

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 25, 2026

Samuel A. Christensen
Clerk of Court of Appeals

NOTICE

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

**Appeal No. 2025AP1738-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2023CF14

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHANE WILLIAM HEMPHILL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Douglas County: KELLY J. THIMM, Judge. *Affirmed.*

Before Stark, P.J., Hruz, and Gill, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Shane William Hemphill appeals a judgment of conviction for three offenses, entered following a jury trial, and an order denying

his motion for postconviction relief. Hemphill contends that he is entitled to a new trial based on newly discovered evidence. Alternatively, he seeks a new trial in the interest of justice, pursuant to WIS. STAT. § 752.35 (2023-24).¹ We reject these arguments and affirm.

BACKGROUND

¶2 The State charged Hemphill with two counts of battery to a law enforcement officer and one count of obstructing an officer causing substantial bodily harm, all three counts as a repeater.² One of the battery counts pertained to a female law enforcement officer, Lisa, while the other two counts pertained to a male law enforcement officer, Jose.³ The case proceeded to a one-day jury trial, at which Lisa and Jose were the only witnesses, and video footage from their body cameras was played for the jury.

¶3 The evidence at trial showed that Lisa and Jose, who were both officers with the Superior Police Department, went to a home at approximately 11:00 p.m. on January 4, 2023, after the home's primary resident asked for assistance in getting Hemphill to leave. On the way to the residence, Lisa and Jose learned that Hemphill had an outstanding arrest warrant. They planned to arrest Hemphill on the warrant, but in order to keep the situation "calm," they did

¹ All references to the Wisconsin Statutes are to the 2023-24 version.

² An additional charge of attempting to disarm a peace officer, as a repeater, was dismissed on the morning of trial.

³ Pursuant to the policy underlying WIS. STAT. RULE 809.86(4), we refer to the victims in this case using pseudonyms.

not plan to tell Hemphill that they would be arresting him until after he was dressed for the cold weather.

¶4 When Lisa and Jose made contact with Hemphill, he initially complied with their directives. Once he was dressed and was headed toward the front door to exit the residence, Lisa told him to put his hands behind his back and tried to grab one of his arms. At that point, Hemphill immediately pulled his arm away from Lisa and began trying to get away from the officers and leave the residence. During the struggle, Hemphill managed to make it out of the residence, despite Lisa holding on to his right wrist and Jose attempting to tase him.

¶5 Once outside, Hemphill continued to struggle against the officers' attempts to handcuff him. Hemphill ended up between Lisa, who was behind him, and Jose, who was in front of him. As the struggle continued, Hemphill fell forward into Jose, causing Jose to fall to the sidewalk with Hemphill on top of him. Jose testified that the left side of his back, neck, and head hit the ground, which was hard, and he lost his vision for about five seconds. Lisa testified—and her body camera video confirmed—that Jose cried out when he hit the ground.

¶6 Jose testified that because of his lost eyesight, he adopted a defensive position, which Lisa's body camera video confirmed. Jose further testified that he resumed standing after his vision returned, but he felt "dizzy" and "exhausted." The State relied on this incident to prove the obstructing charge, and it cited Jose's lost eyesight as the substantial bodily harm required for a conviction on that count.

¶7 The body camera videos showed that after Hemphill and Jose regained their footing, Hemphill continued resisting. Lisa, still standing behind Hemphill, continued to try to pull Hemphill's arms behind his back. Lisa testified

that during the struggle, Hemphill's left arm became free and he "brought his left arm forward and then brought it back towards [her]," and his left elbow hit her face between her mouth and nose. Lisa further testified that this contact caused her pain and drew "a small amount of blood." The State relied on this incident to prove the battery to a law enforcement officer charge pertaining to Lisa.

¶18 After Hemphill's elbow hit Lisa's face, the struggle continued, and Lisa and Jose ultimately pushed Hemphill up against a railing next to the residence's front door. Jose testified that "several times during that struggle while [Hemphill] was physically resisting, [Hemphill] would swing his arms or pull his arms away, and during that time while he was doing that, he had struck me in the chest, shoulder, and head, face region." Jose specifically testified regarding one instance when Hemphill was pinned against the railing and forced his arm back and hit Jose in the face. Jose testified that being hit by Hemphill's arm caused him pain. The State argued that these instances were sufficient to prove that Hemphill had committed battery against Jose. In particular, the State cited two portions of Lisa's body camera video, which it argued showed Hemphill freeing his arm and then intentionally bringing his elbow back to hit Jose.

¶19 The trial evidence showed that the struggle between Hemphill and the officers lasted for approximately three minutes. During that time, Lisa and Jose were unable to handcuff Hemphill, and they succeeded in doing so only after a third officer arrived on the scene. Lisa's body camera video showed that after Hemphill was handcuffed, Lisa asked Jose if he was "good." Although Jose's response is difficult to hear, Hemphill contends that Jose responded, "[H]e fricken levelled me, it hurt, I'm good." Lisa then stated, "Oh, so you're in pain," and Jose responded, "I'm good. I'm dizzy." Lisa reiterated, "Oh, so you're in pain and you're dizzy," and Jose responded, "I'm good." Later on during the video, Lisa

stated that Hemphill had “punched [her] in the fucking nose.” In a subsequent portion of the video—which the State did not play for the jury—another officer asked Lisa if she was okay, and she responded, “Yeah, I’m just pissed.”

¶10 The jury convicted Hemphill of all three of the charges against him. The circuit court sentenced Hemphill to a total of seven years’ initial confinement followed by four years’ extended supervision.

¶11 Hemphill subsequently filed a postconviction motion seeking a new trial, either based on newly discovered evidence or in the interest of justice. The motion relied on events that happened following Hemphill’s trial. Specifically, Hemphill asserted that approximately ten months after his trial, Jose “was involved in an arrest where he claimed the arrestee kicked the squad door and caus[ed] it to slam into his hand.” Jose further “claimed that he felt pain, and noticed swelling and stiffness in his hand,” and “claimed to have gone to the emergency room where he was told the doctor could tell he would not need x-rays.” The district attorney, however, subsequently determined that Jose’s version of these events was not accurate, as Jose “was able to use his hand normally immediately after” the incident, there was nothing in his body camera video “suggesting any abrasion or swelling,” there were no pictures of Jose’s purported injuries, and Jose’s squad car GPS showed that he was only at the hospital for 2 minutes and 21 seconds. The district attorney therefore stated, in a letter to the police chief, that he had “significant concerns about [his] office’s ability ever again to use [Jose] as a witness.” As a result, the district attorney’s office decided to dismiss all cases “that rel[ied] primarily on [Jose’s] credibility and would require him to testify at a motion hearing or jury trial under oath.”

¶12 Hemphill argued that this evidence about Jose falsely reporting that his hand was injured during an arrest constituted newly discovered evidence entitling him to a new trial under the test set forth in *State v. Plude*, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42. Alternatively, Hemphill argued that he was entitled to a new trial in the interest of justice because “[a]llowing [his] convictions to remain despite the known credibility issues of a police witness would be a miscarriage of justice,” and if a jury heard the new evidence regarding Jose’s credibility, “there is a substantial probability that a jury would not find [Jose] credible and would acquit ... Hemphill of one or more charges.”

¶13 Following briefing and oral argument, the circuit court denied Hemphill’s postconviction motion. Citing *State v. Watkins*, 2021 WI App 37, 398 Wis. 2d 558, 961 N.W.2d 884, the court determined that evidence regarding Jose’s dishonesty in connection with the car door incident did not qualify as newly discovered evidence “because it wasn’t in existence at the time of the trial.” Alternatively, the court ruled that even if the evidence did qualify as newly discovered evidence, Hemphill was not entitled to a new trial because there was “no reasonable probability that the jury hearing the evidence would have a reasonable doubt as to [Hemphill’s] guilt.” The court also rejected Hemphill’s request for a new trial in the interest of justice, concluding that “the controversy has been fully tried.” Hemphill now appeals.

DISCUSSION

I. Newly discovered evidence

¶14 “In order to set aside a judgment of conviction based on newly[]discovered evidence, the newly[]discovered evidence must be sufficient to establish that a defendant’s conviction was a ‘manifest injustice.’” *Plude*, 310

Wis. 2d 28, ¶32 (citation omitted). To make this showing, the defendant must prove: (1) that the evidence was discovered after his or her conviction; (2) that the defendant was not negligent in seeking the evidence; (3) that the evidence is material to an issue in the case; and (4) that the evidence is not merely cumulative. *Id.* If the defendant proves all four of these criteria, the court must then determine whether there is a reasonable probability that, had the jury heard the newly discovered evidence, it would have had a reasonable doubt as to the defendant’s guilt. *Id.*

¶15 We review a circuit court’s decision whether to grant a new trial based on newly discovered evidence for an erroneous exercise of discretion. *Watkins*, 398 Wis. 2d 558, ¶44. “However, whether a reasonable probability exists that, had the jury heard the newly[]discovered evidence, it would have had a reasonable doubt as to the defendant’s guilt is a question of law that we review de novo.” *Id.*

¶16 Citing *Watkins*, the circuit court determined that Hemphill’s proffered new evidence did not qualify as newly discovered evidence because it was not in existence at the time of Hemphill’s trial. See *id.*, ¶50 (stating that “evidence of facts that did not exist at the time of trial will not support ... a new trial based on newly[]discovered evidence”). Hemphill argues that the court erred in that regard because “the fact in existence [at the time of trial] was [Jose’s] character for untruthfulness, not that he would later lie about being injured during an arrest.”

¶17 We need not address Hemphill’s argument on this point because we conclude that even if the evidence in question qualifies as newly discovered evidence under the first four *Plude* factors, the circuit court correctly determined

that there is no reasonable probability that, had the jury heard the evidence, it would have had a reasonable doubt as to Hemphill’s guilt. See **Plude**, 310 Wis. 2d 28, ¶32; see also **Turner v. Taylor**, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (stating that this court need not address all issues raised by the parties if one is dispositive).

¶18 First, the circuit court correctly determined that Jose’s false allegation of an injury during another arrest would have had no impact on the jury’s verdict on the battery charge pertaining to Lisa.⁴ The jury’s verdict on that charge was supported solely by Lisa’s testimony and the body camera videos, and it did not depend in any way on the jury finding Jose’s testimony to be credible. As such, there is no reasonable probability that evidence calling Jose’s credibility into question would have caused the jury to have a reasonable doubt as to Hemphill’s guilt on the battery charge pertaining to Lisa.⁵

⁴ By analogy to **State v. Sholar**, 2018 WI 53, 381 Wis. 2d 560, 912 N.W.2d 89, the State argues that the impact of newly discovered evidence should be addressed on a count-by-count basis. In **Sholar**, our supreme court held that the prejudice prong of an ineffective assistance of counsel claim should be analyzed “on a count-by-count basis,” such that an attorney’s deficient performance may be prejudicial as to one count, but not as to others. **Id.**, ¶¶40, 58.

Hemphill does not dispute the State’s assertion that we should analyze each count separately when determining whether there is a reasonable probability that the new evidence would have caused the jury to have a reasonable doubt as to Hemphill’s guilt. Accordingly, we deem that point conceded. See **Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.**, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (noting that unrefuted arguments may be deemed conceded).

⁵ In arguing to the contrary, Hemphill asserts that Jose’s false statements regarding his injury during a subsequent arrest, combined with Lisa’s “statements at the scene”—particularly her statement about being “pissed”—“create a reasonable inference that there existed a larger culture [within the Superior Police Department] of referring serious charges not because they were appropriate, but because the officers were unhappy with the person being arrested.” Hemphill therefore contends that the issue of Jose’s credibility “is material to all three counts,” including the battery count pertaining to Lisa.

(continued)

¶19 With respect to the two remaining charges, at trial, the State identified two instances in Lisa’s body camera video in which Hemphill swung his elbow backward and hit Jose. Either of those instances would have been sufficient to support the jury’s verdict on the battery charge pertaining to Jose. As for the obstructing charge, Lisa’s body camera video clearly showed that during the officers’ struggle with Hemphill, Hemphill fell forward into Jose, which caused Jose to fall to the sidewalk. Given the video evidence, which was corroborated in many respects by Lisa’s testimony, it is not reasonably probable that new evidence undermining Jose’s credibility would have caused the jury to have a reasonable doubt as to Hemphill’s guilt on either of the charges for which Jose was the victim. As the circuit court stated during its postconviction ruling, the video made it “very clear what happened” during Hemphill’s struggle with Lisa and Jose.

¶20 Hemphill asserts that the video evidence “is in no way definitive.” He emphasizes that while the video shows “a prolonged struggle with police,” it does not show Hemphill “throw[ing] punches” or threatening the officers. Be that as it may, the State was not required to prove that Hemphill punched or threatened the officers in order to obtain convictions on any of the three charges. As explained above, the video evidence and Lisa’s testimony amply supported the jury’s guilty verdicts by showing that Hemphill hit both officers with his elbow

We agree with the State that Hemphill’s argument in this regard is purely speculative because Lisa’s acknowledgement that she felt “pissed” following the violent struggle with Hemphill does not “suggest that the Superior Police Department has a policy of overcharging based on personal animus toward the defendant.” Additionally, as the State correctly notes, there is no evidence that either Lisa or Jose had any influence on the prosecutor’s decision regarding the charges that were ultimately filed against Hemphill. Under these circumstances, we see no reasonable probability that Hemphill’s proffered new evidence would have led the jury to find that the Superior Police Department had a policy of overcharging, such that the jury would have then had a reasonable doubt as to Hemphill’s guilt on the battery charge pertaining to Lisa.

and caused Jose to fall to the ground during the struggle. While Hemphill argues that evidence of Jose’s “willingness to lie about being injured” could have led the jury to find that Hemphill “was not intending to harm the officers,” we agree with the State that given the video footage, “[e]vidence that would impugn Jose’s credibility simply had no bearing on whether Hemphill possessed the requisite criminal intent when he engaged in his undisputed physical conduct.”

¶21 Hemphill also asserts that evidence regarding Jose’s credibility would have affected the jury’s verdict on the obstructing charge because absent Jose’s “testimony regarding losing his vision, the State would not have been able to prove the necessary injury” to obtain a conviction. Regardless of whether Jose’s false statements about injuring his hand during a subsequent arrest would have been relevant to the credibility of Jose’s trial testimony regarding his vision loss, in light of the other evidence introduced at trial, we conclude it is not reasonably probable that the evidence about Jose’s false statements would have caused the jury to have a reasonable doubt as to whether Jose sustained substantial bodily injury—i.e., a loss of vision—during the altercation with Hemphill.

¶22 Lisa’s body camera video confirmed Jose’s testimony that during the struggle with Hemphill, he fell and hit the ground on his left side. The video showed—and Lisa confirmed during her trial testimony—that Jose cried out when he hit the ground. Jose testified that he adopted a defensive position after falling, which Lisa’s body camera video confirmed. Jose also testified that he felt dizzy upon standing, and consistent with that testimony, the video showed that Jose stated he felt dizzy shortly after the incident. Given the consistency between the video evidence and the officers’ testimony, Hemphill’s proffered new evidence does not create a reasonable probability that the jury would have had a reasonable

doubt as to whether Jose suffered substantial bodily injury as a result of Hemphill's conduct.

¶23 For these reasons, we conclude that the circuit court properly denied Hemphill's motion for a new trial based on newly discovered evidence.

II. New trial in the interest of justice

¶24 As noted above, in the alternative, Hemphill asks us to grant him a new trial in the interest of justice. We have discretion to grant a new trial in the interest of justice “if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried.” WIS. STAT. § 752.35. However, our discretionary reversal power is reserved for exceptional cases, *State v. McKellips*, 2016 WI 51, ¶52, 369 Wis. 2d 437, 881 N.W.2d 258, and “should be exercised sparingly and with great caution,” *State v. Williams*, 2006 WI App 212, ¶36, 296 Wis. 2d 834, 723 N.W.2d 719.

¶25 Here, Hemphill appears to argue both that the real controversy was not fully tried and that his convictions arose from a miscarriage of justice. The real controversy has not been fully tried when “the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case” or “the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried.” *State v. Mull*, 2023 WI 26, ¶67, 406 Wis. 2d 491, 987 N.W.2d 707 (citations omitted). We may grant a new trial on the ground that the real controversy was not fully tried without determining that the “outcome would be different on retrial.” *Id.* (citation omitted). In contrast, when a defendant seeks discretionary reversal based on a miscarriage of justice, “an appellate court must conclude that

there is a ‘substantial probability of a different result on retrial,’ before granting a new trial.” *Id.*, ¶68 (citation omitted).

¶26 Applying these principles to the instant case, we conclude that Hemphill is not entitled to discretionary reversal on either of the bases set forth in WIS. STAT. § 752.35. While Hemphill asserts that the real controversy was not fully tried, he has not identified any evidence that was either wrongly excluded or improperly admitted at his trial. See *Mull*, 406 Wis. 2d 491, ¶67. As the State correctly notes, “Jose’s misrepresentation could not have been admitted to evidence because it did not yet exist.” Additionally, we reject Hemphill’s assertion that Jose’s credibility was the real controversy at issue during Hemphill’s trial. As explained above, the jury’s verdicts did not rest solely on Jose’s credibility; instead, the jury could also rely on Lisa’s testimony and the body camera videos of the incident, both of which were consistent with Jose’s version of events.

¶27 Moreover, while Hemphill argues that “[a]llowing [his] convictions to remain despite the known credibility issues of [Jose] would be a miscarriage of justice,” we have already concluded—for purposes of Hemphill’s newly discovered evidence claim—that there is no reasonable probability that the new evidence regarding Jose’s false statements would have caused the jury to have a reasonable doubt as to Hemphill’s guilt. For the same reasons, Hemphill has not shown a “substantial probability of a different result on retrial.” See *id.*, ¶68 (citation omitted). Accordingly, Hemphill is not entitled to discretionary reversal based on a miscarriage of justice.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT.
RULE 809.23(1)(b)5.

