STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2014AP2238-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MASTELLA L. JACKSON,

Defendant-Respondent.

ON APPEAL FROM AN ORDER SUPPRESSING EVIDENCE ENTERED IN THE OUTAGAMIE COUNTY CIRCUIT COURT, THE HONORABLE MARK J. MCGINNIS, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

J.B. VAN HOLLEN
Attorney General

JEFFREY J. KASSEL
Assistant Attorney General
State Bar #1009170

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 266-9594 (Fax)
kasseljj@doj.state.wi.us

TABLE OF CONTENTS

Page

CASES CITED

Page

STATUTE CITED

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2014AP2238-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MASTELLA L. JACKSON,

Defendant-Respondent.

ON APPEAL FROM AN ORDER SUPPRESSING EVIDENCE ENTERED IN THE OUTAGAMIE COUNTY CIRCUIT COURT, THE HONORABLE MARK J. MCGINNIS, PRESIDING

BRIEF OF PLAINTIFF-APPELLANT

STATEMENT OF THE ISSUES

1. The circuit court suppressed statements that defendant-appellant Mastella L. Jackson gave to the police. The affidavit in support of a warrant to search Jackson's house included some of those statements. With those

statements excised, does the untainted portion of the warrant affidavit establish probable cause to search Jackson's home?

The circuit court held that the affidavit did not establish probable cause without Jackson's statements.

2. While the police were searching Jackson's home pursuant to the search warrant, officers brought Jackson to the house, where she told the officers where to find the items they were seeking. Assuming that Jackson's statements at the house were tainted, are the items found by the police nevertheless admissible under the inevitable discovery doctrine?

The circuit court held that the evidence was not admissible under the inevitable discovery doctrine.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

STATEMENT OF THE CASE

This is an appeal by the State of Wisconsin pursuant to Wis. Stat. § 974.05(1)(d) from an order granting in part and denying in part a suppression motion filed by defendant-respondent Mastella L. Jackson (62:1; A-Ap. 101).

Jackson is charged in Outagamie County Circuit Court with first-degree intentional homicide for fatally stabbing her husband, Derrick Whitlow (2:1-5; 32:1; A-Ap. 161-65).

The criminal complaint alleges that on February 21, 2012, officers were dispatched to the Roadstar Inn in Little Chute, where they discovered Whitlow's body in Room 114 (2:2; A-Ap. 162). Whitlow suffered approximately twenty-five stab wounds, some of which appeared to be defensive (2:4; A-Ap. 164). Six of the stab wounds were to his chest, and they caused, among other damage, a severe injury to the aorta and a laceration to the right atrium of the heart (*id.*).

The police learned from a hotel employee that Whitlow had been staying at the hotel for several days (2:2; A-Ap. 162). Another hotel employee, Angelica Felipe, reported that around 1:00 to 1:30 p.m., a person wearing a hooded sweatshirt knocked on the door of Room 114 and was admitted into the room (*id.*). Felipe then heard a man screaming for help and what appeared to be the sound of someone being hit (*id.*). The hotel staff then entered Room 114, found an injured Whitlow, and call the police (*id.*).

One of Whitlow and Jackson's sons, R.L.D.J., told police that his family had been living together at their home but that his father had moved to the Roadstar Inn a few days earlier (*id.*). R.L.D.J. told the police that during the early afternoon on the day of Whitlow's death, Jackson had become angry at Whitlow because he had destroyed some family pictures (2:2-3; A-Ap. 162-63). Jackson left the house for about fifteen to twenty minutes, R.L.D.J. said, and when she

returned she went directly to the shower (2:3; A-Ap. 163). Jackson told R.L.D.J. not to tell anyone that she had left the house that day (*id.*).

Jackson spoke to police officers later that day (*id.*). She told them that she was very upset with Whitlow because he had destroyed a box from the funeral of the aunt who had raised her (*id.*). She told a detective that before going to the hotel, she thought that the pain that Whitlow had caused her was not going to stop and that "it was going to be him or me" (*id.*). She acknowledged that she brought a knife with her when she went to the hotel "to confront him about what had been going on in the relationship" (*id.*).

Jackson said that after Whitlow let her into his hotel room, they began arguing (*id.*). She described to the police how she stabbed Whitlow multiple times (2:3-4; A-Ap. 163-64). She then drove home, where she put the clothes and the knife in a garbage can (2:4; A-Ap. 164).

During their investigation, the police obtained multiple search warrants. As relevant to this appeal, one warrant, issued on February 21, 2012, authorized the search of Jackson's residence, including the garage, for evidence related to the homicide (3:1-2; A-Ap. 155-56). A second warrant, also issued on February 21, 2012, authorized a search of Jackson's person, clothing, personal effects, and the collection of biological samples (6:1-2). Three warrants, issued on February 24, March 2, and April 5, 2012, authorized the police to take photographs of Jackson's body using an alternative light source to identify bruising and other injuries (12:1-2; 21:1-2; 29:1-2). Another warrant, issued on March 7, 2012, authorized the

police to search Jackson's home for a jacket with the words "NEW YORK" in white or light colored letters (24:1).

The suppression motion. Jackson filed a motion to suppress all of the statements that she made to the police as well as any evidence derived from those statements (45:1; 46:1-2). Jackson asserted that she had not received the necessary *Miranda*[1] warnings and that her statements were involuntary (*id.*). She also argued that physical evidence obtained from her person and her home should be suppressed because the probable cause portion of the search warrant affidavits included information obtained from her illegal interrogation (49:23).

The court conducted a series of hearings on the suppression motion (77:1-249; 78:1-210; 80:1-205; 83:1-239; 85:1-97). Several police officers testified about the investigation, including the interrogation of Jackson and the search of her home (77:18-248; 78:7-204; 80:5-96, 119-56; 83:37-236; 85:4-97). Jackson called a toxicologist and a psychologist who testified about Jackson's state of mind while she was being interviewed by the police, including the effects of medications she was taking (80:98-118, 159-78). The court also viewed a video recording of Jackson's interrogation at the police station and reviewed a transcript of the questioning (64:Exhibits 1, 2; 87:4, 18; A-Ap. 105, 119).

In an oral decision rendered on June 16, 2014, the circuit court found that the interrogation began at 6:24 p.m. and that Jackson was in

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

custody for *Miranda* purposes at 7:25 p.m. (87:18, 22; A-Ap. 119, 123). The court suppressed as a violation of *Miranda* the statements Jackson made between 7:25 p.m. and the time the police gave her the *Miranda* warnings, which was at 12:39 a.m. (87:36-38; A-Ap. 137-39). Based on *Missouri v. Seibert*, 542 U.S. 600 (2004), and other cases, the court also suppressed the statements Jackson made after she was given the *Miranda* warnings (87:39-40; A-Ap. 140-41). The court further found that Jackson's statements were involuntary under the totality of the circumstances (87:40-33; A-Ap. 141-44).

The court also suppressed the physical evidence found in Jackson's home during the search conducted pursuant to the first warrant (87:45-49; A-Ap. 146-50). It held that with Jackson's improperly obtained statements excised from the search warrant affidavit, the remaining facts failed to establish probable cause to support a search warrant for the home (87:45-46; A-Ap. 146-47). The court additionally ruled that even if there was probable cause for the warrant, the evidence found during the search would be suppressed because the police brought Jackson to the house after the unlawful interrogation while the search was in progress and she told them where the items of evidentiary value were located (87:46-48; A-Ap. 147-49). The court rejected the State's argument that the evidence was admissible under the inevitable discovery doctrine (87:47-49; A-Ap. 148-50).

The court denied the suppression motion with respect to evidence found at the hotel, evidence obtained pursuant to the warrants authorizing a search of Jackson's person,

surveillance video from Walmart showing Jackson buying a knife, and a jacket that was found during the second search of her home (87:43-44, 49-50; A-Ap. 144-45, 150-51).

In a written order entered on September 8, 2014, the circuit court "grant[ed] in part and denie[d] in part the defendant's motion to suppress" "for the reasons stated on the record at the June 16, 2014, hearing" (62:1; A-Ap. 101). The State filed a notice of appeal on September 22, 2014 (72:1).

ARGUMENT

For purposes of this appeal, the State does not take issue with the portion of the circuit court's order that suppressed Jackson's statements to the police. The only portion of the court's order that the State challenges on appeal is the suppression of the physical evidence obtained during the first search of Jackson's home.

The trial court gave two reasons for suppressing that evidence. First, it held that with Jackson's improperly obtained statements excised from the search warrant affidavit, the remaining facts failed to establish probable cause to support a search warrant for the home (87:45-46; A-Ap. 146-47). Second, it ruled that even if there was probable cause for the warrant, the evidence found during the search would be suppressed because the police brought Jackson to the house after the unlawful interrogation and she told them where those items were located (87:46-48; A-Ap. 147-49).

The State believes that the circuit court's analysis and conclusions on both points are erroneous. Even without Jackson's statements, the untainted evidence presented in the search warrant affidavit readily established probable cause to search Jackson's home. And, assuming that the police erred when they brought Jackson to her home and she told them where to find the items they were searching for, the evidence is admissible under the inevitable discovery doctrine because the officers were in the process of conducting a thorough search of the house pursuant to the search warrant and would have found those items regardless of whether Jackson had pointed them out. Accordingly, the court should reverse that part of the circuit court's order that suppressed the physical evidence found during the first search of Jackson's home.

I. THE UNTAINTED PORTIONS OF THE SEARCH WARRANT AFFIDAVIT ESTABLISHED PROBABLE CAUSE TO SEARCH JACKSON'S HOME.

A. Applicable legal principles and standard of review.

An appellate court reviews a motion to suppress applying a two-step standard of review. *State v. Sloan*, 2007 WI App 146, ¶7, 303 Wis. 2d 438, 736 N.W.2d 189. "First, [the court of appeals] review[s] the [trial] court's findings of historical fact, and will uphold them unless they are clearly erroneous. Second, [the appellate court] review[s] the application of constitutional principles to those facts *de novo*." *Id.* (citations omitted).

In reviewing whether probable cause exists to issue a search warrant, the court gives great deference to the warrant-issuing magistrate. *Id*., ¶8. The court is "confined to the record as it existed before the magistrate and must consider whether he or she was 'apprised of sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that they will be found in the place to be searched.'" *Id.* (quoted source omitted). The magistrate's decision to issue a warrant will be upheld unless the facts before the magistrate at the time the warrant was issued were "clearly insufficient to support a finding of probable cause." *Id.* (quoted source omitted).

Probable cause exists when a magistrate is apprised of sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime and that the objects sought will be found in the place to be searched. *Id*., ¶23. "The quantum of evidence necessary to support a determination of probable cause for a search warrant is less than that required for conviction or for bindover following a preliminary examination. . . . The affidavit is to be read in a commonsense, not a hypertechnical, fashion." *Id.* (quoted source omitted). Probable cause is "more than a possibility, but not a probability, that the conclusion is more likely than not." *Id*. (quoted source omitted).

When an appellate court reviews an affidavit that the circuit court found to contain both tainted and untainted evidence, the warrant is valid "where there is sufficient untainted evidence presented in the warrant affidavit to establish probable cause." *State v. St. Martin*, 2011 WI 44, ¶17, 334 Wis. 2d 290, 800 N.W.2d 858

(quoted source omitted). Thus, "where a search warrant was issued based on both tainted and untainted evidence," an appellate court should "independently determine" whether the untainted evidence was sufficient to support a finding of probable cause to issue the search warrant. *Id*. (quoted source omitted).

B. The untainted evidence in the search warrant affidavit established probable cause.

With Jackson's suppressed statements to the police omitted, the affidavit in support of the search warrant for Jackson's house contains the following untainted evidence:

1. At 1:25 p.m. on February 21, 2012, officers responding to a medical call at the Roadstar Inn encountered the body of Derrick Whitlow in Room 114. Whitlow had suffered significant cut wounds to his neck and throat, upper chest, and right hand (4:2; A-Ap. 158).

2. There was substantial blood and blood splatter on the wall, bed and floor of the hotel room. Based on the amount of blood, the officers believed, based on their experience and training, that anyone who had been in the room with Whitlow when he was injured likely would have a significant amount of blood or blood splatter on their clothing or shoes (*id*.).

3. There was an eight-inch Winchester brand knife sheath next to Whitlow's body (*id*.).

4. A Roadstar employee who worked at the front desk, Dave Hoehne, reported that Whitlow had been staying in Room 114 since February 17, 2012, with his ten-year-old son. According to Hoehne, Whitlow had been having problems with his wife (*id.*).

5. Another Roadstar employee, Angelica Felipe, reported that at about 1:00 to 1:30 pm on February 21, 2012, she was doing the laundry in Room 111 when she saw someone knock on the door of Room 114. That person, who was wearing a gray hooded sweatshirt with the hood pulled over the head, was let into Room 114 by someone in the room. Felipe then heard a man screaming for help and she what thought was someone getting hit. She went to the manager to get help and she briefly saw the person in the hooded sweatshirt leaving. Hotel staff then entered Room 114, discovered an injured man, and called the police (4:2-3; A-Ap. 158-59).

6. A man who was staying in Room 115, Eugene Brown, said that he was in his room when he heard a woman's voice yelling. Brown thought that it was the cleaning employee so he went to see what was happening. Brown realized it was someone else because he went down the hall and saw the cleaning employee. Brown was just past Room 114 when he heard a loud yell and then heard a man yelling "help me, help me" (4:3; A-Ap. 159).

7. Eleven-year-old R.L.D.J. told police that his mother is Mastella Jackson and his father is Derrick Whitlow. He said his family had been living together at their home but his father left to stay at the Roadstar Inn a few days earlier. R.L.D.J. said that when his dad went to stay at

the hotel a few days earlier, his brother went with him to the hotel to help him because he had a broken leg. R.L.D.J. told police that his dad had left because he and his mom had been having issues that included "adult conversations" that became loud (*id.*).

8. R.L.D.J. said that on February 21, 2012, he stayed home from school and was with his mother. Late in the morning, he rode with her to a medical appointment. However, when they arrived at the medical facility, his mother said she had sore feet and was not going in. R.L.J.D. and Jackson then went back to their house (*id.*).

9. R.L.D.J. said that in the early afternoon, his mother became angry because his father had destroyed some family keepsakes. R.L.D.J. told police that his mother left the house and was gone for about fifteen to twenty minutes (*id.*).

10. R.L.D.J. told police that when his mother returned, he heard the sound of a zipper and then heard her go directly into the bathroom and take a shower. When she got out of the shower, she was in different clothing than what she had been wearing earlier in the day. R.L.D.J. said that after she got out of the shower, his mother told him not to tell anyone that she had left the house that day (*id.*).

11. A detective knew based upon his previous contacts with Mastella Jackson and Derrick Whitlow the previous month that they were residing at 2505 W. Fourth Street in Appleton (*id.*).

The circuit court gave the following explanation for why it believed that the search warrant affidavit did not establish probable cause without Jackson's statements.

> We then have the issue of what went on at the house, and given my rulings, that paragraph that I read about what Ms. Jackson had indicated to officers which was used in the affidavits would need to be struck from the affidavits. On Exhibit No. 6 that would include the last two lines of page 3 of the affidavit and the top eight lines of page 4, and the legal question then would be is does the State still have probable cause to get into that home and to conduct or to get the search warrant approved without Ms. Jackson's comments.[2]
>
> What I think is interesting about those affidavits, and I read these as I expect the attorneys have, that there's a lot of information in here; but there is no information in there about the incident that happened in January of 2012, there is no identification of Ms. Jackson at the hotel. It's just a person was there, and then there's the comments from [R.L.D.J.] which I'm going to allow to be used as I indicated earlier, that his mother left for 15 to 20 minutes, and when she returned, he heard a zipper sound and then heard his mother go directly into the bathroom and took a shower. Is that, all of that sufficient to get probable cause? I'm going to conclude today that it does not and that there would not be probable cause simply on the fact that an individual leaves for 15 to 20 minutes and may change clothes, that that just is not sufficient.

---

[2]The exhibit to which the court referred, Exhibit 6, (67:Exh. 6) includes a copy of the affidavit in support of the search warrant for Jackson's home, the original of which is in the record (4:1-4; A-Ap. 157-60).

> The key part of that affidavit is in my opinion and what gets to the probable cause is the fact of the admission, she went there with the knife and then went back home and she used her vehicle; but [R.L.D.J.] at that point did not indicate that his mom went to the hotel, that he knew his mom went to the hotel, that he saw anything, there was any information of anything criminal related. And so I'm going to find that that warrant as it relates to the home would not have been authorized as is, lacks probable cause without the information from Ms. Jackson.

(87:45-46; A-Ap. 146-47.)

The State respectfully disagrees with the circuit court's analysis. The court's discussion omits a number of untainted facts in the affidavit that, contrary to the court's analysis, do establish probable cause to believe that evidence related to the homicide would be found in Jackson's home.

With respect to whether Jackson was involved in the incident at the hotel, the circuit court was correct that no one identified Jackson as that person. However, a hotel guest heard a female voice yelling and then heard a man yelling "help me, help me" (4:3; A-Ap. 159). That evidence suggests that the person who killed Whitlow was a woman. One of the hotel employees told police that Whitlow was having problems with his wife (4:2; A-Ap. 158), which is suggestive, albeit only slightly, that Jackson was that woman.

More significant is what R.L.D.J. told police. He did not merely say, as the trial court recounted, that Jackson had left the house for fifteen to twenty minutes and changed her clothing when she returned. He also said that Whitlow had moved out of their home several days

earlier because Whitlow and Jackson had been arguing – in R.L.D.J.'s word, that they "had been having issues that included 'adult conversations' that became loud" (4:3; A-Ap. 159). According to R.L.D.J., in the early afternoon of the day in question, Jackson became angry at Whitlow because Whitlow had destroyed some of her family keepsakes. R.L.D.J. said that Jackson left the house and was gone for about fifteen to twenty minutes (*id.*). When she returned, R.L.D.J. said, she immediately took a shower and changed her clothes (*id.*). And, he said, she told him not to tell anyone that she had left the house that day (*id.*).

The fact that: 1) Jackson was angry at Whitlow when she left the house; 2) R.L.D.J.'s statement that Jackson left the house in the early afternoon is consistent with the information that the incident at the hotel occurred around 1:00 p.m.; 3) Jackson immediately showered and changed her clothing when she returned home; 4) Jackson told R.L.D.J. not to tell anyone that she had left the house that day; 5) that there appeared, based on the sound of her voice, to have been a woman in Whitlow's room when he was attacked; and 6) the bloody nature of the crime made it probable that the perpetrator got blood on her clothing, provide an abundant basis for concluding that there was a "fair probability" that Jackson was the perpetrator and that a search of her home would uncover evidence of wrongdoing. *See St. Martin*, 334 Wis. 2d 290, ¶16. This court should conclude, therefore, that the untainted evidence in the search warrant affidavit established probable cause to search Jackson's home.

II. UNDER THE INEVITABLE DISCOVERY DOCTRINE, THE ITEMS FOUND IN JACKSON'S HOME SHOULD NOT BE SUPPRESSED.

After obtaining a search warrant, the police began to search Jackson's home around 12:50 a.m. (83:87).[3] They were still conducting the search about an hour and twenty-five minutes later when a detective brought Jackson to the house (83:95-96). That detective, apparently based on information from Jackson, directed the searchers to a garbage can that the searchers had not yet examined (83:97). The police found a duffel bag in that garbage can that contained a Winchester knife, bloody shoes, and bloody clothing (5:2-4; 83:99).

For purposes of this brief, the State will assume, based on the circuit court's finding that Jackson's statements to the police were obtained in violation of *Miranda* and were involuntary, that the police improperly relied on information obtained from Jackson to locate those items. For the reasons that follow, however, those items are admissible under the inevitable discovery doctrine and should not have been suppressed.

A. Applicable legal principles and standard of review.

The inevitable discovery doctrine provides that "evidence obtained during a search which is

[3]The warrant authorized a search of the residence and the attached garage (3:1; A-Ap. 155).

tainted by some illegal act may be admissible if the tainted evidence would have been inevitably discovered by lawful means." *State v. Lopez,* 207 Wis. 2d 413, 427, 559 N.W.2d 264 (Ct. App. 1996). To establish that the evidence would have been inevitably discovered, the State must demonstrate by the preponderance of the evidence that: 1) a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct, 2) that the leads making the discovery inevitable were possessed by the government at the time of the misconduct, and 3) that prior to the unlawful search the government was also actively pursuing some alternative line of investigation. *Id.* at 427-28; *State v. Avery*, 2011 WI App 124, ¶29, 337 Wis. 2d 351, 804 N.W.2d 216.

Because the inevitable discovery doctrine is an exception to the exclusionary rule protecting Fourth Amendment interests, its application presents a constitutional question that the court of appeals review de novo. *See Avery*, 337 Wis. 2d 351, ¶29.

B. The evidence found in Jackson's garage is admissible under the inevitable discovery doctrine.

In its oral decision, the trial court explained why it did not believe the inevitable discovery doctrine applied in this case.

> The test really is a four-prong test that the State would need to set forth. As Avery describes, a reasonable probability that the evidence in question would have been discovered by lawful means but for the police

misconduct; that the leads making the discovery inevitable were possessed by the government at the time of the misconduct; that prior to the unlawful search, the government also was actively pursuing some alternate line of investigation.

I'm going to conclude that given the inevitable discovery rule and the limitations in the state that the State has not satisfied by the preponderance of the evidence that the tainted fruits inevitably would have been discovered. The record is clear that they were in the home for a long period of time up to, to an hour, an hour and a half, that they were in the garage, several officers for 15 or 20 minutes, that they did not find those items. And I don't think police officers violating somebody's rights and bringing them to the scene either to save time to be efficient, to do anything other than comply with the constitution is a good way of doing business plus they shouldn't have been in the house based upon my finding that they didn't have probable cause; but even if they had probable cuase, this wasn't the warrant that found it. It was Ms. Jackson's coming back and pointing it out.

I've read and reread these inevitable discovery cases, and in a situation like this where there's not some risk that somebody is going to be killed or injured or there's a body that needs to be found, but when officers are simply looking for evidence of the crime, it's not good policy to award them or provide them the benefit of the doubt when they violate somebody's constitutional rights for over six to seven hours by simply saying, well, we would have gotten it anyway through a back door. It's not going to be a deterrent, it's not going to encourage good police work, it's not going to encourage officers to follow the constitution and do what they're supposed to do, and it's simply going

> to lead to in my opinion the type of police work that was conducted in this case.

(87:47-49; A-Ap. 148-50.)

Although the circuit court began its explanation with a correct recitation of the test set forth in *Avery* (though it erroneously described it as a four-prong rather than a three-prong test), the court did not properly apply that analysis. The court concluded that "the State has not satisfied by the preponderance of the evidence that the tainted fruits inevitably would have been discovered" (87:47; A-Ap. 148). It is unclear whether the court was referring to the first prong of the test or whether that was its ultimate determination under the inevitable discovery doctrine. The court's explanation for that conclusion was that "[t]he record is clear that they were in the home for a long period of time up to, to an hour, an hour and a half, that they were in the garage, several officers for 15 or 20 minutes, that they did not find those items" (87:47-48; A-Ap. 148-49). But the court did not find that the search would not have continued had the police not received the tainted information from Jackson about where to look. And, as discussed below, the record unequivocally establishes that the police were conducting a thorough room-by-room, container-by-container search of the house that would eventually have led to the discovery of the knife, shoes, and clothing.

The circuit court did not discuss the second and third prongs of the inevitable discovery doctrine. Instead, it discussed a fact that is not relevant to the doctrine – that there was no risk that someone was going to be killed or injured or that there was a body that needed to be found – and opined that it is not good policy to reward

police who have violated someone's constitutional rights. The problem with the latter observation is that the inevitable discovery doctrine comes in to play only when there has been a constitutional violation, so the presence of a constitutional violation cannot be a basis for refusing to apply the doctrine.

This court reviews de novo whether the inevitable discovery doctrine exception to the exclusionary rule applies in this case. *See Avery*, 337 Wis. 2d 351, ¶29. For the following reasons, the court should decide that it does.

1. There is a reasonable probability that the evidence would have been discovered by lawful means.

The first prong of the inquiry requires the State to show that there is a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct. *See Lopez*, 207 Wis. 2d at 427-28. The record in this case shows that the State has met that requirement.

The police were in the process of lawfully searching Jackson's home – they had a warrant – when a detective gave the searchers information obtained from Jackson about where specifically they should look to find the knife, bloody clothing, and bloody shoes. At least six or seven officers were involved in the search (83:83). They divided the house into sections, with different groups of searchers responsible for searching certain areas (*id.*). When the search began, one group searched

the basement, while the other group searched the upstairs portion of the house (83:85).

The search process was very thorough. For example, in one bedroom that had a large closet, there was a large number of very large garbage bags, and the officers conducted a time-consuming examination of each of those bags that entailed dumping out the contents and sifting through all of the items in each bag (83:83-85).

After receiving a call from Detective Brad Kuehl suggesting that they check a garbage can near the garage door, the officers who had been searching the basement searched the two garbage cans that were closest to the garage door, but found nothing (83:91-92). Those officers then resumed searching the basement (83:91-92).

Detective Scott Callaway testified that the officers planned to conduct an "[e]xtremely thorough" search of the house and garage (83:92). That search would have entailed methodically dumping out garbage bags and going through boxes, drawers, and kitchen and bathroom cabinets (83:92-93). Detective Callaway testified that he told the other officers that it was going to take a long time to search the garage because of all of the bins and boxes there (83:94).

According to Detective Callaway, when Detective Kuehl arrived at the house with Jackson, his group had either just finished or were about to finish searching the basement and the other group was still searching the upstairs (83:96). The only search of the garage to that point was the earlier search of the two garbage cans near the garage door (83:96-97).

Detective Michael Renkas testified that because this was a homicide investigation, "[i]t was a very serious matter, so we were going to be very thorough. We were going to search everywhere and anywhere that we could search looking for relevant items that could be related to the incident and searching anywhere that the search warrant would allow us to search" (83:211).

Detective Renkas testified that he and three other officers began their search in the master bedroom (83:211). He also searched a closet area in the basement that contained several garbage bags and that they searched each of those bags (83:212).

While he was searching the basement, Renkas testified, the searchers received the information that a knife and clothing would be found in a garbage container near the garage door (83:212). After participating in the unsuccessful search of that garbage can and of a garbage bin outside the house, he resumed searching the basement (83:212-13). He did that "to keep everything systematic and as thorough as possible to make sure that we were doing a complete search of the residence" (83:213).

Detective Renkas testified that it was the searchers' plan to search other areas of the garage because "[t]he search of the garage would have been just starting" as a result of the earlier diversion to search the two garbage containers (*id.*). Before Detective Kuehl arrived at the house, Renkas testified, there had been no search of the garage other than those two containers (83:215).

Another of the searchers, Officer Russell Blahnik, testified that he also was involved in the

search of the master bedroom (83:192). He testified that in the hour and a half he had been searching before Detective Kuehl arrived at the house, he had not completed searching the bedroom (83:192). Blahnik testified that had they not received the information from Detective Kuehl, "at some point we were going to search the garage" because the warrant authorized a search of the entire residence (83:182). According to Blahnik, it was important to conduct the search "anywhere and everywhere" in the areas he was searching (83:200).

The officers' testimony demonstrates that they intended to conduct a thorough and methodical search of the house and the garage that would have entailed examining every container or compartment that might have contained evidence of the crime. Had Detective Kuehl not arrived at the home and given the searchers the information provided by Jackson about which garbage can to search, there is a reasonable probability, at the very least, that the lawful search of the premises pursuant to the search warrant would have continued and that the investigators would have searched that garbage can and discovered the knife and the bloody shoes and clothing.

2. The leads making discovery inevitable were possessed by the government.

The second requirement of the inevitable discovery doctrine is that "the leads making the discovery inevitable were possessed by the government at the time of the misconduct." *Lopez,*

207 Wis. 2d at 428. In this case, at the time of the misconduct – that is, at the time Detective Kuehl brought Jackson to the house and relayed to the searchers the information she provided about the location of the items – the police had the leads making the discovery inevitable.

In *Avery*, the court held that the second inevitable discovery requirement was met because the police had independently developed "evidence pointing to Avery's involvement" in the crime. *See Avery*, 337 Wis. 2d 351,¶31 ("Armed with evidence pointing to Avery's involvement, we are satisfied that the police would have continued the search of Avery's trailer until all areas had been inspected—including that area in between Avery's bed and bookshelf where the key to Halbach's vehicle was discovered. The second requirement is met."). The same is true here.

As discussed in the first section of this brief, the police already had the information that supported the issuance of the search warrant. They knew that there likely was a woman in Whitlow's room when he was attacked. They knew that the attacker likely got blood on her shoes and clothing. They knew that Jackson was angry at Whitlow when she left the house that afternoon. They knew that Jackson immediately showered and changed her clothing when she returned home. And they knew that Jackson had told her son not to tell anyone that she had left the house that day. *See supra*, pp. 10-12. Thus, the police possessed the leads that made discovery inevitable at the time they received the tainted information from Jackson about where to look for the evidence.

3. The government was actively pursuing an alternate line of investigation.

The third requirement of the inevitable discovery doctrine requires the State to demonstrate that prior to the searching of the garbage can based on Jackson's information, it was actively pursuing an alternate line of investigation. *See Lopez,* 207 Wis. 2d at 428. That requirement is satisfied when the police are conducting a search of the premises pursuant to a lawfully issued warrant. *See State v. Pickens*, 2010 WI App 5, ¶49, 323 Wis. 2d 226, 779 N.W.2d 1; *Avery*, 337 Wis. 2d 351, ¶33. That is what the police were doing in this case when Detective Kuehl relayed the information provided by Jackson about where she had put the evidence.

This court's decision in *Lopez* supports the conclusion that the evidence in this case is admissible under the inevitable discovery doctrine. In *Lopez*, police executing a search warrant of Lopez's residence found marijuana in a locked freezer. *See Lopez*, 207 Wis. 2d at 424, 427. Lopez argued that the search warrant was not supported by probable cause and that even if it were, the discovery of marijuana was tainted by his non-*Mirandized* statement telling a police officer where to find the key to the freezer. *Id*. at 424-427.

After concluding that the search warrant was valid, *see id*. at 425-227, the court of appeals held that the evidence was admissible under the inevitable discovery doctrine notwithstanding the

tainted information the police received while conducting the search. The court explained:

> Even without Lopez's statement regarding the key, the freezer would have been searched and the evidence therein seized. Prior to going upstairs to ask Lopez about the key, [Officer] Gibbs had already located and decided to search the freezer as part of the search of the residence. In addition, Gibbs was actively pursuing his decision to search the freezer when he asked Lopez about the key. If he had not found the key, Gibbs testified that he would have pried the freezer open. Inevitably the contents, if any, of the freezer would have been discovered. Accordingly, we conclude that the trial court correctly denied Lopez's motion to suppress based on the doctrine of inevitable discovery.

Id. at 428.

The same rationale applies here. As in *Lopez*, the police were conducting the search of the home pursuant to a valid search warrant. As in *Lopez*, the officers' discovery of the evidence was facilitated by tainted statements by the defendants. And, as in *Lopez*, the officers would have found the evidence even without the tainted statements – in *Lopez* because the officer would have pried open the freezer, and in this case because the officers were conducting a thorough and methodical search of the home and its contents that would eventually have led them to search the garbage can that held the knife, clothes, and shoes. Accordingly, the court should conclude that the evidence found in Jackson's home is admissible under the inevitable discovery doctrine.

CONCLUSION

For the reasons stated above, the court should reverse that part of the circuit court's order that suppressed the physical evidence found during the search of Jackson's home.

Dated this 2nd day of December 2014.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

JEFFREY J. KASSEL
Assistant Attorney General
State Bar #1009170

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 266-9594 (Fax)
kasseljj@doj.state.wi.us

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 6,281 words.

_____
Jeffrey J. Kassel
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 2nd day of December, 2014.

_____
Jeffrey J. Kassel
Assistant Attorney General

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2014AP2238-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MASTELLA L. JACKSON,

Defendant-Respondent.

ON APPEAL FROM AN ORDER SUPPRESSING EVIDENCE ENTERED IN THE OUTAGAMIE COUNTY CIRCUIT COURT, THE HONORABLE MARK J. MCGINNIS, PRESIDING

APPENDIX OF PLAINTIFF-APPELLANT

J.B. VAN HOLLEN
Attorney General

JEFFREY J. KASSEL
Assistant Attorney General
State Bar #1009170

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 266-9594 (Fax)
kasseljj@doj.state.wi.us

INDEX TO APPENDIX

Page

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record

included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

_____
Jeffrey J. Kassel
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(13)

I hereby certify that I have submitted an electronic copy of this appendix that complies with the requirements of Wis. Stat. § (Rule) 809.19(13).

I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

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

Dated this 2nd day of December, 2014.

_____
Jeffrey J. Kassel
Assistant Attorney General