STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2013AP1447

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JESSE J. FRANKLIN, JR.,

Defendant-Appellant.

ON APPEAL FROM ORDER DENYING MOTION FOR POSTCONVICTION RELIEF (WIS. STAT. § 974.06) ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE TIMOTHY G. DUGAN PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are unnecessary because the issues presented are fully briefed and may be resolved by applying well-established legal principles to undisputed facts.

STATEMENT OF FACTS

Complaint.

In a complaint filed on July 25, 2003, defendant-appellant Jesse Franklin was charged with (1) possession with intent to deliver marijuana, (2) possession with intent to deliver cocaine, and (3) possession of a firearm by a felon (2).

The complaining officer was City of Milwaukee Police Officer Paul Lough (2:2). According to the complaint, Lough observed Franklin "reach his hand through the open front passenger window of an empty van and then quickly pull his hand out upon observing police presence" (2:2). Lough and his partner, Officer James Campbell, approached Franklin. Looking through the front passenger window of the van, Lough saw "in plain view on the front passenger seat a white plastic Target shopping bag," in which he was able to see "a large clear plastic bag containing green leafy substance suspected to be marijuana" (*id.*). After seizing the Target bag, Lough looked inside and found "three clear plastic bags each containing an off-white chunky substance suspected to be cocaine base, a scale, and a box of sandwich bags" (*id.*). Looking into the van's console, Lough saw "a black Hi-Point 9mm semiautomatic pistol, Model C8" (*id.*).

The suspected marijuana and cocaine were tested and were in fact marijuana and cocaine (*id.*). Franklin had felony convictions prior to this incident (2:3).

Trial.

Franklin was tried on the aforementioned charges between January 19 and 20, 2006 (51-53).

Officer Campbell was the State's first witness. Campbell testified that he and Lough were patrolling the neighborhood of North 29th and Clybourn Streets in the City of Milwaukee in an unmarked police car on July 23, 2003 (51:29). "We were patrolling that specific area in

regards to recent … complaints of drug dealing in that area" (51:30). Campbell was driving; Lough was in the passenger seat (*id.*).

At approximately 4:00 p.m., Campbell observed Franklin "standing in the middle of the street and what appeared to be a drug transaction" (51:31). This took place at the intersection of 29th and Clybourn near Franklin's house at 429 North 29th Street (51:31, 33). Franklin was standing at the driver's side window of a passing vehicle (51:33). "He was up at the window, leaning on the car with one hand, and he reached his right hand through the driver's side window, with his right hand" (51:35-36). About three seconds passed (51:68). Although Campbell did not see Franklin exchange anything with the driver, he "thought that there was probably a drug transaction going on in the middle of the street" based on Franklin's movements and the complaints about drug dealing in the neighborhood (51:36). Franklin's actions at the car window were consistent with Campbell's knowledge and prior experience with how drug sales are conducted (51:37).

Following these observations, Campbell and Lough circled the block and pulled up behind a van in Franklin's possession (51:40, 42). The van was located at 423 North 29th Street (51:48). As they approached, Franklin "was standing at the passenger-side, front window of the van" (51:42). The officers' car stopped, and Campbell got out and approached Franklin (*id.*). At a twenty-foot distance, Campbell and Franklin made eye contact, and Franklin "immediately reached his right hand into the open window of the van, and pulled his hand out back quickly and stepped backwards" (51:43). Campbell didn't know what Franklin was doing, but "fear[ed] that he [was] attempting to retrieve something," *e.g.*, a "[f]irearm" (51:44).

As Franklin stepped back, he put his hands up and "threw a set of keys on the ground from his right hand" (51:46). Campbell then conducted a pat-down frisk of Franklin; he found no weapons on him (*id.*). Franklin said "I didn't do anything, what is this all about?" (51:47).

Campbell asked Franklin about the van. First, Franklin said it was his mother's van (51:47). Then, he said it was Charlie's van, Charlie being the person he had been talking to in the passing vehicle (*id.*). The keys Franklin threw on the ground belonged to the van (51:48). Franklin was "very nervous" (51:55).

Meanwhile, Lough "was up at the window of the van" (51:48).

Reading from an inventory list, Campbell testified that the officers recovered and seized from the van the following items:

> A High Point nine-millimeter handgun, the nine-millimeter unfired cartridges, gallon-sized, clear Ziploc bags, Target shopping bag, Samsung cell phone, a Tanita gram scale.
>
> Saver's Choice sandwich bags, and the original packaging of the narcotics, the sandwich bags which contained the narcotics were inventoried as a separate number.

(51:51). The inventoried narcotics were 23.89 grams of cocaine and 333.37 grams of marijuana (51:54).

Officer Lough testified next. He confirmed Campbell's testimony about Franklin's standing by the driver side window of a passing vehicle and the officers' driving around the block and stopping behind a van beside which Franklin was standing (52:18, 23-24). He shared Campbell's opinion that Franklin's interaction with the driver of the passing vehicle was consistent with a hand-to-hand drug sale (52:63).

When the officers stopped behind the van, Franklin was standing by its front passenger side (52:24). Then, "[a]s we approached him, he looked at us. He quickly reached his right hand through the open window, and he backed away real fast and put his hands up" (*id.*). Franklin "backpedaled," finally stopping ten feet away from the van (52:25). "He backed all the way almost to the sidewalk past the grass that separates the sidewalk and

the curb" (*id.*). He nervously repeated "'I didn't do anything, I didn't do anything,' real fast" (*id.*). As this was happening, Franklin "dropped from his hands a set of car keys" (*id.*).

Franklin explained his interaction with the passing vehicle in the middle of the street to the officers. He said "he was in the street talking to his friend Charlie" (52:28). He explained that he got the parked van "from his friend Tyrone," who owned it (52:28, 75).

Lough approached the van. The front windows were down (52:70). Lough

> looked in the window where [Franklin had] reached, and I could see on the front passenger seat was a large white Target plastic bag that was kind of sitting slightly open, and inside that bag I could see a large, clear plastic bag which contained a green leafy material which I believed to be marijuana.

(52:29). The marijuana was in a gallon-size "freezer-type bag" (*id.*). The interior of the van smelled like marijuana (52:47). Lough seized the Target bag, in which he saw "a box of sandwich baggies, a digital scale, and three bags that each contained an off-white chunky substance which I believed to be cocaine base" (52:29). Lough had not seen these contents when the bag was lying on the front passenger seat (*id.*).

Beyond the Target bag, Lough searched further inside the van, and "recovered a [loaded] Highpoint semi-automatic nine-millimeter pistol" from the center console (52:43, 45). The console was about three feet from the passenger-side window; Lough testified that it would be possible for a person standing outside the van, by the front passenger door, "to reach in through an open window and access that console" (52:45).

The next witness was Detective Raymond Robakowski, who came upon Franklin and the officers while Franklin was sitting on the curb and the officers

were "by the van" (53:44). Robakowski was in the neighborhood on other business (*id.*).

> I walked up to the passenger door of the van. The window was down. I looked in. There was the white Target bag. It was open, I wouldn't say open where I could see into the bag, and looking into that bag or looking at it, I could see a clear one gallon size plastic baggie with a green leafy substance which I at that time thought was marijuana.

(53:45).

Fingerprint technicians attempted to obtain fingerprints from the items seized from the van (52:104, 109, 111-12). The only useable prints were found on the box of "Saver's Choice" sandwich baggies (52:113-14). Those fingerprints belonged to Franklin (52:128-29).

Franklin's mother, Dorothy Franklin, testified for the defense. Mrs. Franklin testified that she had rented the van Franklin was using from Avis (53:95). She gave him the keys to the van between 3:00 and 3:30 in the afternoon of July 23, 2003 (53:96). She asked Franklin to buy sandwich bags and some fruit for a family reunion she was going to attend in Atlanta, Georgia (*id.*). What kind of fruit? "Oranges, apples, bananas, stuff like that" (53:99). She planned to leave for Atlanta at around 6:00 p.m. on the day in question (*id.*).

Franklin testified on his own behalf. He disputed the officers' account of their first observation of him at 29th and Clybourn Streets. Franklin said that the man in the car was his friend Fred, that Fred was parked in the parking lane (not stopped in the travelling lane) at 29th and St. Paul Streets (not 29th and Clybourn), and that Franklin did not shake hands with Fred, put his hand into Fred's car, or lean into Fred's vehicle (53:128-29, 133).

Franklin's account of his encounter with the officers at the site of the van also differed from theirs.

Franklin confirmed Mrs. Franklin's testimony that she was leasing the van and had leant it to him (53:117-

18). In contrast to his mother's testimony, Franklin said he got the van from her some time *before* 2:00 p.m. (53:118). He recalled that he in turn leant the leased van to an unidentified man, who gave the keys to an unidentified woman who returned the keys to Franklin at the corner of 29th and St. Paul Streets shortly before he encountered Campbell and Lough at 4:00 p.m. (53:120, 122, 124). Franklin told the unidentified man where to leave the van (53:120, 122, 130).

Earlier in the day, Franklin went to an unidentified store "a few times" (53:118). It was not Target; he did not know where the Target bag came from (53:163-64). He confirmed that Mrs. Franklin had asked him to buy baggies and fruit, which he bought along with other items (53:160). "[A]round noon," Franklin's younger brother removed some of those items from the van, which probably included the fruit (53:161, 163). Franklin bought two or three boxes of baggies (his brother did not remove all of these), so naturally the box seized by the police had his fingerprints on it (53:161).

Franklin recalled that the officers approached him at "about 4 o'clock" (53:120). After finishing his conversation with Fred, Franklin walked across the street towards the location of the van (53:130). As he was walking towards it, the squad car drove beside him as he walked down the sidewalk "so we like neck and neck with each other," and then "cut me off" (53:131). Both officers exited their vehicle (53:134).

In his pockets, Franklin had his driver's license, cell phone, keys to the van, and one dollar (53:134). As the officers got out of their car, Franklin was trying to get his driver's license out to show them, but it was deep in his pocket, so he ended up taking everything out (*id.*). Meanwhile, he thought that Lough was about to pull a gun on him, so he dropped his things on the ground and put his hands in the air (*id.*). Lough picked the items up from the ground and patted Franklin down (*id.*). Lough started to question Franklin about the alleged hand-to-hand drug transaction, which Franklin denied (53:135).

After telling Campbell to "place [Franklin] on the curb," Lough took the van key and entered the van on the passenger side (53:135, 148). Franklin insisted that "[t]he window was up" before Lough unlocked the door (53:148). Ten seconds passed (53:150). While Franklin continued to sit unsecured on the curb, Campbell entered the van too (53:149). Another ten seconds passed (53:150). "Then I hear the officer [Lough] say, Arrest him, and I'm asking what for" (53:135). Franklin was then handcuffed and his shoes searched (53:136, 150). After that, Detective Robakowski arrived and questioned him (53:136, 150).

Franklin insisted that the drugs and the gun weren't his and he didn't know where they came from (53:138-39). Franklin had walked past the van twice before the police stopped him, but the windows were all up, so it was therefore "really impossible for me to stick my hand through the window of that van while the window was up" (53:140).

The jury found Franklin guilty on all three counts (22-24). Franklin appealed; this court affirmed his conviction and sentence (58:11).

Postconviction motion.

On January 15, 2013, Franklin filed a postconviction motion for a new trial on the basis of newly discovered evidence (70). The premise of the motion was that "newly discovered evidence establishes that the officers in his case belonged to a group of rogue officers and previous convictions involving this group of officers have been overturned pursuant to *State v. Missouri*, 2006 WI App 74[, 291 Wis. 2d 466, 714 N.W.2d 595]" (70:1). Alternatively, Franklin sought reversal on the theory that trial and original postconviction counsel were ineffective for failing to discover that Lough was a member of the rogue group (70:13-14).

In the *Missouri* case, Missouri moved for the admission of "other acts" evidence about the lead officer

involved in his arrest, Jason Mucha,[1] *i.e.*, the testimony of Booker Scull, who would testify that he had been violently mistreated by Mucha on two occasions. *State v. Missouri*, 2006 WI App 74, ¶¶2, 5-8, 291 Wis. 2d 466, 714 N.W.2d 595. This supported Missouri's defense that Mucha had beaten and planted incriminating evidence on him. *Id.* ¶3. The trial court ruled the testimony inadmissible under the third prong of the *Sullivan* test.[2] Postconviction, Missouri moved for a new trial on the basis of newly discovered evidence, which were statements by four additional men who claimed to have been beaten and/or framed by Mucha. *Id.* ¶10. The circuit court denied the motion on the ground "there was no possibility of a different result at a new trial because none of these four incidents would be admitted into evidence" under *Sullivan*. *Id.* ¶11.

This court reversed and remanded the case for a new trial. As to all the proffered witnesses, the court found that "at a minimum, defense counsel should be allowed to cross-examine Officer Mucha about each of these … incidents. Moreover, … each of these … witnesses could be called to testify as to the bias or prejudice of Officer Mucha in order to attack Mucha's credibility." *Id.* ¶24.

Franklin's postconviction motion summarized incidents involving several alleged victims[3] of "a group of rogue patrol officers in District III" (70:4). Without citation, Franklin asserted that "[t]his group of rogue officers included Officers Ala Awadallah and Mucha, whose misconduct has been reported in the newspaper, but this rogue group also included officers who worked with

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[1]Lough was present at the beginning of Missouri's encounter with Mucha. *State v. Missouri*, 2006 WI App 74, ¶2, 291 Wis. 2d 466, 714 N.W.2d 595.

[2]*See State v. Sullivan*, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998).

[3]Hereinafter, the State will refer to these men simply as "victims."

[them] and this group included Officer Lough, the arresting officer in this case" (70:4).

Franklin named and described the victims as follows:

- Jermaine Cameron, who complained that he was framed by Officers Timothy McNair, Keith Dodd, and Lough;
- Draylon Oliver, who accused Lough and three other officers of beating him during a 2003 arrest;
- Raynard Jackson, who accused Lough of planting a firearm on him (Jackson was later convicted of possessing a firearm as a felon); and
- Charles Michael Griffin, who named Lough and others in a federal civil rights complaint alleging excessive force and false arrest.

(70:4-8).[4] In his reply brief, Franklin added Ronald Means, "Peter Glover, et al.," and Walter Missouri himself to the victim list (79:3-6). Also in his reply brief, Franklin asserted for the first time that the named victims would or could be witnesses on his behalf at a new trial (79:2-5).

The circuit court denied Franklin's postconviction motion (80). The proffered evidence failed the materiality prong of the newly discovered evidence test because

> the defendant never asserted that he was framed by the arresting officers or that they had planted any of the evidence. Nor did the defendant assert that he was mistreated or beaten by the officers. The

[4] Additional facts about the victims named in this paragraph will be discussed in the argument section below.

In his postconviction motion, Franklin also named Harold Young, Sylvester Hamilton, and Earl Cosey as victims in his postconviction motion, but has abandoned this evidence on appeal (70:6-8). *See Polan v. Dep't of Revenue*, 147 Wis. 2d 648, 660, 433 N.W.2d 640 (Ct. App. 1988) ("We deem abandoned a position turning on a point of law known to exist but not briefed or argued.").

> defense was simply that the gun and drugs found in the van did not belong to the defendant. Even if the other incidents involving Officer Lough raise an inference with regard to his credibility, none of them are sufficiently similar in nature to meet the ***Sullivan*** standard for the admissibility of other acts evidence.

(80:3).

This appeal follows.

ARGUMENT

I. FRANKLIN'S "NEWLY DISCOVERED EVIDENCE" DOES NOT WARRANT A NEW TRIAL.

A. Law.

The standards for granting a new trial on the basis of newly discovered evidence are well established:

> [A] defendant must prove: "(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." If the defendant is able to prove all four of these criteria, then 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.

State v. Plude, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42 (citations omitted).

"'A reasonable probability of a different outcome exists if "there is a reasonable probability that a jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant's guilt."'" *Plude*, 310 Wis. 2d 28, ¶33 (citations omitted). "The question is not whether the evidence *could* create a reasonable doubt." *State v. Avery*, 2013 WI 13, ¶32, 345 Wis. 2d 407, 826 N.W.2d 60. "A court reviewing newly-discovered evidence should consider whether a jury would

find that the newly-discovered evidence had a sufficient impact on other evidence presented at trial that a jury would have a reasonable doubt as to the defendant's guilt." *Plude*, 310 Wis. 2d 28, ¶33. Newly discovered evidence can only meet the reasonable probability standard if it is admissible. If the evidence is inadmissible, it can have no "reasonable probability" of leading the jury to "a different outcome." *See State v. Bembenek*, 140 Wis. 2d 248, 253, 256, 409 N.W.2d 432 (Ct. App. 1987).

"Evidence which merely impeaches the credibility of a witness does not warrant a new trial on [that] ground alone." *Greer v. State*, 40 Wis. 2d 72, 78, 161 N.W.2d 255 (1968); *accord Simos v. State*, 53 Wis. 2d 493, 499, 192 N.W.2d 877 (1972); *Birdsall v. Fraenzel*, 154 Wis. 48, 52, 142 N.W. 274 (1913). However, where the impeachment evidence is of a character and magnitude that it shows that "'*the verdict is based on perjured evidence*,'" a new trial may be warranted. *Plude*, 310 Wis. 2d 28, ¶47 (quoting *Birdsall*, 154 Wis. at 52 (emphasis added by *Plude* court)). In *Plude*, one of the State's expert witnesses lied about his expert credentials. In the supreme court's view, the defendant might not have been convicted in the absence of that expert's testimony. "We conclude that in a trial rife with conflicting and inconclusive medical expert testimony about a [circumstantial] case … there exists a reasonable probability that, had the jury discovered that [the expert] lied about his credentials, it would have had a reasonable doubt as to Plude's guilt." *Plude*, 310 Wis. 2d 28, ¶36.

This court reviews the circuit court's newly-discovered-evidence decision for erroneous exercise of discretion on the first four prongs. *See State v. Edmunds*, 2008 WI App 33, ¶14, 308 Wis. 2d 374, 746 N.W.2d 590. Case law is inconsistent as to whether the "reasonable probability" finding is reviewed deferentially or *de novo*. *See Avery*, 345 Wis. 2d 407, ¶32 (erroneous exercise of discretion review); *Plude*, 310 Wis. 2d 28, ¶33 (question of law).

The admission of "other acts" evidence is subject to Wis. Stat. § 904.04 and *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998). *Sullivan* articulates a three-pronged test, as follows:

> (1) Is the other acts evidence offered for an acceptable purpose under Wis. Stat. § (Rule) 904.04(2), such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident?
>
> (2) Is the other acts evidence relevant, considering the two facets of relevance set forth in Wis. Stat. § (Rule) 904.01? The first consideration in assessing relevance is whether the other act evidence relates to a fact or proposition that is of consequence to the determination of the action. The second consideration in assessing relevance is whether the evidence has probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence.
>
> (3) Is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence?

Id. at 772-73 (citations and footnote omitted). If "other acts" evidence is erroneously excluded, reversal is necessary only if its exclusion was prejudicial to the appellant's case. *Cf. id.* at 773.

As noted above, this court in *Missouri* analyzed the defendant's proffered testimony from five other men who had been battered and/or framed by Jason Mucha, the lead officer at Missouri's arrest and a trial witness against him. *See Missouri*, 291 Wis. 2d 466, ¶¶2-8, 10. This court concluded that the "other acts" evidence was admissible under *Sullivan*:

> The evidence at issue here addresses the character of a witness, Officer Mucha, and specifically, whether

> he is being truthful or untruthful in denying physical abuse and planting evidence. Based on § 904.04, Scull's testimony[5] could not be admitted for the purpose of showing that because Mucha mistreated Scull, he also must have mistreated Missouri. However, § 904.04 does allow character evidence for other purposes.
>
> Specifically, "other-acts" character evidence can be admitted to show "proof of motive … intent … or absence of mistake or accident." It can also be admitted to show the bias or prejudice of a witness. Here, the defense wanted to introduce Scull's testimony to show that Mucha had a motive to lie and cover up what he had done, and that this was intentional, not the result of a mistake or accident. The Scull evidence would also be used to show that Mucha intended to frame Missouri for a crime, which occurred because Mucha's prejudice toward black people causes him to commit physical assaults and use excessive force. We conclude that the Scull evidence satisfied the "other purpose" prong of the *Sullivan* test.
>
> We also conclude that the Scull evidence was relevant to a consequential fact. Here, the Scull testimony is very similar in substance and time to what occurred in the instant case. The Scull testimony would be very relevant in questioning Mucha's credibility and truthfulness. It would be relevant to show that Mucha had a motive to lie … , that Mucha had the intent to frame Missouri for a crime he did not commit, and that Mucha's conduct was not an accident. Thus, we also conclude that the second prong of the *Sullivan* test is satisfied.

Missouri, 291 Wis. 2d 466, ¶¶14-16 (citations omitted). Finally, the court concluded that the probative value if the evidence would not be substantially outweighed by the danger of unfair prejudice, waste of time or confusing the jury. *See id.* ¶17 (citing Wis. Stat. § 904.03). The court's application of the *Sullivan* analysis to Missouri's other proffered witnesses yielded the same result. *See id.* ¶¶24-25.

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[5] *See supra* at 9.

A circuit court may, in its discretion, deny a postconviction motion without a hearing. *See State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996); *Nelson v. State*, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972).

> Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. If the motion raises such facts, the circuit court must hold an evidentiary hearing. However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing. We require the circuit court "to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion." We review a circuit court's discretionary decisions under the deferential erroneous exercise of discretion standard.

State v. Allen, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 (citations omitted).

If the circuit court erroneously denies a properly supported newly-discovered-evidence motion without a hearing, the appropriate remedy is not a new trial but remand to the circuit court for an evidentiary hearing at which the proffered witnesses must testify. *See State v. Love*, 2005 WI 116, ¶56, 284 Wis. 2d 111, 700 N.W.2d 62; *State ex rel. Booker v. Schwarz*, 2004 WI App 50, ¶20, 270 Wis. 2d 745, 678 N.W.2d 361. Depending on what it learns at the evidentiary hearing it is then up to the circuit court to determine whether a new trial is warranted. *See In re Commitment of Sorenson*, 2002 WI 78, ¶39, 254 Wis. 2d 54, 646 N.W.2d 354; *Schwarz*, 270 Wis. 2d 745, ¶¶9, 20.

B. Analysis.

1. Summary of Franklin's argument and introduction to State's response.

Franklin's theory is that

- allegations by five unrelated men about their mistreatment by Officer Jason Mucha were admissible in Walter Missouri's new trial,
- Officer Paul Lough was a member of the rogue group of officers whose most notorious member was Mucha,
- under *Missouri*, allegations by six unrelated men regarding their mistreatment by members of the Mucha group (not necessarily Lough) would be admissible in a retrial of Franklin,
- with such evidence, there is a reasonable probability that the jury in a retrial of Franklin would find him not guilty,
- therefore, Franklin is entitled to a new trial.

Franklin's theory fails.

The circuit court's decision denying Franklin's postconviction motion was correct and should be affirmed. The State assumes that Franklin has satisfied three of the first four questions posed by the newly discovered evidence test: the proffered evidence was discovered after his conviction, he was not negligent for failing to discover it sooner, and it was not "merely cumulative." *Plude*, 310 Wis. 2d 28, ¶32. However, as the State will show, the evidence is "not material to an issue in the case." *Id.* Concomitantly, it would not be admissible under *Sullivan*. Given its immateriality and inadmissibility, it would have no "reasonable probability" of yielding a different result from the jury. *See Plude*, 310 Wis. 2d 28, ¶32. Furthermore, Franklin's implicit theory, that Lough planted the gun, drugs, and drug paraphernalia

in the van, makes no sense given his own testimony and the undisputed facts of the case.

2. Summary of postconviction evidence.

In later subsections, the State will show that Franklin's proffered evidence would be inadmissible under *Sullivan*, is not "material" under the newly discovered evidence test, and would have no reasonable probability of leading to a different verdict. Before doing so, the State will briefly review Franklin's evidence about the six victims, highlighting the inadequacies of this evidence under *Sullivan* and the newly discovered evidence test.

a. *Jermaine Cameron*. According to Franklin: Cameron complained that he was framed by three officers, including Lough, in Milwaukee Case Number 2002-CF-6863. Franklin's Brief at 8. Cameron was convicted in that case of possession of cocaine with intent to deliver. *Id.* A postconviction investigation revealed that two other men were most likely guilty of the crime for which Cameron had been convicted. *Id.* at 9. This court ordered the circuit court to conduct an evidentiary hearing into the matter. *Id.* "After remand, the parties reached a settlement where the conviction was vacated and Mr. Cameron entered a No Contest plea to a misdemeanor and received time served." *Id.*

Franklin's evidence about Cameron's case consisted of a "CCAP" (Wisconsin Circuit Court Access Program) list of the record events in *State v. Cameron*; Cameron's postconviction motion based on newly discovered evidence (included in the motion's attachments were the criminal complaint against Cameron and Cameron's post-arrest statement); and this court's opinion and order summarily remanding Cameron's case for a postconviction evidentiary hearing (70:29-71). The evidence did not include an affidavit from Cameron or any other evidence that Cameron would testify for the defense were Franklin granted a new trial.

The Cameron evidence does not meet the legal standards of *Sullivan* and *Plude*. First, Franklin presents not a scintilla of evidence suggesting that Lough was even involved in Cameron's case. Lough was not mentioned in Cameron's criminal complaint (70:47-48), was not identified by Cameron in his signed probation/parole statement (70:59-63), did not testify at Cameron's trial (70:32), and was not named in Cameron's postconviction motion or accompanying affidavit (70:38-45, 49-51). Second, the resolution of Cameron's case does not prove that he was in fact framed. Cameron claimed at trial "that he had been framed, and that Officer McNair lied" (70:67). This court concluded that Cameron's newly discovered evidence that two other men were the more likely culprits "arguably demonstrated that coincidental circumstances wrongfully led to [Cameron's] conviction" (70:67). It remanded the case for an evidentiary hearing without determining whether Officer McNair or the new evidence was more credible (70:70-71). Had Cameron's innocence been definitively established (or McNair proved a liar), one assumes that the resolution would have been dismissal of the charges, not a misdemeanor[6] plea (70:36).

For these reasons, the Cameron evidence is irrelevant and does not support the relief requested.

b. *Draylon Oliver*. According to Franklin: Oliver accused Lough and three other officers of beating him during a 2003 arrest. Franklin's Brief at 9.

To support his Oliver claim, Franklin relies exclusively on an article from "OnMilwaukee.com," written by Doug Hissom and titled "Surveying the debate on surveillance cameras" (70:72). The article is not a piece of news reporting, but a several-pronged critique of several matters pending before or recently disposed of by

[6] The record does not reveal whether Cameron pleaded to a misdemeanor, but Franklin asserts that he did (70:36). Franklin's Brief at 9.

the Milwaukee Common Council (70:72-75). The article states in pertinent part:

> A bill from the [law firm of Eggert & Cermele] being considered by a Common Council committee next week is $23,908.75. In a case where attorney Jonathan Cermele billed the city for $2,110.50 for representing four notorious cops, the resulting dismissal of the complaint by the Fire and Police Commission actually had nothing to do with the firm's legal prowess—the plaintiff in the case happened to be in jail after being arrested on a bail-jumping charge and couldn't make it to testify against the cops.
>
> ….
>
> The case stems from a police battery complaint from Draylon Oliver, who accused officers Joseph Warren, Paul Lough, Dean Newport and Michael Lutz of beating him during a 2003. [sic]

(70:73). Franklin did not include an affidavit from Oliver or any other evidence that Oliver would testify for the defense were Franklin granted a new trial.

The Oliver evidence does not meet the legal standard. This evidence is blatant hearsay. The State concedes that a postconviction motion "need not demonstrate theories of admissibility for every factual assertion he or she seeks to introduce." *Love*, 284 Wis. 2d 111, ¶36. However, Franklin should be required to provide more than a "thought piece" about the recent activities of a political body, which alludes in passing to a fact of possible relevance to his motion. Presumably, Franklin could have provided court documents similar to those supporting his Cameron allegations if they supported his Oliver allegations. His failure to do so is unexplained and should give this court pause. Moreover, the paucity of detail in Hissom's article renders the evidence virtually meaningless. What, precisely, was Lough accused of doing to Oliver? Do we really know that the complaint was dismissed because of Oliver's

involuntary failure to appear and not because it lacked merit?

Even crediting the vague allegations contained in the Hissom piece, it fails to support Franklin's premise. The article shows, *at most*, that Lough participated in beating Oliver. As reprehensible as that may be, it is not relevant to Franklin's postconviction theory in this case, that Lough planted evidence in his van. Franklin does not now and never has suggested that Lough laid a finger on him. The Oliver case is therefore irrelevant to the present case and does not support the relief requested.

c. *Raynard Jackson*. According to Franklin: three officers on patrol including Lough spotted Jackson and another man, both of whom had outstanding warrants. When the men saw the officers they ran.

> Lough chased Jackson …. Lough testified [at Jackson's trial] that while he was chasing Jackson, he "saw him take his right hand and reach in the area of his right waistband and kind of turn and … discard[] what appeared to be a black firearm, semiautomatic pistol." Lough testified that he recovered a forty caliber Glock pistol while pursuing Jackson, and admitted that this was the same type of gun issued to police officers…. The pistol did not bear Jackson's fingerprints and had not been reported as stolen. Jackson's defense was that he was framed by police.

Franklin's Brief at 10. A jury found Jackson guilty of possessing a firearm as a felon and carrying a concealed weapon. *Id.*

After an unsuccessful direct appeal, Jackson filed a postconviction motion pursuant to § 974.06, which "raised the issues as to whether … original postconviction counsel was deficient for failing to raise the publicly disclosed misconduct of the same officers [including Lough] involved in Jackson's apprehension." *Id.* at 11. The circuit court denied the motion, but this court reversed and remanded the case for an evidentiary hearing. Subsequently, "the parties reached a settlement where the

State agreed to dismiss Counts 1 & 2 of possessing a firearm as a felon and carrying a concealed weapon." *Id*.

Franklin's evidence about Jackson's case consisted of this court's unpublished opinion in Jackson's case (70:76-87). It did not include an affidavit from Jackson or any other evidence that Jackson would testify for the defense were Franklin granted a new trial.

The Jackson case supports Franklin's position better than the Cameron and Oliver cases do. However, it too fails to carry the day. Jackson, unlike Franklin, argued at trial that he had been framed by the police (70:78). Accordingly, the evidence that the investigating officers, including Lough, faced accusations of framing defendants in other cases was relevant to his defense. Franklin made no such claim at his trial. Instead, his theory was that another unknown person left the contraband in the van before he (or the police) got there (53:230). Therefore, the allegation that Lough framed Jackson is not relevant to any issue of consequence at Franklin's trial, and does not support the relief requested.

d. *Charles Michael Griffin*. According to Franklin: Griffin named Lough in a federal civil rights complaint filed in the United States District Court for the Eastern District of Wisconsin, which accused Lough and three other officers of excessive force against Griffin (among other things). Franklin's Brief at 11-12.

Franklin's evidence about Griffin's case consisted of an unsigned complaint filed in *Griffin v. Harris, et al.*, Case No. 2:05-CV-00502-LA (E.D. Wis.). It did not include an affidavit from Griffin or any other evidence that Griffin would testify for the defense were Franklin granted a new trial.

The Griffin evidence does not meet the legal standard. Griffin's complaint is vague and fails to specify what Lough, in particular, did to Griffin (70:129-36). Curiously, Franklin fails to reveal that Griffin's excessive force claims went to trial, and that the trial court

"declare[d] a mistrial based on a hung jury" (R-Ap. 110). The case ultimately "[t]erminated" on November 17, 2010 without a retrial (R-Ap. 101). Moreover—once again—the Griffin suit alleged excessive force (not evidence planting), which Franklin has never claimed occurred in this case. Therefore, the Griffin case is irrelevant to Franklin's postconviction claim that he was framed, and can afford him no relief.

e. *Ronald Means (and Peter Glover, et al.)*: According to Franklin: on January 7, 2004, federal Judge Lynn Adelman for the Eastern District of Wisconsin, suppressed evidence in the case of *United States v. Means*, because the evidence was the fruit of a pretextual traffic stop not supported by probable cause. "Judge Adelman found the testimony of Means and Glover more credible than the 'evasive' and 'contradictory' testimony of a number of officers involved in the investigation, including Lough." Franklin's Brief at 12.

Franklin's evidence about this case consisted of Judge Adelman's memorandum and order in the *Means* case (79:11-17). It did not include an affidavit from Means, Glover or "et al." or any other evidence that these men would testify for the defense were Franklin granted a new trial.

Officers Virgil Cotton and Ray Harris made the pretextual stop (79:11). Officers Lough and Campbell were in a squad car behind Cotton and Harris when the latter stopped Means' car (Glover was his passenger) (79:11-12). This stop evolved into searches of multiple apartments in two different buildings (it appears that at least one and possibly both buildings were owned by Means) (79:12-15). The court summarized portions of testimony (presumably given at a suppression hearing) by several officers (including Lough) and several civilians (*id.*). Lough prepared a report of the building searches (79:15). Aspects of Lough's testimony and report were inconsistent with the testimony of other officers (79:13-15).

The court acknowledged that "the issue … is whether there was probable cause" for the traffic stop, but examined the credibility of the officers' actions after the stop as an aid "in assessing the credibility of the testimony concerning that issue" (79:15). In sum, the court judged the civilians' testimony more credible than the officers', and concluded that there was no probable cause to stop Means' vehicle (79:16).

This evidence does not meet the legal standard. First of all, the only legal issue before the *Means* court was the legality of the stop of Means' vehicle, something that neither Lough nor Campbell were party to. Second, while Lough wrote a report and testified at the suppression hearing, Judge Adelman nowhere found that Lough was not credible. At several points, Judge Adelman noted that Lough's testimony (or report) was inconsistent with that of the other officers (79:13-15). However, he did not decide that Lough was less credible than the others. Nor did he decide that Lough was less credible than the civilians. The court limited its decision to deciding that the testimony of Means and Glover was more credible than that of Cotton and Harris about the stop (79:16). He expressed no opinion about Lough's credibility. Finally, and most importantly, the *Means* case is nothing like the present case. Here, Franklin belatedly claims that Lough might have planted evidence in his van. There was no such allegation in *Means*. Therefore the case is irrelevant to Franklin's postconviction claim and affords him no relief.

f. *Walter Missouri*: According to Franklin: Lough was one of three police officers conducting a drug search that led to Missouri's arrest. "Although the decision does not name the officers in the group … referred to as 'the police,' it is implied that this group includes Lough participating directly or indirectly in the investigation and arrest." Franklin's Brief at 16. Missouri testified that he was threatened (by Jason Mucha), "'beaten by the police, and that while he was on the ground, they put the baggie

of cocaine in his mouth.'" *Id.* at 16 (quoting *Missouri*, 291 Wis. 2d 466, ¶3).

Franklin's evidence about Missouri's case consisted of a reference to this court's published decision in that case (79:5-6). It did not include an affidavit from Missouri or any other evidence that Missouri would testify for the defense were Franklin granted a new trial.

The *Missouri* opinion is focused on the misconduct of Officer Jason Mucha. Therefore, it does not specify what, if any, bad acts were committed by Lough. However, a simple reading of the opinion indicates that Lough was uninvolved in Mucha's misconduct. First, "Milwaukee Police Officer Jason Mucha, together with fellow officer Paul Lough, went to a residence at 2013 North 36th Street to conduct a drug investigation. They observed a male exit the … residence and run toward a white four-door sedan." *Missouri*, 291 Wis. 2d 466, ¶2. Then, "Officers Brad Westergard and Mucha"—not Lough—"began searching the area for the vehicle in an unmarked squad." *Id.* The officers (presumably Westergard and Mucha, not Lough) found Missouri seated in the front passenger seat of the sedan about five blocks away. All of the alleged bad acts—the threat, the beating, the planted evidence—followed the officers' discovery of Missouri in the car. The opinion does not suggest that Lough was present at the vehicle's location. Instead, it implies that he was still back at 2013 North 36th Street conducting the drug investigation. *Id.* ¶2.

This evidence does not meet the legal standard. Based on Missouri's allegations that *Jason Mucha* had abused him and planted evidence on him, this court directed the trial court to give Missouri an evidentiary hearing at which other alleged victims of *Jason Mucha* would testify. *Id.* ¶¶21-25. Thus, again, *Missouri* is irrelevant to the present case and affords Franklin no relief.

3. *Sullivan*.

The State's analysis begins with *Sullivan* because *Sullivan* admissibility was the lynchpin of the newly discovered evidence conclusions in *Missouri*. The circuit court denied Missouri's postconviction motion because it concluded that his proffered evidence was inadmissible under *Sullivan*, and the court of appeals reversed after concluding that the evidence was admissible under *Sullivan*. Similarly, the circuit court in this case concluded that Franklin's failure to satisfy *Sullivan* underlay his failure to satisfy the newly-discovered-evidence test (80:3).

a. Relevance.

All of the proffered evidence fails the second prong of *Sullivan*, the relevance prong. To prove relevance, Franklin must show that the evidence "relates to a fact or proposition that is of consequence to the determination of the action," and that it is probative, meaning that it "has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence." *Sullivan*, 216 Wis. 2d at 772. Franklin argues that the evidence is relevant because it shows that Lough "in other arrests during this timeframe planted or assisted other rogue officers in planting guns or drugs on other black defendants makes Franklin's defense that someone other than himself was responsible for the placement of drugs and gun in the van more probable." Franklin's Brief at 21-22. There are several problems with this argument.

First, the race issue is conclusory and unsupported. With a few exceptions, there is no evidence in the record about the race of the various men named by Franklin. We know that Franklin is African-American (1:1). Missouri's race is not identified, but merely implied in the published opinion. *See Missouri*, 291 Wis. 2d 466, ¶¶15, 22. Franklin does not bother to provide record citations indicating of the either the other victims or the officers. More importantly, while Mucha's bias or prejudice

against African-American men is taken as a given in *Missouri*, there is no such statement or evidence anywhere that either Lough or Campbell (assuming they are not black) share Mucha's racism. *See Missouri*, 291 Wis. 2d 466, ¶15.

Second, the proffered evidence can only be relevant to Franklin's theory that Lough planted the guns and drugs on Franklin if it shows that Lough planted contraband or evidence of crime on the other victims. But the evidence does not show that. *See supra* at 17-24. The record does not suggest that Lough was even involved in Cameron's arrest. The Oliver and Griffin cases accused officers, including Lough, of the excessive or improper use of force. They do not accuse any officer of planting evidence and Franklin does not accuse Lough of excessive or improper use of force. In the *Means* case, there is no evidence that Lough did anything wrong. The court concluded that two other officers were guilty of a pretextual stop and that some officers' testimony (not necessarily Lough's) was incredible. In *Missouri*, Jason Mucha was accused of beating and framing the defendant; there is no indication that Lough was present when Mucha did these things.

At first blush, Raynard Jackson's case appears relevant. It certainly comes much closer to meeting the relevance standard than any of Franklin's other evidence. *See supra* at 20. However, *Jackson*, like *Missouri*, is critically different from this case. In *Jackson* and *Missouri*, each defendant argued from the beginning that he had been framed by (respectively) Lough and Mucha (70:3-4). *Missouri*, 291 Wis. 2d 466, ¶3. Franklin made no such claim at trial. His defense theory was simply that the inculpatory evidence was left in the van by some unidentified person that wasn't Franklin (53:230). Franklin only came up with the theory that Lough planted the evidence *after* he learned about *Missouri* and the other cases. Thus, even *Jackson* is not relevant to any fact of consequence to this case as it was actually tried. The evidence is only relevant to a new theory of defense

developed after Franklin's conviction. That cannot be the basis for a new trial. *See State v. Maloney*, 2006 WI 15, ¶36, 288 Wis. 2d 551, 709 N.W.2d 436 (no new trial where allegations of district attorney's misconduct "are an attempt … to reargue [defendant's] case using a different theory of defense").

b. Acceptable purpose.

"[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." Wis. Stat. § 904.04(2). It may be admitted for an acceptable purpose "such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Sullivan*, 216 Wis. 2d at 772; *accord* Wis. Stat. § 904.04(2). "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility … may not be proved by extrinsic evidence. They may, however, … if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness …." Wis. Stat. § 906.08(2).

The court need only analyze the Raynard Jackson evidence under the "acceptable purpose" prong, because it is the only evidence proffered by Franklin that is arguably relevant and probative.

As a threshold matter, Franklin should not be permitted to impugn Officer Campbell with his accusations against Lough. Franklin asserts that "evidence that one of the two arresting officers in this case had been involved in attempts to frame suspects was relevant to prove that all of the arresting officers had a motive to testify falsely." Franklin's Brief at 22. There is no basis for this contention. Even if Lough is guilty of everything Franklin accuses him of, there is no evidence whatsoever in the record of any bad behavior by Campbell. And, from this record, there is no basis to conclude that because *Lough* may have attempted to frame

Raynard Jackson, *Campbell* would therefore perjure himself at *Franklin's* trial. That is quite a leap. Campbell's credibility must be judged on its own. "Each tub stands on its own bottom." *State v. Christopher*, 44 Wis. 2d 120, 125, 170 N.W.2d 803 (1969). On the basis of the record in this case, Campbell's credibility remains unimpaired.

Franklin suggests that the evidence of Lough's prior acts would be admissible to support his trial theory that "someone other [Franklin]"—but not necessarily Lough—"was responsible for the placement of drugs and gun in the van." Franklin's Brief at 21-22. The language of § 904.04(2) and the case law interpreting it do not recognize such a broad purpose for admitting presumptively inadmissible evidence of a witness's other acts or crimes. Franklin is essentially arguing: "I said some other person left that evidence in the van, Lough is some other person, therefore, any evidence of Lough's conduct fits within my original defense argument." Franklin's theory would eviscerate long-standing other-acts doctrine. *Cf. State v. Denny*, 120 Wis. 2d 614, 623, 357 N.W.2d 12 (Ct. App. 1984) ("[E]vidence that simply affords a possible ground of suspicion against another person should not be admissible. Otherwise, a defendant could conceivably produce evidence tending to show that hundreds of other persons had some motive or *animus* against the deceased—degenerating the proceedings into a trial of collateral issues."). Moreover, it would not clear the hurdles of *Sullivan*'s third prong or Wis. Stat. § 904.03.

Franklin argues that the proffered evidence is admissible for the following acceptable purposes:

> [T]o show that Lough had a motive to lie and cover up what they had done and that this was intentional, not the result of mistake or accident, and to impeach the credibility and truthfulness of both the officers at the scene. The other acts evidence is also admissible to show that the officers had a plan, a *modus operandi*, to plant drugs or weapons on black males

> as a means of taking people they believed were thugs or criminals off the streets.
>
> ….
>
> … The testimony of prior acts reveals a motive by Officer Lough to advance his own career by lying, planting evidence and acquiescing to the conduct of other rouge [sic] officers' conduct.

Franklin's Brief at 24-25.

Again, Franklin's imputation of dishonesty or corrupt behavior to Campbell on the basis of Lough's alleged prior acts is baseless and should be ignored by this court. The proffered evidence does not impeach Campbell's credibility, and does not show that Campbell had a plan or "*modus operandi*" to plant drugs or weapons on black males.

Even as to Lough, Franklin's suggested purposes for the evidence are inapposite. He says that it could show that Lough, like Mucha in *Missouri*, had "a motive to lie and cover up" the planted evidence and to show that planting the evidence "was intentional, not the result of mistake or accident." The reason these were acceptable purposes for admitting the evidence in *Missouri* was because Mucha's physical abuse of Missouri and planting evidence on him were contested issues. Therefore, Mucha's similar conduct in the past was admissible to resolve the question of whether his version of events was true or whether he lied about what he did to Missouri and whether he did it deliberately. *See Missouri*, 291 Wis. 2d 466, ¶¶14-16. Unlike Jason Mucha in the *Missouri* case, Lough did not deny framing Franklin because Franklin never suggested that he had. *See id.* ¶3.

Franklin has failed to show that the proffered evidence would be admissible for a "plan" or "modus operandi" purpose. For evidence to be admitted to show a "plan," the proponent must "establish[] a definite prior design, plan, or scheme which includes the doing of the act charged," such that "'the various acts are materially to

be explained as caused by a general plan of which they are the individual manifestations.'" *State v. Gray*, 225 Wis. 2d 39, 53, 590 N.W.2d 918 (1999) (citations and internal quotation marks omitted). Here, Franklin seeks admission of evidence of wholly independent incidents, not acts related to the present incident as elements of a single "plan." The "modus operandi" purpose requires the proponent to show a concurrence of common features and so many points of similarity between the other acts and the act alleged that the actor's imprint or the signature can be easily identified. *See e.g., State v. Fishnick*, 127 Wis. 2d 247, 281, 278 N.W.2d 272 (1985). The State sees no such commonality or similarity here, and Franklin's effort to articulate the required commonality or similarity is conclusory at best.

Franklin's other idea, that Lough's alleged conduct here and in other case was part of his effort "to advance his own career" is supported by no evidence whatsoever. Franklin's Brief at 25.

Franklin's true purpose in seeking the admission of the victims' stories at trial is to impugn the character of Lough, to plant the seed in the jury's collective mind that a cop who is dirty some of the time is dirty all of the time. That is prohibited character evidence. Wis. Stat. § 904.04(1)(intro.); *Missouri*, 291 Wis. 2d 466, ¶14 ("Scull's testimony could not be admitted for the purpose of showing that because Mucha mistreated Scull, he also must have mistreated Missouri.").

c. Balancing test.

All of the proffered evidence fails the last part of *Sullivan* because its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, [or] waste of time." *Sullivan*, 216 Wis. 2d at 772-73. This is primarily because Franklin's postconviction theory—that Lough planted the incriminating evidence in the van—is belied by the trial evidence.

To plant the evidence in this case, Lough would have had to carry the Target bag full of drugs and drug paraphernalia and the semiautomatic pistol from his squad car to the van. At the van, he would have had to put the Target bag on the passenger seat *and* insert the Saver's Choice baggies box (which Franklin admitted was his (53:161)) into the Target bag. He would also have had to put the gun into the console. Then, he would have had to pretend to discover all these things.

The problem for Franklin is that, according to his own testimony, only twenty seconds passed between Lough's initial entry into the van and his declaration that Franklin must be arrested (53:150). Thus, for Franklin's theory to succeed, Lough had to accomplish all these actions in *twenty seconds*. Not only that, Lough had to carry this large Target bag (presumably large because of its many contents) from the squad car to the van without Franklin noticing what he was doing. Surely, if Franklin had seen Lough carrying a large bag to the van, he would have mentioned it in his trial testimony. It would be incredible for him not to mention this fact if he had seen it. Equally incredible is that he would not have seen Lough transferring this cargo if he had in fact done so.

Revisiting Franklin's testimony this way indicates why Franklin never contended at his trial that Lough planted the evidence against him. Franklin himself saw nothing to support such a notion. Meanwhile, logic dictates that if Lough had done such a thing Franklin must have seen *something suspicious* in Lough's behavior. These observations put in even greater relief the crucial distinction between this case and *Missouri* and *Jackson*—those defendants asserted at their original trials that they had been framed because they witnessed behavior by the arresting officers that supported that suspicion (70:2). *Missouri*, 291 Wis. 2d 466, ¶3.

Whatever generalizations might be made about Lough from the *Jackson* case, they are not particularly probative here, where the likelihood that he planted evidence is close to nil. The slight probative value of the

Jackson evidence is substantially outweighed by (1) unfair prejudice to the State, whose case could be dashed by irrelevant accusations of bad behavior by the arresting office in an unrelated case; (2) confusion of the issues or misleading the jury, as the jury is swept into a sideshow about Lough's past deeds when it should be concentrating on Franklin's criminal liability in the case before it; and (3) undue delay and waste of time, as the parties, court, and jury are forced to litigate, preside over, and decide a case unnecessarily protracted by proof of a matter of marginal relevance. *See Sullivan*, 216 Wis. 2d at 773.

d. Summary.

Franklin's proffered evidence fails all three parts of the *Sullivan* test for the admission of "other acts" evidence.

4. Newly discovered evidence test.

The State does not contest Franklin's arguments that the evidence was discovered after his conviction, that he was not negligent in discovering it, and that it was not cumulative. *See Plude*, 310 Wis. 2d 28, ¶32. Nevertheless, Franklin's claim fails because he has failed to show that his proffered evidence "is material to an issue in the case." *Id.* As shown above, only one of the victims' stories is even arguably relevant to Franklin's postconviction theory of planted evidence. *See supra* at 9. However, even as to this victim, Raynard Jackson, Franklin fails the materiality test because the idea that Lough planted evidence in the van was never introduced at his trial. While the evidence may be relevant to a completely new defense theory Franklin would like to pursue in a retrial, it is not material to the case as it was actually tried the first time.

Even if Franklin satisfied all of the first four prongs of the newly-discovered-evidence test, his claim must fail because he has not shown that "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." *Plude*, 310 Wis. 2d 28, ¶32. At best, the proffered evidence "merely impeaches the credibility of a witness." *Greer*, 40 Wis. 2d at 78. In contrast to *Plude*, Franklin's best evidence (*i.e.*, the *Jackson* case) does not suggest that the verdict against him was based on perjured testimony. *See Plude*, 310 Wis. 2d 28, ¶47.

Franklin fails the reasonable probability requirement for two reasons.

First, in order to satisfy the reasonable-probability requirement, the proponent of newly discovered evidence must show that the evidence would be legally admissible at a new trial. *See Bembenek*, 140 Wis. 2d at 253, 256. The State has shown in the previous subsection that Franklin's proffered evidence would *not* be admissible. Therefore, under *Bembenek*, Franklin's claim fails.

Second, to determine whether Franklin can clear the reasonable-probability hurdle, this court must reimagine Franklin's trial as it actually occurred with the addition of Franklin's newly discovered evidence about the victims. *See Plude*, 310 Wis. 2d 28, ¶33; *Love*, 284 Wis.2d 111, ¶43. As shown above, such an analysis compels the conclusion that the jury's verdict would have been the same even with the proffered evidence. That is because none of the evidence was relevant to the case as Franklin defended it. The Cameron evidence did not mention Lough at all. *See supra* at 17-18. The Means and Missouri evidence mentioned Lough, but did not suggest that he engaged in any misconduct. *See supra* at 22-24. The Oliver and Griffin cases suggested that Lough engaged in excessive or improper force against suspects, but—even postconviction—Franklin does not allege that Lough used excessive or improper force against him. *See supra* at 18-19, 20-22.

In contrast to the other evidence, the Jackson case suggests that Lough planted evidence on Jackson, as the State has repeatedly conceded. *See supra* at 20. However, even that would have no "reasonable

probability of [yielding] a different outcome." *Plude*, 310 Wis. 2d 28, ¶33. On the one hand, the Jackson evidence is a *non sequitur* because there was no other suggestion at Franklin's trial that Lough planted the evidence in the van. On the other hand, even if Franklin had utilized that theory of defense, the Jackson evidence would not have been enough to convince the jury that Franklin had been framed. The State showed above that the framing theory simply does not square with Franklin's trial testimony. *See supra* at 30-31. This is because Lough simply could not have accomplished this deed in the time allowed (twenty seconds), and because he could not have carried the large Target bag full of incriminating evidence to the van without Franklin's noticing it. *See id.*

The circuit court correctly concluded that Franklin's proffered evidence did not satisfy the newly-discovered-evidence test; its ruling should be affirmed.

5. Denial of motion without a hearing.

The circuit court appropriately denied Franklin's motion without a hearing because, as the State has shown, it lacked merit. *See Allen*, 274 Wis. 2d 568, ¶9.

The denial of the motion without a hearing was appropriate for an additional reason. Franklin offered no evidence—through personal affidavits from the victims or otherwise—indicating that any of the victims would be available or willing to testify. The documentation attached to Franklin's postconviction motion is not sufficient to guarantee that any of these men would be available or willing to testify. *See supra* at 17-24. Indeed, there is no reason to believe that any of them are even aware that Franklin is volunteering them to appear on his behalf at a new trial or evidentiary hearing. Thus, Franklin's motion fails not only on the substantive law, but because it is unsubstantiated as a factual matter.

6. Remedy.

If this court is not fully convinced by the State's arguments in this brief, it should grant Franklin the limited remedy of remand for an evidentiary hearing at which one or more of the named victims will be called to testify. This was the remedy ordered by this court in the Cameron and Jackson cases. (70:71, 86). The circuit court should limit the hearing to only those witnesses that are capable of offering testimony that is relevant and material to Franklin's defense.

II. FRANKLIN DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL.

To prove an ineffective assistance of counsel claim, the defendant must show that counsel's performance was deficient and prejudicial to the defense. *See Strickland v. Washington*, 466 U.S. 668, 692 (1984). The burden is on the defendant to prove both elements. *State v. Liukonen*, 2004 WI App 157, ¶18, 276 Wis. 2d 64, 686 N.W.2d 689. If the defendant fails on one prong, the court need not address the other. *See Strickland*, 466 U.S. at 697.

Franklin asserts in conclusory fashion that trial counsel and postconviction counsel were ineffective for not finding the victims and raising these issues at trial or in the original postconviction and appellate period.

The circuit court denied relief to Franklin on *Strickland* grounds. That ruling should be affirmed. Franklin has made absolutely no showing that trial or postconviction counsel should or could have discovered the evidence about the victims prior to or during trial or during the original postconviction and direct appeal period. Without a showing that counsel should or could have uncovered this evidence, Franklin has failed to carry his burden of proving deficient performance.

Franklin also fails to prove prejudice. As shown in Part I of this argument, Franklin's "other acts" theory has

no merit. Therefore, even if counsel had presented this evidence earlier, it would have made no difference to the result in this case.

CONCLUSION

For the reasons stated herein, the State of Wisconsin respectfully requests that this court affirm the judgment and order from which this appeal is taken.

Dated this 24th day of January, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,602 words.

Dated this 24th day of January, 2014.

_____
Maura FJ Whelan
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 24th day of January, 2014.

_____
Maura FJ Whelan
Assistant Attorney General