APPENDIX

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COURT OF APPEALS
DECISION
DATED AND FILED

May 27, 2021

Sheila T. Reiff
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. 2019AP1996-CR **Cir. Ct. No. 2016CF1270**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALIJOUWON T. WATKINS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: JOSANN M. REYNOLDS, Judge. *Affirmed.*

Before Fitzpatrick, P.J., Kloppenburg, and Nashold, JJ.

¶1 KLOPPENBURG, J. Alijouwon T. Watkins was convicted of multiple charges, referred to in this opinion as the "assault-related crimes," that arose from a domestic violence incident in 2015 between Watkins and his girlfriend and from Watkins's ensuing altercation with two police officers who

responded to the domestic violence call. Watkins was also convicted of three additional charges, referred to in this opinion as the "conspiracy-related crimes," that arose from events occurring in 2016 in which Watkins, while incarcerated in the Dane County Jail, solicited false testimony regarding the assault-related crimes and conspired to kill one of the police officers who responded to that incident so that she could not testify as to the those crimes.

¶2 On appeal, Watkins argues that he is entitled to a new trial on both the assault-related crimes and the conspiracy-related crimes because the circuit court improperly joined the two sets of crimes for trial. In the alternative, Watkins argues that, based on new information relating to Damian James, who testified at trial as a "key witness" for the State regarding the conspiracy-related crimes, he is entitled to a new trial on the conspiracy-related crimes based on newly-discovered evidence. Specifically, Watkins cites as newly-discovered evidence James's post-trial arrests and convictions for impersonating a police officer.[1]

¶3 We conclude that Watkins's joinder argument fails because the assault-related crimes and the conspiracy-related crimes are "connected together" in that the conspiracy-related crimes were arguably committed to avoid conviction on the assault-related crimes. *See* WIS. STAT. § 971.12(1) (2019-20)[2] ("Two or more crimes may be charged in the same complaint ... if the crimes charged ... are based on the same act or transaction or on 2 or more acts or transactions connected together ...."); ***State v. Salinas***, 2016 WI 44, ¶38, 369 Wis. 2d 9, 879

[1] For ease of reading, we will refer to James's post-trial arrests and convictions as his "post-trial arrests."

[2] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

N.W.2d 609 (separate crimes are "connected together" for purposes of joinder when the defendant "arguably engaged in one crime to prevent disclosure and punishment for another"). We also conclude that Watkins's newly-discovered evidence argument fails because evidence of James's post-trial arrests does not satisfy the requirements for newly-discovered evidence in that the facts of James's post-trial arrests did not exist at the time of Watkins's trial. Therefore, evidence of those facts could not possibly have been heard by the jury at trial so as to have created reasonable doubt as to Watkins's guilt. *See* ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42 (to succeed on a motion for a new trial based on newly-discovered evidence a reasonable probability must exist that "had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt."); WIS. STAT. § 805.15(3) (describing requirements for new trial based on newly-discovered evidence). Accordingly, we affirm.

BACKGROUND

¶4 The following facts are undisputed for purposes of this appeal. In June 2015, police responded to a domestic violence incident involving Watkins and his girlfriend. Officer E.M.,[3] responding to the incident with another officer, attempted to arrest Watkins and met with Watkins's resistance. E.M. sustained a concussion in the course of her attempt to arrest Watkins before he escaped. Watkins was subsequently arrested, brought to the Dane County Jail, and charged with eight counts related to the June 2015 events referenced above: misdemeanor battery, disorderly conduct, criminal damage to property, felony intimidation of a

[3] We, like the parties, refer to Officer E.M. by her initials as a victim of some of the crimes at issue, pursuant to WIS. RULE 809.86(4).

victim, felony intimidation of a witness, attempted battery of a peace officer, resisting an officer causing substantial bodily harm to the officer, and escape.

¶5 Watkins was subsequently charged with three additional counts related to his communications while in the Dane County Jail in 2016: conspiracy to commit first-degree homicide, felony intimidation of a witness, and solicitation of perjury. Before Watkins's scheduled trial date on the assault-related crimes, the State moved to join the two sets of crimes for trial. The circuit court granted the motion over Watkins's objection. The trial on all crimes took place in May 2017.

¶6 Damian James testified at trial regarding the conspiracy-related crimes. We relate James's testimony at trial in some detail, as follows.

¶7 In May 2016, James was twice arrested and placed in the same cell pod with Watkins. While in jail, James told "stories" that he "was associated with Italian organized crime" and James believed that Watkins believed James to be "associated with organized crime."

¶8 On May 27, 2016, James found a note under his cell door. The unsigned note reads:

> DJ
>
> Bro, I heard that you may know people who will do my friend a favor. He will pay whatever to have two pigs in Madison slaughtered and the bitch who called them on him. They say he battered two pigs and his ex. He will work for you until his debt is pay [sic] off. He already tried someone else, but they was all talk. Let me know if you can help. This is no joke. This is real.
>
> Please flush this.
>
> P.S. If you can't help, can you point me in the direction of who can? Someone say they will do it, but we want to be sure it is done for real.

With all respect.

¶9 James did not know at the time who wrote the note and responded by writing his own note requesting that the writer of the original note "come and talk." James placed his note on the television stand in the common area of the cell pod. James did not see who took the note he wrote, but he received another note the next day (May 28), which reads: "Bro, he just scared to approach you so he asked me to. This is not a setup. I swear on my life."

¶10 James came to believe that Watkins was the author of the notes because of a previous conversation between James and Watkins. That conversation arose when Officer E.M. appeared on television and Watkins, appearing agitated, said, "That's the bitch right there. That's the bitch that arrested me. I want that bitch dead. That's the bitch that arrested me."

¶11 James met with law enforcement on May 28, 2016, gave them the two notes, and told them where he "thought that [the notes] came from." James told law enforcement that he would be "willing to cooperate" in further investigation of the notes. From that time through June 6, 2018, James wore an "electronic listening device," also referred to as a "recording device" or "wire," to record conversations with Watkins and provided information to law enforcement about his communications with Watkins. During that period, James and Watkins exchanged notes by flinging them into one another's cells. James, on his own initiative and "without instruction" by law enforcement, wrote a note to Watkins that reads:

> Bro, we need to know what you want done about this cop. We can throw money at her, but it can backfire. She can turn it in and get you another case or we can just deal with this bitch directly. This way we will both have dirt on each other so we would never have to worry about the two of us turning on each other. Plus, if she is gone, so

> is her testimony. It's up to you, little bro. Let me know, though, because I have to talk to my uncle.

Watkins replied, writing, "I need her gone." James then wrote to Watkins, "I need her name, age, full description, shift, hours and area that she works in. You need to understand that if I do this, there is no going back. We are in this for life," and Watkins replied with a note detailing the areas in which Officer E.M. usually patrolled and her name, height, date of birth, and physical description.

¶12 Watkins subsequently asked James if he "knew of anybody who would come and say that they witnessed this arrest," referring to the attempted arrest of Watkins by Officer E.M. and another officer in June 2015. The two men formed a plan that James's "significant other's sister" would "come and testify and say that she witnessed the arrest and that there was no resisting going on and that [the officers] lied, stuff like that." Watkins then wrote to James a note detailing how James's significant other's sister should testify:

> I was leaving Leopold Park on [T]raceway when I seen 2 police officers approach a black male he place his hands behind his back that's when the taller female grab the young man hair and tried to force him to the ground he then stood up and was walking to the two females. 3 secs later he was taze by both female officers one in the back and one in the chest the black male stood in place that's when the taller female with blonde hair began to throw kicks and punches at the male the smaller officer still has his right arm pinned down they push him to a mailbox that's when the male was able to run.

¶13 Law enforcement asked James to wear a "wire" and discuss with Watkins payment for the "hit," referring to the killing of Officer E.M. to prevent her from testifying at Watkins's trial regarding the assault-related crimes. At law enforcement's instruction, James wrote Watkins a note providing a phone number that was ostensibly for a "hitter" who would carry out the killing of Officer E.M.,

and instructing Watkins to "just tell him that this is about the work you need done on your car." In fact, James knew that the phone number would reach an undercover officer who had established "car parts" as the code for a "hit."

¶14 While in the Dane County Jail in 2016, James fabricated stories about his connections with organized crime and his military background. James also lied to law enforcement about being a Marine and suffering from post-traumatic stress syndrome (PTSD) from his military service. James stated during his testimony that he had seven prior convictions.

¶15 In response to James's testimony, Watkins presented testimony from multiple inmates regarding James's fabrications while in the Dane County Jail in May and June 2016. The inmates testified that: James was "sneaky" and "untruthful"; nothing James said, and nothing James said under oath, could be believed; James was "dishonest" and "conniving"; James was "not trustworthy" and fabricated stories about his membership in the Army, the Marines, the Vice Lords criminal gang, and the Italian mob. Watkins also presented testimony from law enforcement officers that in May and June 2016 James lied to them about his background.

¶16 The State presented, among other exhibits, a recording of Watkins's phone call to the undercover officer in which he requested help fixing his car and stated that James's wife would provide payment and a form signed by Watkins requesting release of jail funds to James's wife.

¶17 During closing arguments, defense counsel drew the jury's attention to the above-described testimony about James being a "liar." The circuit court gave the jury a limiting instruction regarding James's testimony:

> You have heard testimony from Damian James who stated that he was involved in the crime charged against the defendant. You should consider this testimony with caution and great care, giving it the weight you believe it is entitled to receive. You should not base a verdict of guilty upon it alone, unless after consideration of all the evidence you are satisfied beyond a reasonable doubt that the defendant is guilty.

¶18 On May 5, 2017, the jury found Watkins guilty of three of the eight assault-related crimes and all three of the conspiracy-related crimes.

¶19 Following Watkins's trial, in June 2017 and in July 2018, James was twice arrested and convicted, upon James's guilty pleas, for impersonating a law enforcement officer. Watkins filed a postconviction motion seeking a new trial on the conspiracy-related crimes based on newly-discovered evidence, proffering James's above-described post-trial arrests as the newly-discovered evidence. The circuit court denied Watkins's motion in a written decision and order. This appeal follows.

DISCUSSION

¶20 Watkins argues that the circuit court erred in (1) joining the assault-related crimes and the conspiracy-related crimes for trial; and (2) denying Watkins's motion for a new trial on the conspiracy-related crimes based on what Watkins argues is newly-discovered evidence of James's post-trial arrests for impersonating a police officer. We conclude that Watkins fails to show either that joinder was unauthorized by the joinder statute or that the circuit court erred in denying Watkins's motion for a new trial based on the purported newly-discovered evidence.

I. Joinder

¶21 We first summarize the standard of review and general legal principles governing decisions on joinder. We next explain why we conclude that joinder was proper here. Finally, we address and reject Watkins's arguments to the contrary.

A. Standard of Review and General Legal Principles

¶22 We review de novo a circuit court's decision on joinder under Wisconsin's joinder statute, WIS. STAT. § 971.12. ***Salinas***, 369 Wis. 2d 9, ¶30 ("joinder is a question of law that we review de novo"). That statute provides, in pertinent part:

> (1) Joinder of crimes. Two or more crimes may be charged in the same complaint, information or indictment in a separate count for each crime if the crimes charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan. When a misdemeanor is joined with a felony, the trial shall be in the court with jurisdiction to try the felony.
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> ....
>
> (3) Relief from prejudicial joinder. If it appears that a defendant or the state is prejudiced by a joinder of crimes or of defendants in a complaint, information or indictment or by such joinder for trial together, the court may order separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. The district attorney shall advise the court prior to trial if the district attorney intends to use the statement of a codefendant which implicates another defendant in the crime charged. Thereupon, the judge shall grant a severance as to any such defendant.

WIS. STAT. § 971.12(1)-(3).

¶23 We construe WIS. STAT. § 971.12(1) "broadly in favor of the initial joinder." ***State v. Locke***, 177 Wis. 2d 590, 596, 502 N.W.2d. 891 (Ct. App. 1993). "The purpose of the joinder provisions is to promote economy and efficiency in judicial administration and to avoid a multiplicity of trials ...." ***State v. Leach***, 124 Wis. 2d 648, 671, 370 N.W.2d 240 (1985) (quoted source and punctuation marks omitted); ***Salinas***, 369 Wis. 2d 9, ¶43.

¶24 By its plain language, WIS. STAT. § 971.12(1) permits joinder of charged crimes that are "of the same or similar character" or that are "connected together." For separate crimes to be "of the same or similar character," the crimes must be "the same type of offenses occurring over a relatively short period of time and the evidence as to each must overlap." ***State v. Linton***, 2010 WI App 129, ¶14, 329 Wis. 2d 687, 791 N.W.2d 222. To determine whether crimes are "connected together,"

> we look to a variety of factors, including but not limited to: (1) are the charges closely related; (2) are there common factors of substantial importance; (3) did one charge arise out of the investigation of the other; (4) are the crimes close in time or close in location, or do the crimes involve the same victims; (5) are the crimes similar in manner, scheme or plan; (6) was one crime committed to prevent punishment for another; and (7) would joinder serve the goals and purposes of § 971.12.

Salinas, 369 Wis. 2d 9, ¶43.

¶25 Pertinent here, our supreme court has repeatedly held that separate crimes are "connected together" when the defendant "arguably engaged in one crime to prevent disclosure [of] and punishment for another." ***Id.***, ¶38. In ***Peters v. State***, 70 Wis. 2d 22, 233 N.W.2d 420 (1975) (disapproved of on other grounds by ***State v. Poellinger***, 153 Wis. 2d 493, 451 N.W.2d 752 (1990)), our supreme court ruled that the crimes of burglary and obstruction of an officer were properly

joined where the crime of obstruction was charged based on the defendant's fabricated alibi in relation to the burglary, writing: "The two crimes charged here, 'burglary' and 'obstructing an officer,' are 'connected together' since the charge of obstructing an officer is based upon an alibi defense to the charge of burglarizing the tavern." ***Peters***, 70 Wis. 2d at 29. In ***State v. Bettinger***, 100 Wis. 2d 691, 303 N.W.2d 585 (1981), the court held that a sexual offense crime and an attempted bribery crime were "connected together" because the latter crime was charged based on the defendant's attempt to bribe the victim to drop the sexual offense charges. ***Id.*** at 693-95. In ***Salinas***, the court held that sexual assault crimes and witness intimidation crimes were "connected together" where the latter crimes were charged based on the defendant's intimidation of the sexual assault victim and her mother. ***Salinas***, 369 Wis. 2d 9, ¶44.

B. Analysis

¶26 Here, the criminal complaints allege in pertinent part that: (1) in 2015 Watkins assaulted his girlfriend, Officer E.M. responded to investigate and arrest Watkins for that assault, and Watkins resisted arrest, causing substantial bodily harm to E.M., and escaped; and (2) in 2016 Watkins solicited E.M.'s killing to prevent her from testifying about the 2015 assaults and solicited a witness to testify falsely about those assaults because he thought E.M.'s testimony was the "only thing" that would cause him to "do the time" for the assault-related crimes.

¶27 Thus, as alleged in the criminal complaints, two of the eight assault-related crimes (escape and resisting an officer causing substantially bodily harm) and all three of the conspiracy-related crimes involve the same victim (Officer E.M.), all eleven charges involve the same perpetrator (Watkins), and the conspiracy-related crimes were committed to prevent punishment for all of the

assault-related crimes. Accordingly, both sets of crimes are "connected together" under WIS. STAT. § 971.12(1).

¶28 In addition, to the extent that the conspiracy-related crimes arise from Watkins's efforts to prevent Officer E.M. from testifying about the assault-related crimes and to solicit false testimony on the assault-related crimes, the facts of the assault-related crimes are necessary to provide context for the conspiracy-related crimes. Thus, consolidating both sets of crimes for trial serves the purposes of the joinder statute in that it promotes efficiency in judicial administration and avoids multiple trials of the same defendant on overlapping facts. *Id.*, ¶43.

¶29 Accordingly, we conclude that the two sets of crimes were properly joined under WIS. STAT. § 971.12(1).

¶30 We now address in turn Watkins's two arguments to the contrary: (1) the two sets of crimes are not "connected together" within the meaning of WIS. STAT. § 971.12(1); and (2) even if joinder was proper under § 971.12(1), the circuit court should have severed the two sets of crimes under § 971.12(3) because joinder was prejudicial.[4]

[4] In his initial appellate brief, Watkins argues that joinder was improper because the two sets of crimes are not of the "same or similar character." Our conclusion that joinder was proper because the two sets of crimes are "connected together" is dispositive and, therefore, we need not address this argument. *See State v. Salinas*, 2016 WI 44, ¶34, 369 Wis. 2d 9, 879 N.W.2d 609 (we may uphold joinder "based solely on the 'connected together' language in WIS. STAT. § 971.12(1)"); *Barrows v. American Family Ins. Co.*, 2014 WI App 11, ¶9, 352 Wis. 2d 436, 842 N.W.2d 508 (2013) ("An appellate court need not address every issue raised by the parties when one issue is dispositive."). Only in his reply brief does Watkins address the "connected together" basis for joinder under the statute, indicating that he had not addressed that basis in his initial appellate brief because the State relied in the circuit court on the "same or similar character" language in the statute and only on appeal argued joinder based on the statutory "connected together" language. For the sake of completeness, we proceed pursuant to our de novo review to (continued)

¶31 Watkins first argues that the crimes are not "connected together" because: (1) "the State cannot point to any evidence that the purpose of E.M.'s [killing] was to avoid punishment on the Assault charges"; (2) the two sets of crimes, arising "eleven months apart," were not "close in time"; and (3) the conspiracy-related crimes did not arise out of investigation of the assault-related crimes. This argument fails for at least the following reasons.

¶32 We begin by noting that Watkins's argument does not address three of the four bases for our conclusion that the two sets of charges are "connected together," namely, that the two sets of charges involve the same victim and the same perpetrator and joinder serves the goals and purposes of the statute. While Watkins briefly states why the State's contentions that joinder serves the goals and purposes of the statute (contentions that we do not adopt) fail, he does not affirmatively explain why joinder does *not* serve the statute's goals and purposes. Watkins's argument addresses only the fourth basis for our conclusion, that as alleged in the criminal complaint Watkins committed the conspiracy-related crimes to escape punishment for the assault-related crimes. We now explain why this argument lacks merit.

¶33 As stated, Watkins argues that "the State cannot point to any evidence that the purpose of E.M.'s [killing] was to avoid punishment on the Assault charges." Leaving aside that this assertion misrepresents the evidence, the focus of our inquiry is on the crimes alleged in the criminal complaint, not the evidence presented at trial. *See* WIS. STAT. § 971.12(1) (dealing with joinder of

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address Watkins's argument in his reply brief that the charged crimes are not "connected together."

crimes in the same complaint). As shown above, those allegations suffice to support the determination that Watkins at least "arguably engaged in" the conspiracy-related crimes "to prevent disclosure [of] and punishment for" the assault-related crimes. ***Salinas***, 369 Wis. 2d 9, ¶38.

¶34 Watkins's reference to the eleven-month gap between the two sets of crimes fares no better. He cites no case law supporting the proposition that the passage of months alone suffices to preclude joinder absent consideration of other factors such as those we have considered above. On the contrary, our supreme court has held that incidents separated by six months, as in ***Salinas,*** 369 Wis. 2d 9, ¶¶11-14 (describing witness intimidation occurring in the six months following report of sexual assault), and even two years, as in ***Bettinger***, 100 Wis. 2d at 693-94 (describing June 1978 sexual assault connected to June 1980 attempted bribery), may be "connected together."

¶35 Watkins's assertion that the conspiracy-related crimes did not arise out of investigation of the assault-related crimes is similarly inapposite because the question of whether one crime arose "out of the investigation of the other" is merely one in a non-exhaustive list of factors for the "connected together" analysis; as we have explained, the crimes in this case were connected together based on other factors. *See* ***Salinas***, 369 Wis. 2d 9, ¶43 (listing non-exhaustive factors courts consider in determining whether crimes are "connected together" for purposes of joinder).

¶36 Watkins next argues that, even if the statutory criteria for joinder were met, Watkins was entitled to severance of the crimes under WIS. STAT. § 971.12(3) because he was substantially prejudiced by joinder. Specifically, Watkins argues that the State's relatively weak case for the conspiracy-related

crimes was bolstered by the State's relatively strong case for the assault-related crimes and that the sheer number of the combined crimes prejudiced the jury against Watkins. As we now explain, Watkins fails to show the potential for prejudice necessary to warrant severance.

¶37 As a preliminary matter, the State argues that Watkins's prejudice argument is not properly before us because Watkins never moved the circuit court to sever the crimes. *See* ***Salinas***, 369 Wis. 2d 9, ¶49 ("Failing to make a severance motion, regardless of the reason, however, results in this issue not being ripe for our consideration."). Watkins counters that his objection to the State's motion for joinder, which referenced severance based on prejudice, sufficed to preserve the issue of prejudice for appeal. We need not decide this dispute because we conclude that, under controlling case law, Watkins fails to show the prejudice necessary to warrant severance.

¶38 Under the joinder statute, if "it appears that a defendant ... is prejudiced by a joinder of crimes ... the court may order separate trials of counts." WIS. STAT. § 971.12(3). "In evaluating the potential for prejudice, courts have recognized that, when evidence of the counts sought to be severed would be admissible in separate trials, the risk of prejudice arising because of joinder is generally not significant." ***Locke***, 177 Wis. 2d at 597. As our supreme court explained in ***Bettinger***, when one crime is commissioned in order to prevent punishment for a prior crime, evidence of the prior crime is admissible as "other acts" evidence to prove motive in a trial for the later crime, and evidence of the later crime is admissible as "other acts" evidence to prove consciousness of guilt in a trial for the prior crime. ***Bettinger***, 100 Wis. 2d at 697-98 (evidence of sexual

assault admissible to show motive for bribery and evidence of bribery admissible to demonstrate consciousness of guilt for sexual assault).[5] *See also* ***Peters***, 70 Wis. 2d at 30 (evidence of burglary admissible to show motive for obstruction and evidence of obstruction admissible to show consciousness of guilt for burglary).

¶39 Here, evidence of the assault-related crimes would be admissible to show motive in a trial on the conspiracy-related crimes and evidence of the conspiracy-related crimes would be admissible to show consciousness of guilt in a trial on the assault-related crimes. Therefore, Watkins cannot show prejudice from joinder of the crimes. Accordingly, his prejudice argument fails.

¶40 In sum, we conclude that Watkins fails to show that the circuit court erred in joining the two sets of crimes for trial.

II. Newly Discovered Evidence

¶41 Watkins argues that James's post-trial arrests for impersonating an officer constitute newly-discovered evidence entitling Watkins to a new trial. We first explain the general legal principles and standard of review governing the circuit court's decision on a motion for a new trial based on newly-discovered evidence. We next provide additional pertinent background regarding the circuit court's denial of Watkins's postconviction motion. We then explain why we agree with the circuit court that James's post-trial arrests are not newly-discovered evidence justifying a new trial and why we reject Watkins's argument to the contrary.

[5] Though not admissible to show the defendant's character, evidence of other acts is admissible under WIS. STAT. § 904.04(2) if it is offered as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

A. General Legal Principles and Standard of Review

¶42 "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 (quoted source omitted). Our supreme court has set forth a two-step process for determining whether such a manifest injustice exists: first, the defendant must prove by clear and convincing evidence that the proffered evidence is in fact "newly-discovered evidence;" second, if the defendant meets that burden, the circuit court must determine that, had a jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt. ***Id.***, ¶¶32-33; ***State v. McAlister***, 2018 WI 34, ¶¶31-32, 380 Wis. 2d 684, 911 N.W.2d 77.

¶43 The first step is completed when the defendant proves by clear and convincing evidence that: "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative."[6] ***Plude***, 310 Wis. 2d 28, ¶32 (citing ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997)); ***McAlister***, 380 Wis. 2d 684, ¶31. The circuit court then moves to the second step and determines whether "a reasonable probability of a different outcome exists," that is, "whether a jury would find that the newly-discovered evidence had a sufficient impact on other evidence presented at trial

[6] We follow the parties' lead and refer to these four criteria as the "four ***Plude*** criteria. ***State v. Plude***, 2008 WI 58, 310 Wis. 2d 28, 750 N.W.2d 42. The statute lists these same four prerequisites using slightly different language, requiring that the evidence "has come to the moving party's notice after trial," that "failure to discover the evidence earlier did not arise from lack of diligence" and that "the evidence is material and not cumulative." WIS. STAT. § 805.15. The parties do not identify any difference that matters between the language in the statute and in ***Plude***.

that a jury would have a reasonable doubt as to the defendant's guilt."[7] ***Plude***, 310 Wis. 2d 28, ¶¶32-33.

¶44 We review the circuit court's decision on whether to grant a new trial based on newly-discovered evidence for an erroneous exercise of discretion. ***State v. Avery***, 2013 WI 13, ¶22, 345 Wis. 2d 407, 826 N.W.2d 60; ***McCallum***, 208 Wis. 2d at 474. 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. ***Plude***, 310 Wis. 2d 28, ¶33; ***McAlister***, 380 Wis. 2d 684, ¶36 (whether a jury considering the old and new evidence would have a reasonable doubt as to the defendant's guilt is a legal determination).

B. Additional Background

¶45 Before the circuit court, Watkins argued that James's post-trial arrests were newly-discovered evidence justifying a new trial because they were "additional evidence of his untrustworthiness" that "would have tipped the scales in Watkins's favor." The State opposed the motion, arguing that Watkins's proffered newly-discovered evidence "did not exist at the time of trial" and that, "at the time James testified, he had not even committed the crimes with which [Watkins] wished to impeach [James]." The State conceded that the first three ***Plude*** criteria had "technically" been met and focused the bulk of its argument on the fourth criterion, that the evidence not be merely cumulative.

[7] For ease of reading, we refer to this part of the analysis as the "fifth ***Plude*** requirement."

¶46 The circuit court determined that evidence of James's post-trial arrests does not satisfy the four ***Plude*** criteria because it: (1) is not "newly-discovered" evidence but rather is "an entirely new set of purported facts"; (2) has "no relation to the charges or verdict and ... did not stem from any actions or testimony that occurred during the trial"; and (3) is cumulative to evidence presented at trial regarding James's untrustworthy and dishonest character. The court also determined that Watkins failed to satisfy the fifth ***Plude*** requirement, that the evidence would have created reasonable doubt as to Watkins's guilt. The court observed, "Criminal trials often rely on testimony from witnesses that engage in criminal activities themselves, and the judicial system could not function if every conviction were subject to re-litigation once a witness engaged in new criminal activity following his or her testimony."

C. Analysis

¶47 As we now explain, Watkins fails to show that the circuit court erroneously exercised its discretion in denying his motion for a new trial based on evidence of James's post-trial arrests, because he fails to satisfy the first step of the ***Plude*** analysis—that the evidence of James's post-trial arrests is in fact "newly-discovered evidence." ***Plude***, 310 Wis. 2d 28, ¶32.

¶48 The four ***Plude*** criteria that comprise the first step of the ***Plude*** analysis, by their terms, assume that the proffered evidence is of a fact that was true at or before the time of trial. *See, e.g.*, ***McCallum***, 208 Wis. 2d at 478, 484 (statement of victim, made after conviction of defendant for sexual assault, satisfied four criteria for newly-discovered evidence where statement concerned victim's statements at trial that led to conviction); ***Plude***, 310 Wis. 2d 28, ¶¶34, 37, 41 (evidence that expert witness was not a clinical professor satisfied the four

criteria for proving newly-discovered evidence where such evidence showed that witness lied under oath in the trial leading to conviction). Here, in contrast, the facts of James's post-trial arrests did not exist at or before trial.

¶49 The proposition that newly-discovered evidence must generally be of a fact that is true at the time of trial is bolstered by case law from the federal courts, whose analysis of newly-discovered evidence "requires proof of criteria nearly identical to that provided by Wisconsin law ...." ***State v. Jackson***, 188 Wis. 2d 187, 198 n.3, 525 N.W.2d 739. Most notably, the Seventh Circuit addressed the issue of post-trial events in ***United States v. Bolden***, 355 F.2d 453, 461 (7th Cir. 1965), *cert. denied*, 384 U.S. 1012, a case with many parallels to the case at bar. In ***Bolden***, the defendant moved for a new trial based on newly-discovered evidence consisting of the fact that a key government witness was, after trial, convicted of a counterfeiting charge. ***Id.*** The court explained that the government witness's conviction "was not evidence that was in existence at the time of the defendant's trial and therefore did not constitute evidence upon which a new trial could be based," and that, moreover, the subsequent conviction "was merely cumulative and impeaching." ***Id.*** *See also* ***United States v. Lafayette***, 983 F.2d 1102, 1105 (D.C. Cir. 1993) ("In general, to justify a new trial, 'newly-discovered evidence' must have been in existence at the time of trial. Events and transactions occurring after the trial obviously could not have been the subject of testimony at the trial.") (evidence that police officers who testified at defendant's trial later committed misconduct was not newly-discovered evidence). Other state courts addressing this issue pursuant to language virtually identical to Wisconsin's newly-discovered evidence rule are in accord. *See, e.g.*, ***State v. Bordelon***, 37 So.3d 480, 487 (La. Ct. App. 2010) (evidence of victim's criminal behavior three years after trial was not newly-discovered evidence and "could not possibly have

been introduced at trial because it had not yet occurred"); ***State v. Bartel***, 953 N.W.2d 224, 233 (Neb. 2021) ("Whereas an object is new at the moment that it begins to exist, it is newly-discovered once it is 'revealed' or 'found out' to have previously been in existence.") (order that was not entered until eight months after jury verdict was not newly-discovered evidence); ***People v. Rogers***, ___ N.W.2d ___, 2020 WL 7409615, at *8-9 (Mich. Ct. App. 2020) (evidence that, after defendant was convicted of sexually assaulting victim, victim made false allegations of sexual assault against adoptive father and brother could not "have conceivably been the subject of testimony at trial" because the allegations occurred after trial).

¶50 Having established that evidence of facts that did not exist at the time of trial will not support in these circumstances a new trial based on newly-discovered evidence, we need not individually analyze each of the four ***Plude*** criteria. However, for the sake of completeness and to refute Watkins's argument on the issue, we further explain why Watkins is unable to satisfy his burden for even the first of those criteria, that the evidence was discovered after conviction. ***Plude***, 310 Wis. 2d 28, ¶32. *See* ***McAlister***, 380 Wis. 2d 684, ¶¶50-51 (court's conclusion that one of the four ***Plude*** criteria is not met is sufficient to affirm denial of motion for new trial based on newly-discovered evidence). Simply put, it is a fallacy to characterize James's 2017 and 2018 arrests as "discovered after conviction," ***McCallum***, 208 Wis. 2d at 473, or as coming to Watkins's "notice after trial," WIS. STAT. § 805.15(3)(a), because James's post-trial arrests, rather than being "discovered" or "noticed" after trial, simply happened after trial. The circuit court implicitly addressed this issue when it determined that James's arrests were "not newly-discovered" but were instead "an entirely new set of purported facts."

¶51 Events occurring post-conviction such as the development of new technology or a new scientific consensus can sometimes be considered the discovery of new evidence, but the new technology or new scientific consensus must relate to evidence that existed at the time of trial. *See, e.g.,* ***State v. Vollbrecht***, 2012 WI App 90, ¶¶12, 15, 20, 37, 344 Wis. 2d 69, 820 N.W.2d 443 (evidence comprising DNA analysis made possible by new technology was newly-discovered where the analyzed biological material existed at time of trial); ***Avery***, 345 Wis. 2d 407 (evidence comprising enhanced video analysis made possible by new technology was newly-discovered where video tape and the events it depicted were in existence at time of trial); ***State v Edmunds***, 2008 WI App 33, 308 Wis. 2d 374, 746 N.W.2d 590 (evidence comprising new medical consensus regarding Sudden Infant Death Syndrome was newly-discovered where it related to child's injuries and symptoms that were in existence at time of trial). Here, Watkins does not present new evidence of pre-existing but previously undiscoverable arrests but, rather, presents evidence of arrests that occurred after the trial ended. Watkins has not proven by clear and convincing evidence that James's arrests were "discovered after conviction" within the meaning of the applicable law.

¶52 Watkins argues that, by stating that newly-discovered evidence must "stem from the actions or testimony that occurred during trial," the circuit court failed to apply the ***Plude*** test, "made up its own criteria" for newly-discovered evidence, "categorically reject[ed] 'subsequent arrests' as ever being 'newly discovered evidence,'" and applied an incorrect legal standard to newly-discovered evidence, thereby misusing its discretion. This argument fails because, as shown above, the circuit court did properly apply the ***Plude*** test to the evidence of James's post-trial arrests and explained why that evidence fails the test. The

court specifically contrasted new, unrelated crimes such as those here with the post-trial discovery of crimes that existed at the time of trial, such as a witness's perjury before or during trial. Watkins fails to show that the court applied the incorrect legal standard.

CONCLUSION

¶53 For the reasons stated, we conclude that Watkins fails to show that the circuit court erred in joining the assault-related crimes and the conspiracy-related crimes for trial or in denying his motion for a new trial based on newly-discovered evidence. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

Recommended for publication in the official reports.

FILED
10-03-2019
CIRCUIT COURT
DANE COUNTY, WI
2016CF001270

BY THE COURT:

DATE SIGNED: October 3, 2019

Electronically signed by Josann Reynolds
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT BRANCH 2 DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs. Case No. 16-CF-1270

ALIJOUWON T. WATKINS,

Defendant.

DECISION AND ORDER

I. INTRODUCTION

On May 5, 2017, a jury found Defendant Alijouwon Watkins ("Watkins") guilty of nine (9) charges arising from events occurring on two separate dates. Watkins filed his motion for postconviction relief under Wis. Stat. § 809.30(2)(h) on June 10, 2019 seeking a new trial based on "newly discovered evidence" involving a key witness against Watkins one Damian James ("James"). As a preliminary matter, it is unclear if Defendant is seeking

a new trial on all charges. His motion papers specifically refer to only three (3) of his convictions including:

1. Conspiracy to Commit First Degree Intentional Homicide Wis. Stat. §§ 939.31 & 940.01(1)(a);
2. Intimidation of a witness, Wis. Stat. § 940.43(7); and
3. Solicitation of Perjury, Wis. Stat. §§ 939.30 & 946.31(1)(a).

(Def.'s Mot. Postconv. Relief 4.)

These three (3) offenses allegedly arose on or about May 28, 2016 while Watkins was an inmate in the Dane County Jail following his arrest for a June 27, 2015 domestic incident and subsequent struggle with law enforcement officers. The June 27, 2015 incident resulted in eight (8) charges and six (6) convictions and they are not raised in Defendant's motion papers. James was not a witness as to those underlying charges so I am assuming, and analyzing, the postconviction motion as applying to the May 28, 2016 charges only.[1]

Following the filing of the June 10, 2019 motions, I set a tight briefing schedule and the Court of Appeals, by Order dated July 5, 2019, extended the time for this decision to October 8, 2019. Defendant's Reply Memorandum was filed on September 13, 2019 and this matter is now ripe for decision.

II. BACKGROUND

Defendant's motion for postconviction relief is almost exclusively focused on James' credibility and his subsequent arrests and convictions in Dane and Milwaukee

[1] Defendant's postconviction motion involved a second issue regarding reconstructing part of the record involving recordings that were played to the jury. Counsel for the parties have advised this office that they have reached a stipulation on that issue which they will file by the end of the week.

County for Impersonating a Peace Officer following the May 5, 2017 verdicts. The Madison conduct and arrest of James occurred in June and July of 2017 and his Milwaukee activities arrest and conviction transpired in 2018.

Watkins' charges involving conspiracy, intimidation and solicitation charges arose while Watkins and James were assigned to the same cell pod in the Dane County jail during 2016. The abbreviated version of events is that James misled Watkins and others about his ties to organized crime and being a sniper in the marines, he further claims to have been a member of the Vice Lords gang. During their time in the jail, Watkins is alleged to have solicited James' assistance to "eliminate" a Madison police officer who was a key witness and victim in the June 2015 domestic incident and subsequent struggle with law enforcement during Watkins' arrest. James brought this alleged "solicitation" conduct to the attention of the jail staff and ultimately wore a wire and obtained incriminating evidence from Watkins, which, along with other testimony and physical evidence, led to his convictions.

During the trial James testified as a, if not the, key witness for the State. Pursuant to Wis. Stat. § 906.09(1), James was asked about his previous convictions. At the time of the trial, James testified he had previously been convicted of seven crimes and had a history of fabricating stories. (May 3, 2017 Trial Tr. 233:21–24.) For example, James told other jail-mates that he was related to members of an organized crime family and had been a sniper in the marines. (*Id.* 232-233.) He also admitted to being in the Dane County Jail on at least three (3) occasions in 2016 alone. (*Id.* 233.) According to James' testimony,

Watkins believed that he was tied to organized crime. (*Id.* 235:21.) James testified that Watkins asked for assistance in assassinating the arresting officer through a series of notes and comments. (*Id.* 238:23–239:2.) At the time of his initial arrest, Watkins was 19 years old and 20 years old at the time the new charges arose out of his interactions with James. Damian James was 34 years old when he was dealing with Watkins in the jail.

Defendant's postconviction motion argues James' two subsequent arrests demonstrate that James is fundamentally untrustworthy. The two arrests and convictions include that in July of 2017 James was charged with impersonating an officer in Dane County, he subsequently pled guilty and on September 28, 2017 he was sentenced to six (6) months in jail. In August of 2018, James was again charged with impersonating a police officer, this time in Milwaukee County, to which he pled guilty on October 11, 2018 and was sentenced to an additional nine (9) months in jail. The police reports setting forth the troubling facts of James' behavior are attached to Defendant's postconviction briefs.

Watkins filed his motion for postconviction relief seeking a new trial pursuant to Wis. Stat. § 809.30(2)(h), arguing that James' conduct, arrests, and convictions following the 2017 verdicts demonstrate a fundamental untrustworthiness and a desire to be seen as a "hero." He further points out that James is either "delusional or a pathological liar" and that allowing a jury to hear this additional impeachment evidence would result in a reasonable jury disbelieving James and acquitting Watkins.

III. DISCUSSION

A. Are the subsequent arrests "newly discovered evidence?"

Watkins requests postconviction relief on the theory that newly available evidence impeaches the State's key witness, Damian James. The defendant asserts that, had the jury known of James' subsequent arrests and convictions, there is a "reasonable probability" that "at least one jury member" would have found "reasonable doubt as to Watkins' guilt." (Def.'s Reply Mem. 6.)

The decision to grant or deny a motion for a new trial based on newly discovered evidence is committed to the circuit court's discretion. *State v. Plude*, 2008 WI 58, ¶ 31, 310 Wis. 2d 28, 750 N.W.2d 42. At the outset, the Court is left to determine whether the subsequent arrests constitute "newly discovered evidence." Defendant primarily relies on *Plude* and *Birdsall v. Fraenzel*, 154 Wis. 48, 142 N.W.2d 274 (Wis. 1913), to demonstrate that evidence arising after a jury verdict can be considered newly discovered evidence. However, I do not read these cases with the same breadth as does Defendant.

In *Plude*, a new trial was granted after it was discovered that a key expert witness lied under oath at the trial about his credentials. 310 Wis. 2d 28, ¶ 49. The defendant argued that this deception invalidated that expert's opinion regarding the facts of the case. *Id.* at ¶ 2. While the evidence of his deceit was discovered after the verdict, the expert's lying clearly occurred during the trial and was critical to the facts and issues in that case which turned on circumstantial evidence in a "trial rife with conflicting and inconclusive medical

expert testimony." *Id.* at ¶ 36. The Supreme Court concluded "there exists a reasonable probability that, had the jury discovered that Shaibani lied about his credentials, it would have had a reasonable doubt as to Plude's guilt." *Id.* In *Plude* the newly discovered evidence flowed directly from the testimony at trial unlike the present case where the arrest did not occur until months or years after the verdict. Unlike the present situation, it does not appear that the expert's honesty was the focus of any testimony or cross examination during the actual trial.

In *Birdsall*, the plaintiff took the stand just before the close of evidence and testified that the defendant could read and write English. *Birdsall*, 154 Wis. 48. Plaintiff testified that he saw defendant "write an English letter." *Id.* Following the trial, the defendant found the letter and wanted a new trial for the purposes of impeaching Plaintiff's testimony. *Id.* The request for a new trial was denied because the evidence was explicitly addressed at trial and the "newly discovered evidence" was merely cumulative. *Id.* While the Court did indicate in *dicta* that newly discovered evidence, which is offered for impeachment, might be so strong as to constitute ground for a new trial, in that case it was cumulative and not sufficient to give rise to a new trial. *Id.* 274.

Both *Birdsall* and *Plude* involved witnesses who allegedly perjured themselves during the actual trial and their perjury was subsequently discovered. In the instant action there is no question that during the actual trial, James' credibility was seriously and effectively impeached. This Court is unable to locate any authority that allows a new trial based on a witnesses subsequent commission and conviction of new, unrelated crimes. As

required by Wis. Stat. § 906.09, James was properly asked during the trial if he had ever been convicted of a crime and answered "yes," "seven" times. (May 3, 2017 Trial Tr. 233.)

Defendant also cites *State v. Avery*, 2013 WI 13, 345 Wis. 2d 407, 826 N.W.2d 60, and *State v. McAlister*, 2018 WI 34, 380 Wis. 2d 684, 911 N.W.2d 77, for the proposition that newly discovered evidence need not exist at the time of trial. In *Avery*, the Wisconsin Supreme Court determined that photogrammetry evidence that was developed after the trial was "new evidence"; however, that evidence still did not warrant a new trial. 345 Wis. 2d 407, ¶ 29. The photogrammetry evidence was enhanced video imagery from software that was not available when the original trial and conviction occurred in 1994. *Id.* at ¶ 12. The images and video were of the events that led to the 1994 conviction; therefore, the new evidence flowed directly from the evidence used at trial. The Supreme Court found that given the strength of the rest of the evidence at trial, including a confession, the "newly discovered evidence" did not create a reasonable probability that a jury would have found a reasonable doubt as to the defendant's guilt.

In *McAlister*, affidavits were offered in support of postconviction motions averring that the defendant's accomplices (witnesses at trial) admitted they intended to perjure themselves in order to implicate McAlister. The Supreme Court denied McAlister even an evidentiary hearing on the issue of whether a new trial was warranted because the proffered evidence was "cumulative" and of the same general character, attacking the accomplices' credibility, as was raised during the trial. 380 Wis. 2d 684, ¶ 50 In *McAlister* the proffered evidence was directly related to the evidence presented at trial, and the eventual

convictions. There, as here, defense counsel repeatedly challenged the witnesses' credibility. *Id.* at ¶¶ 9, 16.

Watkins presents an entirely new set of purported facts, wholly distinct from the issue that was tried in the 2016 case. The subsequent arrests have no relation to the charges or verdict and they did not stem from any actions or testimony that occurred during the trial. I recognize the defendant's argument that the evidence need not be available when the trial occurs, but even the later developed evidence of *Avery* was explicitly tied to the case and underlying trial.

Criminal trials often rely on testimony from witnesses that engage in criminal activities themselves, and the judicial system could not function if every conviction were subject to re-litigation once a witness engaged in new criminal activity following his or her testimony. As such, I find that the subsequent arrests are not "newly discovered evidence" for the purposes of postconviction relief particularly in light of the extensive impeachment of James that occurred via his cross examination and the testimony of numerous other witnesses during the trial in this matter.

B. Are the *Plude* factors met to justify a new trial?

Even if I considered the subsequent arrests as "newly discovered evidence," adequate grounds for a new trial do not exist. When moving for a new trial based on the allegation of newly discovered evidence, the defendant must prove: (1) the evidence was discovered after conviction; (2) Watkins was not negligent in seeking the evidence; (3) the

evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. *Plude*, 310 Wis. 2d 28, ¶ 32 (citation omitted). If Watkins proves all four elements, then there is a final barrier to a new trial: "it must be determined 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." *Id.*

In this instance, the State concedes the first three (3) elements have been met for purposes of this motion. The newly discovered evidence is James being twice convicted of impersonating an officer after Watkin's convictions. It would clearly not have been possible to discover the arrests that occurred after the verdict. Thus, Watkin's could not have been negligent in seeking this evidence. Finally, history of James' fraudulent or deceitful activity is and was highly material to the issues in the case which is why it was comprehensively challenged over the course of the trial.

However, based on the entirety of the record in this matter Watkins is unable to prove the fourth factor to support his request for postconviction relief. During trial, Watkins' attorney effectively and vigorously attacked James's credibility by presenting evidence that James has repeatedly lied about being a Marine sniper and a mafia member. On direct examination, James admitted to lying to other inmates and the detectives investigating the case. (May 3, 2017 Trial Tr. 233.) Moreover, on cross-examination, James went through many of the lies he told other inmates and the police officers. For example, James stated that he lied to his wife and Detective Blake. (*Id.* 281, 285–286, 327–328.)

James also confirmed that he disobeyed law enforcement by continuing communication with Watkins without their permission. (*Id.* 288:20–24.)

When initially meeting with Detective Chapmen, James lied to him and stated, "I'm not a gang member. I'm a Marine." (*Id.* 291–92.) James admitted he lied to "Bear," the individual who was a mutual acquaintance, and allegedly told Watkins about James' mafia connection, his being a sniper, and serving in Iraq and Afghanistan. (*Id.* 292–93.) He admitted he lied to a lot of people, including the detectives, that he had PTSD from his time in the military. (*Id.* 303.) He admitted he lied to Watkins about setting up the "hit" through his "uncle." (*Id.* 306.) Additionally, James had previously been arrested for impersonating a police officer and the Court ruled that the defense could count his "2001 impersonating . . . and the '99 impersonating" convictions outside the typical 10 year cut-off because they appropriately addressed James' honesty. (*Id.* 153–54.) Defendant also cross-examined James about a 2008 conviction where James allegedly approached the police and offered to "make a deal" although James denied the 2008 effort. (*Id.* 331:6–10.)

During cross-examination Detectives Scott Reitmeier and Michael Blake both testified that they knew that James had lied to them. (*Id.* 144–45; May 4, 2017 Trial Tr. 211.) Detective Blake further testified that James had contacted law enforcement in 2008 to attempt to provide information and "make a deal." (May 4, 2017 Trial Tr. 214:17–25.) This testimony was offered to impeach James' credibility in regards to an alleged history of seeking deals with law enforcement or acting as an asset to law enforcement for his personal benefit.

Defense counsel called four other inmates as additional witnesses to testify regarding James' history of lying and general credibility. Julian Thomas, the defense's first witness testified that James was "sneaky, untruthful." (*Id.* 237.) Mr. Thomas stated that he would never believe something that James said to him. (*Id.* 239.) The remaining witnesses from the pod where Watkins and James were housed reiterated Julian Thomas's testimony. Jamal Scott described James as "dishonest" and "untruthful." (*Id.* 253, 256.) Fabian Zepeda testified that James was not a truthful person. (*Id.* 268.) Finally, James Thompson testified that Damian James was untruthful or "unbelievable." (*Id.* 280.)

Based on the past criminal convictions and overwhelming testimony regarding James' credibility, I gave a jury instruction that explicitly addressed James' character and truthfulness. The jury was instructed:

> "You have heard testimony from Damian James who stated that he was involved in the crime charged against the defendant. You should consider this testimony with caution and great care, giving it the weight you believe it is entitled to receive. You should not base a verdict of guilty upon it alone, unless after consideration of all the evidence you are satisfied beyond a reasonable doubt that the defendant is guilty."

(May 5, 2017 Trial Tr. 75–76.) Defense counsel emphasized and reiterated this instruction during his closing argument. (*Id.* 130.)

There is no doubt that during the five (5) day jury trial in this matter there was a significant focus on James' credibility and truthfulness from his own testimony, the detectives involved, and all the other occupants of the jail pod where the "solicitation" was said to occur. James' subsequent arrests and convictions for impersonating an officer are indeed confirmation of his character and lack of trustworthiness. Given the extent of the evidence on this issue during the underlying trial, it is apparent that these subsequent arrests

are simply cumulative as to James' deplorable credibility. Therefore, I find that even if the subsequent arrests were considered "newly discovered" evidence, they would simply add to the substantial amount of testimony and evidence presented at trial impugning James' character and credibility.

I recognize that the defendant takes the position that the recent arrests go toward a new theory that James has a "fixation with being seen as a member of law enforcement," (Def.'s Reply Mem. 4.), but I disagree with Defendant's distinction. Evidence is cumulative when it "supports a fact established by existing evidence." *State v. Thiel*, 2003 WI 111, ¶ 78, 264 Wis. 2d 571, 665 N.W.2d 305. Evidence is not cumulative if it is not "of the same general character and drawn to the same point. *McAlister*, 380 Wis. 2d 684, ¶ 50. The claimed "newly discovered evidence" supports the fact already established at trial: that James was, and is not, a truthful person; that he seeks out deals with law enforcement; and he has a history of lying about his status to anyone that will listen. I find that under the analysis from *Plude*, the defendant has not shown a need for postconviction relief.

> We have long held that newly discovered evidence that is merely cumulative is not grounds for a new trial. *Lock v. State*, 31 Wis. 2d 110, 116, 142 N.W.2d 183 (1966). Newly discovered evidence is cumulative where it tends to address "a fact established by existing evidence." *State v. Thiel*, 2003 WI 111, ¶ 78, 264 Wis. 2d 571, 665 N.W.2d 305 (citing *Washington v. Smith*, 219 F.3d 620 (7th Cir. 2000)); *see also Wilson v. Plank*, 41 Wis. 94, 98 (1876) (stating that newly discovered evidence in the form of witness testimony is merely cumulative where it "tends to prove propositions of fact which were litigated at trial").

McAlister, 380 Wis. 2d 684, ¶ 37.

Finally, even assuming that the subsequent arrests are newly developed evidence and that the evidence is not cumulative, I find that this evidence would not have created reasonable doubt as to the defendant's guilt. If, after hearing the plethora of evidence and

testimony, recited only in part above, the jury still convicted Watkins, I do not believe that the new evidence of similar charges involving James would have changed the jury's view of the balance of the physical and testimonial evidence. Both sides agree that James played a crucial role in the State's case which is why so much time and latitude was allotted to challenging his credibility. The jury heard all of that testimony and still convicted Watkins. As such, the newly discovered evidence is unlikely to create a "reasonable doubt" which would result in a different determination as to the defendant's guilt.

IV. CONCLUSION

For all of the above reasons, I **DENY** Defendant's Motion for Postconviction Relief.

THIS DECISION IS FINAL FOR PURPOSES OF APPEAL.

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 2

= =

STATE OF WISCONSIN,

Plaintiff,

-vs- Case Nos. 16CF1270
17CF321

ALIJOUWON T. WATKINS,

Defendant.

= =

PROCEEDINGS: Status Conference/Final Pretrial

DATE: April 19, 2017

BEFORE: HONORABLE JUDGE JOSANN M. REYNOLDS

APPEARANCES: STATE OF WISCONSIN, Plaintiff, appeared by COLETTE CATHERINE SAMPSON and STEPHANIE HILTON, Assistant District Attorneys; Madison, Wisconsin.

ALIJOUWON T. WATKINS, Defendant, appeared in person, in custody, and with DAVID MICHAEL STEGALL, Attorney at Law; Madison, Wisconsin.

REPORTED BY: Lynn Schultz, RPR
District 5 Court Reporter

THE COURT: State of Wisconsin versus Alijouwon Watkins, 16CF1270, 17CF321. Can I have your appearances, please?

MS. SAMPSON: Good morning, Your Honor. Colette Sampson and Stephanie Hilton appear for the State of Wisconsin.

MR. STEGALL: Good morning. Mr. Watkins appears in person, in custody, by Attorney David Stegall.

THE COURT: Good morning. I think we're primarily here on the State's motion to consolidate. I do note that we have trial dates set in one of them. Which one? Don't we? 16CF1270, trial set for May 1st jury draw.

And they have not been consolidated, and this is the State's request to consolidate them for purposes of trial; is that correct?

MS. SAMPSON: Yes, Your Honor.

THE COURT: I have looked at each of your briefs. If they are consolidated, does that affect the trial date?

MS. SAMPSON: No, Your Honor. The trial date would be able to stay as it is if they're consolidated. The State in its request for time did take that into consideration.

THE COURT: Okay. Anything you want to add

beyond what is in your written submission?

MS. SAMPSON: Just to briefly respond to some of the points made by defense counsel, I do believe that the State's motion stands on its own in terms of the reasons for joinder as well as the reasons for admission of other acts should the court decide not to join. We still do believe that other acts are admissible and should be admissible.

I would note for the court *State versus Holmes, 62 Wis.2d 389*, there is a valid public interest to avoid duplication of time-consuming trials involving the same fact situation. The State does believe that these cases are transactionally related; that they would have -- had one case not already been pending, that they could have been charged in the same information and could have passed a preliminary hearing bindover based on those facts. They do come from the same nucleus of facts.

One thing I do think defense counsel neglected to add in his definition of transactionally related, which you can find in *State versus Williams, 198 Wis.2d 516*, is that not only does transactionally related include the parties involved, witnesses, geographical proximity, time, physical evidence, it also includes motive and intent. And that is the basis for the State's motion is the belief that motive and intent would bring

all of these acts into the same trial.

I would note for the court that even if the court were to decide not to grant a joinder motion and not to grant any other acts, a significant portion of the cases would still be being tried in both trials.

The conspiracy case unequivocally is pertinent to the domestic violence case because it's all consciousness-of-guilt evidence. And as the State mentioned in its motion at page 17 in the footnote, *State versus Neuser*, N-e-u-s-e-r, states at 191 Wis.2d 131 at page 144, "It is generally acknowledged that evidence of criminal acts of an accused which are intended to obstruct justice or avoid punishment are admissible to prove consciousness of guilt in the principal criminal charge." So we do believe that the bulk of the conspiracy case would be admissible and would be incurred by the jury in the domestic violence case.

Likewise, in order to prove our solicitation charge, our solicitation of perjury charge, in the conspiracy case, the State -- the defendant at one point handed over a sheet of paper to a CI saying, "This is what -- we want our witness to come in, and this is what we want the witness to say."

In order for the jury to be able to ascertain that what was being requested was perjury, the jury would

have to know what the underlying facts of the first case are.

So I do believe that it is in the public interest to avoid duplicitous time-consuming trials that the cases be joined. I also believe that we do -- that the defendant would not be substantially prejudiced, as we put in our motion.

I do have the ability to answer any questions specifically that the court has, but I don't want to take any more time since you do have our motions.

THE COURT: Mr. Stegall, I've also reviewed your brief; albeit, it came in rather late. And I've made my own notations on that. Anything you want to add?

MR. STEGALL: No, no.

THE COURT: Okay. It's an interesting concept as to whether or not the solicitation charges from May of 2016 are even in an other acts category. I think they are relevant as to consciousness of guilt.

And I think Ms. Sampson's simple summary right now clearly delineated my analysis. And let's begin with stating the obvious. If the solicitation acts in May of 2016 involved Officer Smith or Jones, who had no active role in the June 2015 acts, it would be simply not relevant.

But because it is the officer that was

material and hands-on in the original domestic incident in 2015 that is the subject of the solicitation in the May 2016, it does become highly relevant and probative both as to his motive and intent to eliminate that officer's availability to come and testify at the trial, and it is also evidence of consciousness of guilt.

Likewise, without the domestic-abuse incidents coming in and that arrest and the surrounding circumstances coming in in the May 28, 2016 charges, there's no context for the jury. They are clearly intertwined. Each is relevant in the other to give motive, intent, context. They are related. They involve the same parties, and I think joinder is the only logical step to take. And I do so based on their respective relevance in each other's -- in each trial that they were separate, they would all be coming in.

I do it based on fundamental use of judicial resources, witnesses, court time, attorneys. And while there may be some prejudice, the probative value of all of this information clearly outweighs any prejudice. I don't think you can have one without the other.

I will tell you, Mr. Stegall, that if you believe some limiting instruction is appropriate, you can draft it, request it, and I will give it all due consideration. But in terms of the fundamental evidence,

it's all coming in in each case, so there's no logical reason to not join them at this time.

Is there anything further I need to take up today?

MS. SAMPSON: I think, Your Honor, what we were hoping, and I don't mean to cut defense counsel off, is that we would be able to have an additional status conference between Wednesday and Friday of next week so that the State can get its motions in limine filed.

We are in the process of doing witness prep at this point in time so we can have our specific motions in limine filed so we can have that all taken care of prior to trial and just deal with any last odds and ends prior to getting the jury here so that we can take off running May 1st.

THE COURT: Okay. I'm not really clear at this point on what is going to trial next week. So it's kind of hard for me to do that and give you a date certain.

Any motions -- any and all motions have got to be filed by the close of business Friday along with your jury instructions.

MS. SAMPSON: Close of business this Friday?

THE COURT: This Friday, the 21st. And if you can wait until Monday, I -- I can give you a time and

date certain when I know what actually goes; otherwise, I will tell you that it would be on Friday -- actually, Friday, the 28th, and I would probably do it 2 o'clock.

But when I know what is going Monday, I can give you the other options on Wednesday or Thursday. All right?

MR. STEGALL: Okay.

THE COURT: Anything further?

MS. SAMPSON: Not from the State. Thank you.

MR. STEGALL: No.

THE COURT: All right. Thank you.

(Adjourned at 9:30 a.m.)

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

I, LYNN SCHULTZ, District 5 Court Reporter, do hereby certify that I took in shorthand the above-entitled proceedings held on the 19th day of April, 2017; I reduced the same to a written transcript; and that it is a true and correct transcript of my notes and the whole thereof.

Dated at Madison, Wisconsin, this 24th day of November, 2017.

Electronically signed by
Lynn Schultz, RPR
District 5 Court Reporter

The foregoing certification of this transcript does not apply to any reproduction of the same by any means unless under the direct control and/or direction of the certifying reporter.