimony should have been excluded as irrelevant because Brummer did not name Gonstead as the person she threatened to kill. Evidence is relevant if it has any tendency to make the existence of a consequential fact more or less probable than it would be without the evidence. Section 904.01, STATS. A threat to kill someone who is later killed is a consequential fact in a prosecution for killing that person. *See* ***Simpson v. State***, 83 Wis.2d 494, 510-11, 266 N.W.2d 270, 277 (1978). Foseid's testimony, when considered with the other evidence presented at trial, which the court carefully detailed, had at the very least a tendency to make it more probable than it would be without his testimony that Brummer threatened to kill Gonstead.

SUFFICIENCY OF EVIDENCE

Brummer contends that the evidence is insufficient to support Brummer's conviction beyond a reasonable doubt. Pointing out that the evidence against her was entirely circumstantial, she acknowledges that a finding of guilt may rest upon circumstantial evidence, but contends that this circumstantial evidence did not meet the State's burden of proof.

When we review the sufficiency of evidence to support a jury verdict, the standard we use is the same whether the evidence presented at trial

was direct or circumstantial. ***State v. Poellinger***, 153 Wis.2d 493, 503, 451 N.W.2d 752, 756 (1990). The credibility of the witnesses and the weight of the evidence is for the trier of fact, and we view the evidence in the light most favorable to the verdict, including drawing inferences from the evidence that supports the verdict if more than one reasonable inference can be drawn. ***Id.*** at 504, 451 N.W.2d at 756. We are not concerned with evidence that might support other theories of the crime; we decide only whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence. ***Id.*** at 507, 451 N.W.2d at 757. We may not substitute our judgment for that of the trier of fact unless the evidence, viewed most favorably to the State and the conviction, is so lacking in probative value and force that no trier of fact acting reasonably could have found guilt beyond a reasonable doubt.[5] ***Id.*** at 507, 451 N.W.2d at 757-58.

Applying these standards, we conclude that there was sufficient evidence to support Brummer's conviction for first-degree intentional homicide. We summarize the evidence, including reasonable inferences from the evidence, that support the conviction.

Gonstead suffered no injuries other than the single bullet wound that killed her. She was not raped. Since she still had, when she was found, the only things of value she carried, it is a reasonable inference that she was not robbed. Her body was found in a wooded area thirty-two feet from Mineral Point Road. There was no indication from either her clothing or the vegetation that she had been dragged into the woods, giving rise to a reasonable inference that she was shot at that spot.

She was shot in the back of the head with a .22 caliber bullet. Although the bullet could have been fired from either a rifle or a pistol, the fact that the muzzle of the murder weapon was only six inches from the victim's head at the time it was fired, suggests that Gonstead was shot with a handgun. Brummer's parents kept a .22 caliber pistol in a dresser drawer. When the police looked for it after Gonstead was killed, it was no longer there, although a box containing .22 caliber ammunition was still in the dresser drawer.

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[5] Brummer incorrectly cites to ***Stewart v. State***, 83 Wis.2d 185, 192, 265 N.W.2d 489, 492 (1978), and ***State v. Wyss***, 124 Wis.2d 681, 692, 370 N.W.2d 745, 751 (1985), as sources for our standard of review. As ***State v. Poellinger*** makes clear, the hypothesis-of-innocence rule applicable at the trial court level in a circumstantial evidence case is not the standard of appellate review for such cases. ***Poellinger***, 153 Wis.2d at 504-05, 451 N.W.2d at 756-57.

Brummer's mother was surprised to find the pistol missing. Other partially empty boxes of .22 caliber ammunition were found in a gun cabinet in an adjoining bedroom. The bullets from one of these boxes were consistent with the bullet recovered from the victim's head. Brummer was familiar with firearms because she had been hunting and had been a security specialist in the Air Force where her normal duties included carrying a gun.

Gonstead was Johnson's best friend since second grade. Brummer had a sexual relationship with Johnson, was jealous of Johnson's friendship with Gonstead and did not like Gonstead. The relationship between Brummer and Johnson began to deteriorate in January 1994 because Johnson was no longer sure she wanted to be sexually involved with another woman. Brummer was having a hard time accepting the breakup of the relationship and believed that Gonstead was trying to talk Johnson into resuming a heterosexual lifestyle. Brummer told Foseid she was "going to waste" "that fat ugly bitch" who was trying to break up her relationship with her girlfriend by urging her to go straight. Brummer tried to get back with Johnson after Gonstead disappeared.

Brett Turner, Johnson's former boyfriend, knew Gonstead through Johnson and liked Gonstead. He was upset when Johnson broke up with him and upset when he heard she started seeing Brummer; he was not upset with Gonstead. He was working on the evening of March 14, as was Johnson.

Brummer had not been out alone with Gonstead prior to the evening of March 14 when Brummer picked her up at her home. Brummer and Gonstead went barhopping. Among other bars, they went to the Speedway Bar on Mineral Point Road and Jake's Bar on Mineral Point Road and County Highway P, less than two miles east of where Gonstead's body was found. No one but Brummer saw Gonstead again after they left Jake's past midnight. Brummer was familiar with the rural section of far western Mineral Point Road where the victim's body was found because it was a route she took from Madison to her home in Spring Green.

Brummer told the police she and Gonstead had stopped at a different location to urinate in a wooded area. A tissue with yellowish stains was found near Gonstead's body. A reasonable inference from this evidence, coupled with the evidence that they had been drinking, is that Brummer and Gonstead stopped at the location where Brummer's body was found in order to

urinate. This would have provided an opportunity for Brummer to be close to Gonstead in a secluded wooded area without Gonstead being suspicious.

Brummer's account of the evening could reasonably be considered fabricated and evidence of her consciousness of guilt.[6] She initially denied being at Jake's that evening though she identified the other bars they had been to; when confronted with the evidence that she had been seen at Jake's, she said she must have been extremely drunk and did not remember being there. She stated that she and Gonstead were going to Club 3054 that evening, which she said had a full parking lot, but that Gonstead got out of the car there and started to walk to Johnson's house because she was not feeling well. However, other evidence showed the club was closed that evening and the parking lot was empty. Also, Johnson was normally working at that time on second shift. Brummer stated that she thought she saw Gonstead, who was supposed to be sick, talking to some people standing near motorcycles in a nearby Taco Bell parking lot, even though other evidence showed there were no motorcycles in that lot the entire evening.

Brummer contends that the State presented evidence only of motive--jealousy--but no evidence that she caused Gonstead's death; that no weapon was found; and there was no evidence of blood in Brummer's car or on her clothes. This is simply another way of saying that the evidence of Brummer's guilt is circumstantial. Brummer also makes these points: (1) there was evidence that her father had gotten rid of the .22 pistol well before this event; (2) a .22 caliber bullet is one of the most common manufactured; (3) she invited two other co-workers to go out with her that evening, before she went to Gonstead's house; and (4) although Brummer had the opportunity to kill Gonstead, any number of others could have killed her anytime between March 14 and March 20. Brummer is asking us to consider evidence favoring other theories of the crime, but that is not the proper standard on appellate review. *See* ***Poellinger***, 153 Wis.2d at 507, 451 N.W.2d at 758. We are persuaded that,

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[6] Brummer is correct that the negative inference drawn from a defendant's account that a jury may reasonably consider fabricated does not, by itself, constitute the type of affirmative proof of guilt necessary to sustain a guilty verdict. *See* ***Stewart v. State***, 83 Wis.2d 185, 195, 265 N.W.2d 489, 493 (1978). In this case there is such affirmative proof, which we have already summarized. We discuss Brummer's account to complete a summary of the evidence, including reasonable inferences from the evidence, that support the jury's verdict.

based on the evidence viewed most favorably to the State and the conviction, a reasonable jury could have found Brummer guilty beyond a reasonable doubt.

PROSECUTOR'S REBUTTAL ARGUMENT

Brummer argues that she is entitled to a new trial because the prosecutor improperly implied in her rebuttal argument at closing that the prosecution possessed unintroduced evidence to support a witness's credibility, that the defense testimony was contrived, and that Brummer had a burden to introduce evidence.[7] When a prosecutor is charged with misconduct for remarks made in argument to the jury, the test to be applied is whether those remarks so infected the trial with unfairness as to make the resulting conviction a denial of due process. ***State v. Wolff***, 171 Wis.2d 161, 167, 491 N.W.2d 498, 501 (Ct. App. 1992). In applying this test, we must view the prosecutor's statements in context. ***Id.*** at 168, 491 N.W.2d at 501. We must also recognize that counsel should be allowed considerable latitude in closing argument and that the trial court has the discretion to determine the propriety of counsel's statements and arguments to the jury. ***Id.*** at 167, 491 N.W.2d at 501.

The prosecutor's challenged comments concern the testimony of Turner, one of the State's witnesses. Brummer subpoenaed Turner's work records from his employer and moved all those records into evidence. Turner used them three days later to refresh his recollection when he testified about the hours he worked on March 14, 15 and 16, 1994. He also testified that he had obtained copies of his work records when he heard that a private investigator was suggesting that he was involved in Gonstead's death. Defense counsel asked if he could have those records and Turner replied that he did not have them there with him, but he could bring them. Defense counsel said, "Please

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[7] We note that defense counsel objected to only two of the challenged remarks, both on the ground that they suggested the defense had the burden of presenting evidence, and it appears there was no motion for a mistrial based on any of the prosecutor's challenged remarks. Failure to object at the time of alleged improprieties in closing argument waives review of the alleged error; additionally, a defendant must move for a mistrial to preserve the alleged error for appeal. ***State v. Goodrum***, 152 Wis.2d 540, 549, 449 N.W.2d 41, 46 (Ct. App. 1989). However, the State does not argue that we should not decide the merits of Brummer's argument on improper closing remarks and does present extensive argument on the merits. Because Brummer also requests a new trial in the interests of justice, we address her claim of improper closing argument on the merits.

do." There was no further reference to these records during the evidentiary portion of the trial.

In the defense's closing argument, counsel summed up the evidence concerning Turner which, counsel suggested, showed that Turner could have been responsible for Gonstead's death. In that context, counsel argued that Turner said he had records that showed he was at work at the relevant times, but he did not produce them.

Referring to defense counsel's argument on Turner, the prosecutor argued in rebuttal:

> Brett Turner, you know, is also faulted for basically just defending his own honor and integrity. He's out there in the City of Madison working a job, trying to pay off his truck, and he starts hearing rumors from the likes of Mike O'Neill that they're going to put the finger on him. And so he get his work records together *and, no he didn't bring them to court because we had them.* But Mr. Priester asked him, "Would you bring those to court? Can you get those?" And Turner said, Brett Turner said, "Yeah, I can get them." *Well, he didn't have him come back, did he? He didn't call him as a witness and say, "Let's see those records." That's because he is not interested in the truth.*

....

> Brett Turner has had four months, [defense counsel] said, to come up with an explanation, and all he [Turner] can do is say, "Yeah, I checked the records, but didn't bring them." Who's had six months? Who's had six months?

Defense counsel objected at this point on the ground the defense had no duty to present evidence. The court immediately instructed the jury that the burden of proof is on the State, the burden is beyond a reasonable doubt as

the jury was previously instructed, and the defense has no burden to produce evidence. The prosecutor continued:

> Who has had six months to have all of this evidence and all of those reports that you heard replete [sic] reference to, officer's reports, this witness's report, has had six months to have that available to them to conform and to weave a defense to and around?

The defense did not object to this but did later object when the prosecutor said:

> Foseid, the man who didn't come forward until Friday. Why didn't we hear from the bartender, Mr. Priester says? I don't know why. Mr. Priester, why didn't we?

Immediately upon this objection, the court again instructed the jury that the burden of proof was on the State, the burden is beyond a reasonable doubt, and that the defendant is presumed innocent and has no obligation to come forward with any evidence. The court cautioned the prosecutor not to indicate in any way that the defendant had any burden or obligation to bring any evidence forward. Before continuing her argument, the prosecutor told the jury that she had not meant to imply that the defendant in any way had a burden to come forward.

Defense counsel did not object to the prosecutor's argument on Turner's work records until the prosector's rhetorical question, "Who's had six months?," implied that the defense should have produced something, at which point the defendant objected on the ground that it had no obligation to do so. Up until that rhetorical question, the prosecutor was responding to defense counsel's argument that Turner should have produced his work records; the prosecutor was indicating that the defense had itself moved all those records into evidence.[8] We see nothing arguably improper about the prosecutor's

[8] The State's brief treats the work records of Turner already in evidence as the same records, although different copies, that Turner reviewed after he heard about the private investigator. In her reply, Brummer does not respond to this contention or explain what

argument up until the rhetorical question. We reject Brummer's contention that the prosecutor's comments on Turner's work records implied that there was unintroduced testimony that would support Turner's credibility.

As for the implication that the defense had an obligation to produce evidence, the court responded to defense counsel's objection with a curative instruction. The court responded to the same objection at a later time with a curative instruction and an admonition to the prosecutor who did not again repeat the implication. The general rule is that improper remarks made by a prosecutor are not necessarily prejudicial where objections are promptly made and sustained and curative instructions and admonitions are promptly given by the court. ***Hoppe v. State***, 74 Wis.2d 107, 120, 246 N.W.2d 122, 130 (1976). Although we recognize that there are cases where objections and curative instructions may be insufficient to dispel prejudice because the pattern of misconduct by a prosecutor is egregious and repetitive, we are persuaded that this is not such a case. We conclude that the objections and court response cured any prejudice that may have resulted from implications that the defense had to present evidence.

Brummer's contention that the prosecutor implied the defense was contrived is based on the prosecutor's rhetorical question implying that the defense had six months, with all the reports available to them "to weave a defense around and through." The State argues that defense counsel invited this response because he suggested that Turner had contrived his testimony to conform to work records that had long been available to him. We agree with Brummer that the prosecutor's response is not the type of "measured and reasonable response" sometimes appropriate to "right the scales" in reply to defense counsel remarks. *See* ***Wolff***, 171 Wis.2d at 168-69, 491 N.W.2d at 501-02. However, we conclude that although improper, the prosecutor's rhetorical question about the opportunity to "weave a defense around and through" did not rise to the level of denying Brummer her due process to a fair trial. It was a rhetorical question, it was stated once, and it was couched in terms of opportunity and a vague metaphor. It was not a specific accusation of false or planted evidence. *Cf.* ***United States v. Rios***, 611 F.2d 1335, 1342 (10th Cir. 1979).

(..continued)
work records the defense counsel was asking Turner to produce that were not already in evidence.

In summary, we conclude that the prosecutor did not refer to evidence outside the record; that any improper comments implying the defense had to present evidence were adequately dealt with by objection, curative comments and admonition; and that the prosecutor's comments suggesting the defense's opportunity to make its testimony consistent with available reports, while improper, did not result in a violation of due process. Considering the improper comments of the prosecutor together and also in context, we are satisfied that they did not affect the fairness of the trial.

EVIDENTIARY RULINGS

Brummer contends that the trial court erroneously admitted, as adoptive admissions, testimony of two affirmative head nods Brummer made to statements during police questioning, and erroneously admitted evidence that Brummer declined requests to submit to hypnosis. Evidentiary rulings, particularly relevancy determinations, are left to the discretion of the trial court. When we review a trial court's discretionary decision, we consider only whether the trial court properly exercised its discretion, putting to one side whether we would have made the same ruling. ***State v. Smith***, 203 Wis.2d 288, 295, 553 N.W.2d 824, 827 (Ct. App. 1996). 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 one a reasonable judge could reach and consistent with applicable law, we will affirm the decision even if it is not one that we ourselves would reach. *See* ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20, 21 (1981).

Adoptive Admissions

The court conducted a pretrial evidentiary hearing on Brummer's motion in limine regarding the introduction of evidence that Brummer made head nods on two occasions in response to statements of Detective Kenneth Pledger. For purposes of the proceeding, the parties stipulated that at the time these nods occurred, Brummer was in custody, had been given the statement of her rights required by ***Miranda v. Arizona***, 384 U.S. 436 (1966), had waived those rights and was responding to questioning by Pledger. Detective Linda Draeger, who was present during the questioning, was the only witness at the hearing.

According to Draeger, when Pledger stated to Brummer that he believed she was involved in the death of Gonstead and that she and Gonstead had been at a bar extremely close to where Gonstead's body had been located, Brummer stared intently at Pledger and very slightly nodded her head up and down without saying anything. Draeger had not seen Brummer nod or engage in intense staring before that point in the questioning. Later in the questioning, in response to Pledger's statement, "I know you'd like to take back that night," Pledger testified that Brummer made the same slight head nodding and directly stared into Pledger's eyes.[9] Draeger's opinion as to both head nods was that Brummer was acknowledging and agreeing with the statements directly preceding the nods. In response to questions from the court, Draeger stated that she considered the head nods to be affirmative and that affirmative (up and down) and negative (side to side) head nods are not uncommon responses of the people she questions. The court questioned Draeger in detail about the context of Brummer's head nods--for example, what preceded and followed each of Pledger's statements to which Brummer nodded and Brummer's manner of response to other questions and statements.

Based on Draeger's testimony, the court found that Pledger's words immediately prior to Brummer's nods were statements, not questions. The court also found that Brummer's nod in each case was an affirmative response to a single assertion by Pledger and that his statements were unequivocal, definite and positive. The court specifically noted that it was not bound by Draeger's opinion on the meaning of the head nods. The issue, in the court's view, was one of intent, which it noted was subjective but must necessarily be determined in an objective manner: would a reasonable person in the position of Draeger consider the head nods affirmative. The court further found that Brummer's conduct was unequivocal, positive and definite, clearly showing that she intended to adopt those statements as her own. The court concluded that either or both Pledger and Draeger could testify to Pledger's statements and Brummer's nods because they were adoptive admissions. Both Pledger and Draeger testified at trial concerning Pledger's statements and Brummer's nods, although briefly and with considerably less detail than Draeger did at the evidentiary hearing.

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[9] The transcript reveals that both times Draeger described Brummer's head nod, Draeger nodded her own head to illustrate.

An admission by a party opponent is not hearsay and includes a statement of which a party has manifested the party's adoption or belief in its truth. Section 908.01(4)(b)2, STATS. A "statement" includes nonverbal conduct of a person if it is intended as an assertion. Section 908.01(1). Brummer implicitly concedes that a nod in response to a statement may be admissible as an adoptive admission, but she argues that her nods were not admissible because they were equivocal. According to Brummer, it is not clear whether she was agreeing that Pledger believed in the statements he was making or whether Brummer was adopting his statements as her own.

The parties debate the proper standard for determining the admissibility of the head nods. The trial court relied on ***Village of New Hope v. Duplessie***, 231 N.W.2d 548 (Minn. 1975), in which the court ruled that the defendant's response of a head nod and laugh to a statement made by another juvenile in the presence of police was not admissible. Duplessie challenged the trial court's admission of the testimony because it violated his right to remain silent and his right to confront his accuser. The court noted that the record did not indicate whether the nod and laughter was positive or negative. The court also expressed the need for a standard that would sufficiently protect both constitutional rights. The court concluded that before admitting "hearsay accusations" against an accused on the grounds it was adopted by the accused, the trial court must first determine that the asserted adopted admission be manifested by conduct or statements that are "unequivocal, positive, and definite in nature, clearly showing that in fact the defendant intended to adopt the hearsay statements as his own." ***Id.*** at 553.[10] This is the proper standard, Brummer argues, and the evidence of Brummer's nods does not meet this test.

The State asks us to apply the standard we employed in ***State v Rogers***, 196 Wis.2d 817, 539 N.W.2d 897 (Ct. App. 1995). There we upheld the trial court's decision not to admit, as a defendant's adoptive admission, the statement of a codefendant to the police. The State's basis for arguing that the

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[10] A later Minnesota case, ***Minnesota v. Shoop***, 441 N.W.2d 475 (Minn. 1989), applied the ***Duplessie*** standard after noting that ***Duplessie*** was decided before the adoption of the rules of evidence that provide that the admission of a party opponent is not hearsay. The ***Shoop*** court concluded that the trial court did not erroneously exercise its discretion in admitting as an adoptive admission testimony that the defendant affirmatively nodded his head in response to the statement of another because the record "demonstrates [the witness's] positive and unequivocal testimony that he saw defendant affirm [the] statement by nodding his head." ***Id.*** at 482.

defendant had adopted the statement was that, at a later time, the defendant described to a third person the codefendant's statement and then said that the codefendant had "snitched him out." ***Id.*** at 829, 539 N.W.2d at 902. We stated that the proper procedure for the trial court was to first establish that there were sufficient facts from which a jury could reasonably conclude that the accused intended to adopt the declarant's statement, meaning that the defendant has "purposefully embraced the truth" of someone else's statement. ***Id.*** at 830, 539 N.W.2d at 902. We concluded that the trial court did not erroneously exercise its discretion in determining the lack of such evidence. ***Id.*** at 834, 539 N.W.2d at 904.

Brummer does not argue that considering Brummer's nod as an adoptive admission implicates any of her constitutional rights. We therefore see no reason to employ a different standard than that used in ***Rogers***, and we need not address whether, under other circumstances, a more stringent standard is required. The standard the trial court applied more than meets the ***Rogers*** standard. The trial court carefully reviewed the extensive testimony of Draeger and made findings based on that testimony that Brummer's nods were unequivocal, positive, and definite and clearly showed that she intended to adopt Pledger's statements as her own. The trial court's findings are supported by the record and are not clearly erroneous. However, under ***Rogers***, the trial court need only have determined that a jury could reasonably conclude Brummer purposefully embraced the truth of Pledger's statements. We hold that the record contained sufficient facts from which a jury could reasonably so conclude. The trial court did not erroneously exercise its discretion in admitting the testimony of Brummer's nods as adoptive admissions.

Declining to Submit to Hypnosis

Brummer contends that the trial court erroneously exercised its discretion in admitting evidence of two occasions on which Brummer declined to be hypnotised because (1) the evidence was not relevant, (2) even if relevant, its probative value was substantially outweighed by unfair prejudice, and (3) it unfairly burdened her privilege against self-incrimination under the Fifth Amendment of the United States Constitution and Article I, Section 8 of the Wisconsin Constitution.

At a pretrial hearing on Brummer's motion in limine regarding this evidence, the parties stipulated to the relevant facts. Prior to Brummer's arrest, while she was voluntarily in the company of Dane County Detective Mary Easland, Easland asked Brummer if Brummer would consider being hypnotised so that the police could obtain a detailed description of the people Brummer stated she had seen in the Taco Bell parking lot. In reply to Brummer's response that she did not like people "messing with her mind," Detective Easland informed Brummer that she would only be asked questions pertaining to the night Gonstead disappeared. Brummer stated she would not feel comfortable being hypnotized because she might have something in her subconscious. Easland asked Brummer what she was afraid she might have in her subconscious. Brummer said she did not know but she did not feel comfortable being hypnotized.

There was also stipulated testimony on a second request by Cynthia Moore, Johnson's aunt, before Brummer was arrested and before Gonstead's body was discovered. Moore asked Brummer if she would agree to be hypnotized in order to help find out where Gonstead was. Brummer refused, stating that if she were to undergo hypnosis "it would be conducted by authorities." However, as we later discuss in this section, at trial Moore testified that Brummer did not respond to her request. Therefore, we do not discuss Moore's stipulated pretrial testimony or the court's pretrial ruling that it was admissible.

The trial court denied Brummer's motion to exclude Easland's testimony. Citing ***State v. Armstrong***, 110 Wis.2d 555, 573, 329 N.W.2d 386, 395 (1983), the court first correctly noted that in Wisconsin hypnotically enhanced testimony is admissible in the courts of Wisconsin provided that certain conditions relating to the reliability of such testimony is met. Next, the trial court determined that Brummer's refusal to submit to hypnosis and her explanations occurred in a non-custodial setting voluntarily agreed to, and therefore ***Miranda*** warnings were not required. The court also found that Brummer did not choose to exercise her right not to incriminate herself but instead chose to respond to the inquiry and to give her reasons. The trial court concluded that Brummer's responses were relevant to an assessment of her credibility, applying the definition of relevancy in § 904.01, STATS.

The court also concluded that it was not unduly prejudicial for the jury to consider this evidence along with all the other evidence that it would be

considering. The court reasoned that this evidence did not necessarily lead to an inescapable conclusion that because Brummer refused to submit to hypnosis, she must necessarily be guilty. Rather, the court considered that this was another factor, one of potentially many, that the jurors could give whatever weight they felt was appropriate, if any.

Brummer first argues that declining to submit to hypnosis is not relevant to credibility because statements given under hypnosis may be unreliable, pointing to the conditions for admissibility established in ***Armstrong***. However, it is Brummer's belief about what hypnosis can do that is relevant to an assessment of her credibility, not the actual limitations of hypnosis when it occurs. Brummer's explanation to Easland indicates that Brummer believed that under hypnosis she might reveal things in her subconscious and she did not want that to happen. While Brummer might have innocent reasons for not wanting things in her subconscious revealed, one reasonable interpretation of her explanation is that under hypnosis she might reveal information that contradicted what she had told the police about last seeing Gonstead. We conclude that the trial court did not erroneously exercise its discretion in concluding that Brummer's response to Easland's request is relevant to an assessment of her credibility.

We also conclude that the trial court did not erroneously exercise its discretion in concluding that the probative value of this evidence was not outweighed by the danger of unfair prejudice. Unfair prejudice means that the proffered evidence would have a tendency to influence the outcome by improper means. ***State v. Mordica***, 168 Wis.2d 593, 605, 484 N.W.2d 352, 357 (Ct. App. 1992). The court's conclusion--that the evidence would not lead a jury to decide that because Brummer refused to submit to hypnosis she was guilty of Gonstead's death--is a reasonable one.

While Easland's trial testimony was substantially the same as the stipulated facts at the pretrial hearing, Moore's testimony differed at trial. At trial, Moore testified that when she asked Brummer whether she would consent to being hypnotized to help gather more information about a van she stated she had seen the night of March 14 when she dropped Gonstead off, Brummer did not answer the question. The trial court's view of the relevancy of Brummer's silence in response to the question from Moore might well have differed from its view of the relevancy of the facts as stipulated at the pretrial hearing. However, it does not appear defense counsel objected or otherwise brought this

discrepancy to the court's attention during trial. On appeal, Brummer bases her argument on what Moore testified to at trial, even though the court's pretrial ruling was based on different facts.

We will assume for purpose of argument that evidence of Brummer's silence in response to Moore's request has no probative value and, if there had been a proper objection, should have been excluded. We conclude nonetheless that its admission was harmless. At trial, Brummer testified that she had never really refused hypnosis but just said she did not like doctors and would not be comfortable. Brummer also testified that no one explained the procedures to her or the protections so she could not get hurt from hypnosis. The prosecutor did not refer to any testimony regarding hypnosis in closing argument. Given this fact, Brummer's explanation at trial, and the evidence we have summarized above that supports the verdict, we are confident that there is no reasonable possibility that Moore's testimony on this point contributed to the conviction. *See* ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 232 (1985).

Brummer's constitutional objection to the trial court's ruling is brief. She argues that, had she submitted to hypnosis, she would not be able to exercise her right against self-incrimination because statements made under hypnosis would not be voluntary. Just as her right to remain silent cannot be used against her, she continues, so her right "to refuse to relinquish her capacity to exercise her right against self-incrimination" should not be used against her. Brummer's legal authority is ***Wainwright v. Greenfield***, 474 U.S. 284, 295 (1986), which reaffirmed that it was fundamentally unfair for the state, after giving ***Miranda*** warnings, to use post-arrest, post-***Miranda*** silence for impeachment purposes.

However, as the State correctly points out, a defendant's right against self-incrimination is not implicated when the State elicits testimony of the defendant's silence, pre-arrest and pre-***Miranda***, at a time when the defendant is not subject to coercive questioning or restriction of freedom of action by police officers. *See* ***State v. Brecht***, 143 Wis.2d 297, 311-12, 421 N.W.2d 96, 101-02 (1988). There is no evidence, and Brummer does not contend, that any of the conditions were met for the invocation of the privilege against self-incrimination. Brummer does not explain how, in light of ***Brecht***, her right against self-incrimination is implicated by Easland's and Moore's questions about hypnosis, even considering that she responded to Moore's question only with silence. Nor does Brummer explain why the constitutional protections that

might apply had she undergone hypnosis prevent the admissibility of evidence that she refused to do so. Based on the sketchy argument Brummer presents, we conclude the admission of the responses to Easland's and Moore's questions did not violate her right against self-incrimination.

DISCRETIONARY POWER--§ 752.35, STATS.

Brummer argues that we should exercise our discretionary power of reversal under § 752.35, STATS., because the real controversy has not been tried. This is the case, Brummer contends, because the jury had before it evidence not properly admitted--Foseid's testimony, the threat to Derrick, and Brummer's adoptive admissions and testimony of her refusal to be hypnotized. We have held that Foseid's testimony was properly admitted. We have held that the trial court's curative instructions and admonition to the jury to disregard the testimony of Brummer's threat to Derrick were adequate to prevent prejudice resulting from that testimony. We have held that the trial court did not erroneously exercise its discretion in admitting the head nods as adoptive admissions and in admitting testimony of Brummer's refusal and explanation to Easland regarding hypnosis. We have held that any error in the admission of Moore's testimony at trial was harmless. We conclude that the real controversy was tried.

Brummer also asks that we reverse on the second ground in § 752.35, STATS.,--that it is probable that justice was miscarried--because Juror Olsen was not impartial. However, we have held that the trial court did not erroneously exercise its discretion in deciding that he was impartial.

We have carefully considered each of Brummer's arguments on this appeal. We are satisfied that there are no grounds for exercising our power of discretionary reversal under § 752.35, STATS.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

No. 95-3037-CR(C)

ROGGENSACK, J. *(concurring)*. The majority opinion does an excellent job of dealing with numerous and complex issues raised by this case, and comes to what I believe to be the correct result. However, I cannot join its analysis of the two evidentiary issues because I conclude that the trial court erroneously exercised its discretion when it admitted testimony of Ms. Brummer's head nods as adoptive admissions of three statements made by a police interrogator and when it admitted testimony of Brummer's refusals to submit to hypnosis. However, I conclude the errors were harmless; and therefore, I concur in affirming the judgment of the trial court.

Adoptive Admissions.

On April 13, 1994, Ms. Brummer was interrogated by Detective Pledger in the presence of Detective Draeger. At trial, Draeger testified that during that interrogation Pledger said, "I believe that you were responsible for Sarah's death … [Y]ou were seen awfully close to where the body was." According to Draeger, Brummer "glared" at Pledger after the first statement and she "very lightly" nodded her head after the second statement. Later Pledger said, "I know you would like to take back that night." Draeger testified Brummer again nodded. The trial court held Pledger's three statements were admissible as Brummer's adoptive admissions.

The majority correctly notes that we review the trial court's admission of evidence under the erroneous exercise of discretion standard. *See* ***State v. Rogers***, 196 Wis.2d 817, 829, 539 N.W.2d 897, 901 (1995). When we review a discretionary decision by the trial court, we examine the record to determine if the trial court logically interpreted the facts and applied the proper legal standard. ***Id.*** In order to determine whether the proper legal standard was applied in this case, we should review independently, as a question of law, the legal test the trial court must apply to determine whether there was a sufficient foundation to qualify the statements as admissions under § 908.01(4)(b)2., STATS. *See* ***State v. Carter***, No. 94-2001-CR, at 2 n.1 (Wis. March 19, 1997).

When faced with a decision about whether to admit proffered testimony, a trial court must first determine whether it is relevant; *i.e.,* whether the testimony has any tendency to make the existence of any material fact more or less probable than would be the case without the testimony. ***Bittner v.***

American Honda Motor Co., 194 Wis.2d 122, 147, 533 N.W.2d 476, 486 (1995); § 904.01, STATS. Then, if the testimony is offered as an adoptive admission under § 908.01(4)(b)2., STATS., the trial court must determine what facts tend to show that the party did, and did not, purposely embrace the truth of the statement. *See* ***Rogers***, 196 Wis.2d at 830 and 834, 539 N.W.2d at 902 and 904. All of a defendant's actions and statements must be taken in context. *See* ***State v. Marshall***, 113 Wis.2d 643, 659, 335 N.W.2d 612, 619 (1983) (Abrahamson, J., concurring). And finally the trial court must conclude whether the facts found are sufficient to satisfy the foundation required before a jury can consider evidence proffered under § 908.01(4)(b)2. ***Rogers***, 196 Wis.2d at 830, 539 N.W.2d at 902. The facts relied on to establish adoptive intent must be unambiguous, evincing a knowing approval of the statement of another. ***Id***. at 831-32, 539 N.W.2d at 902-903. The burden of proof is on the proponent of the proposed admission to satisfy the standards of § 908.01(4)(b)2. *See* ***White Industries, Inc. v. Cessna Aircraft Co.***, 611 F. Supp. 1049, 1062 (W.D. Mo. 1985) (ruling under Federal Rules of Evidence 801(d)(2)(B), which duplicates § 908.01(4)(b)2.[11]

1. Relevance.

Brummer objected to the relevance of Pledger's statement that he believed she was responsible for Sarah's death. Brummer argued that Pledger's belief was not relevant to whether she committed the crime. The trial court overruled the objection reasoning:

> [I]t was a conversation, interrogation, what have you, involving the two detectives and the defendant, and that had the defendant not responded in the way she did to

[11] "Federal court decisions interpreting counterpart rules of evidence are persuasive authority." ***State v. Rogers***, 196 Wis.2d 817, 830 n.6, 539 N.W.2d 897, 902 n.6 (1995).

> Detective Pledger's statements, which I've read in the record, it would be inadmissible, because then the defendant would have been exercising her right to silence. However, since she did, it is an adoptive admission ….

While the trial court's reasoning may be relevant to the question of whether Brummer's Miranda rights were violated, the court still should have applied the basic relevancy test to Pledger's first statement, as all evidence must be relevant before it is admissible. ***Bittner***, 194 Wis.2d at 147, 540 N.W.2d at 486. Pledger's belief about Brummer's guilt is not relevant to that question and improperly invades the province of the jury. The trial court did not apply the correct legal standard; therefore, it erroneously exercised its discretion when it admitted Pledger's first statement.

2. Ambiguity.

Non-verbal conduct of a criminal defendant must unambiguously manifest a knowing approval of the statement to which adoption is ascribed, otherwise there is too great an opportunity to manufacture evidence by making statements in an interrogation and then resurrecting them at trial as adoptive admissions. Conduct of a defendant which is ambiguous cannot form the basis for an adoptive admission. ***Rogers***, 196 Wis.2d at 831-32, 539 N.W.2d at 902-903. Here, the trial court relied on two slight head nods made after the second and third of Pledger's statements to Brummer. In order to satisfy § 908.01(4)(b)2., STATS., as construed by ***Rogers*** and ***Marshall***, Brummer's slight head nods must be taken in context with Brummer's other statements to Pledger and Draeger and, in that context, be able to provide the complete foundation from which the jury could reasonably conclude that Brummer "purposefully embraced the truth" of Pledger's statements.

The first slight nod was ambiguous because it occurred after multiple statements[12]. Pledger's first statement carried the connotation of a confession. Brummer did not nod after that statement. Draeger testified she "glared." Both before and after Pledger's April 13th interrogation, Brummer repeatedly denied that she was involved in Sarah's death.[13] Therefore, the jury did not have a sufficient foundation from which it could reasonably determine that she had purposely adopted her interrogator's statement that she was *responsible for* Sarah's death.

The nods to the second and third statements were also ambiguous because, while an up-and-down nod may reasonably be assumed to be an affirmative response to a question, a very light nod is inherently more ambiguous in regard to a statement. *See* ***Village of New Hope v. Duplessie***, 231 N.W.2d 548, 552 (Minn. 1975) (discussing nods in various contexts) and James Duff, Jr., Annotation, *Nonverbal Reaction to Accusation*, 87 A.L.R. 3d 706 at § 6. Nodding in response to a statement commonly means nothing more than an acknowledgment that the statement has been heard. There was nothing introduced at trial to indicate whether Brummer normally nods along as people speak or whether she does so only when she is adopting the statement of the speaker. A jury could just as easily find that her head nods were acknowledgements that she heard what Pledger had said, as it could find that she adopted his accusations. Therefore, I conclude the trial court erred when it admitted this evidence because it did not apply the proper legal standard to assure a sufficient foundation from which a reasonable jury could have decided that Brummer intended to adopt Pledger's three statements as her own.

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[12] Pledger said, "I believe that you were responsible for Sarah's death … you were seen awfully close to where the body was."

[13] The trial court reviewed the head nods in isolation, not in the context of all Brummer's statements to police.

Refusal to Submit to Hypnosis.

Both Detective Easland and Cynthia Moore testified at trial that they had asked Brummer to submit to hypnosis. Because the majority agrees Moore's testimony was erroneously admitted, I will focus on Easland's request. Easland's testimony on direct examination was as follows:

Q:Detective, at some point, did you make a request of the defendant?

A:Yes, I did.

Q:What was that request?

A:When we were in route back to the building, I asked her if she would consider being hypnotized to recall the events of the night that Sarah disappeared.

Q:Did you -- did you explain what would be helpful about this or potentially helpful?

A:So we could obtain details of what she had seen at Taco Bell.

Q:Did the defendant agree to this?

A:No, she didn't. She initially said that she didn't like people messing with her head.

Q:Now, did you -- after she declined, saying she didn't like people messing with her mind, did you engage in some further discussion with her about hypnotism?

A:I told her that it would only -- we would only ask her questions pertaining to the night that Sarah disappeared.

Q:Did she again refuse?

A:Yes, she did.

Q:What reason did she give?

A:She said that she might have something in her subconscious.

Q:Did you ask her anything else?

A:I asked her what she meant by that, and she again stated she didn't want to be hypnotized and she didn't know what she had in her subconscious.

Evidence must be relevant to be admitted. Section 904.02, STATS. Relevant evidence is that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable…." Section 904.01, STATS. Some evidence becomes relevant only after a sufficient foundation has been laid. "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." Section 901.04(2), STATS. A trial court may not admit evidence unless it is satisfied by a preponderance of the evidence that a sufficient foundation has been laid. ***State v. Whitaker***, 167 Wis.2d 247, 263, 481 N.W.2d 649, 655-56 (Ct. App. 1992). If the trial court fails to consider whether a proper foundation has been laid, this court must independently review the record to determine whether it provides a basis for the admission of the evidence. *See* ***State v. Pharr***, 115 Wis.2d 334, 343, 340 N.W.2d 498, 502 (1983).

The trial court concluded that Brummer's responses to requests to submit to hypnosis, including statements that she did not like people "messing with her head" and that she would be uncomfortable being hypnotized because "she might have something in her subconscious," were relevant under § 904.01, STATS., to an assessment of her credibility. It relied on ***State v. Hoffman***, 106 Wis.2d 185, 316 N.W.2d 143 (Ct. App. 1982) for its conclusion that refusing to be hypnotized was relevant to credibility. In ***Hoffman***, this court suggested that the withdrawal of a witness' offer to take a polygraph test might bear upon his credibility. ***Id.*** at 217, 316 N.W.2d at 160 (decided on other grounds). But here, Brummer never wavered in her refusal to submit to hypnosis, and when the prosecution elicited the testimony, she had not taken the stand. Therefore, her credibility was not at issue. Thus, it is difficult to see how Brummer's refusals were in any way relevant to her credibility—that is, the likelihood that she was telling the truth.

Rather, if Brummer's refusals were relevant at all, it was because they may have indicated a consciousness of guilt. In other words, Brummer declined hypnosis because she *knew* she had something to hide. However, before the evidence could have been admitted under that theory, a foundation was required which showed that Brummer believed that being hypnotized would cause a person to tell the truth. Section 901.04(2), STATS. There was never any testimony that Brummer believed one told the truth under hypnosis. In fact, the opposite may have been true: her responses could suggest fear that a hypnotist would trick her into saying things which were not true. While the trial court correctly noted that any probative value of Brummer's refusals lay in her belief as to what her statements given under hypnosis were capable of showing, it did not apply the proper legal standard and require an evidentiary foundation of her belief, for the admission of Easland's testimony.

The trial court also relied on ***State v. Armstrong***, 110 Wis.2d 555, 329 N.W.2d 386 (1983) (holding that testimony given under hypnosis may be admissible when the procedures used to obtain the testimony meet certain

standards for reliability) for admitting Easland's testimony. However, ***Armstrong*** provides no such support. Moreover, the principle underlying ***Armstrong***, *i.e.*, that hypnosis may be unduly suggestive, supports Brummer's claim of error.

In ***Armstrong***, the supreme court examined hypnotically induced testimony[14] and resolved its potential for unreliability by requiring the State to meet an initial burden of showing the testimony was not the result of impermissibly suggestive statements made during the hypnosis session. ***Id.*** at 560, 329 N.W.2d at 389 (1983). Before the trial court could have applied ***Armstrong***, there must have been hypnotically induced testimony to examine. Here there was none. If the State is now allowed to present evidence that a defendant refused to undergo hypnosis, the burden will shift to the defendant to justify her refusal to give testimony that the supreme court has concluded may not be reliable. This may also implicate a defendant's constitutional right to refuse to give testimony. U.S. CONST. amend. V; WIS. CONST. art. I, § 8. Therefore, the trial court applied an incorrect legal standard and erroneously exercised its discretion in admitting the testimony.

Harmless Error.

An error is harmless if there is no reasonable possibility that it contributed to the conviction. ***State v. Patricia A.M.***, 176 Wis.2d 542, 556, 500 N.W.2d 289, 295 (1993). A "reasonable possibility" is one which is sufficient to undermine confidence in the outcome of the proceeding. ***Id***. The conviction in

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[14] The court stated, "Although memory may be enhanced by the use of hypnosis, there are problems which attend the enhancement. Many experts have found that hypnotized persons 'recall' both accurate and inaccurate information....(H)ypnosis of an individual results in that person being highly susceptible to suggestions made during the hypnotic session." ***Armstrong***, 110 Wis.2d 555, 565 and 571, 329 N.W.2d 386, 392 and 394 (1983).

this case followed seven days of testimony. In closing, the prosecutor referred to the head nods only briefly, and did not mention Brummer's refusal to be hypnotized. Given all of the other testimony in the week long trial, and the force given to other testimony in closing, I am satisfied that there is no reasonable possibility that the erroneously admitted testimony contributed to the conviction. Therefore, I concur in affirming the judgment of the trial court.