STATE OF WISCONSIN

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

DISTRICT 2

Appeal No. 17AP 680
Waukesha County Case No. 15CF70

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DARRIN L. MALONE,

Defendant-Appellant.

AN APPEAL FROM THE JUDGMENT OF CONVICTION AND DENIAL OF THE DEFENDANT-APPELLANT'S MOTION FOR POST-CONVICTION RELIEF

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Malone is not requesting oral argument or publication. The issues presented by this appeal are based on well-settled legal principles.

STATEMENT OF THE ISSUES

I. Was evidence of the Brookfield 7-11 robbery admissible as other acts evidence in Mr. Malone's felony murder trial related to the events that occurred at the Waukesha robbery/homicide?

Trial court answered: Yes

II. Did the State's omission of exculpatory footage from a video exhibit, and false testimony that no activity was omitted, require a new trial in the interest of justice?

Trial court answered: No

III. Did Attorney Bihler's failure to use the exculpatory footage at trial or the other acts motion hearing require a finding that he provided ineffective assistance?

Trial court answered: No

IV. Did the State's omission of the exculpatory footage and false testimony that no activity was omitted

result in a denial of Mr. Malone’s right to a fair trial?

Trial court answered: No

STATEMENT OF THE CASE

On January 10, 2015 two suspects robbed the 7-11 convenience store located at 19600 West Bluemound Road in the Town of Brookfield (7:2). Both suspects were alleged to be armed (7:2-3). A shot was fired toward the clerk in the store and the suspects fled on foot with cash and lottery tickets (7:3). The clerk pursued the robbers and more shots were fired, none of which struck anyone (7:3).

On January 13, 2015 two suspects robbed the Citgo station located at 1445 White Rock Avenue in Waukesha (7:3). During the robbery, a scuffle ensued between one of the robbers and the clerk, Saeed Sharwani (92:59). Mr. Sharwani was shot and killed by the suspect (92:59).

Officers serving an unrelated search warrant at 5861 West Washington Avenue #2 in West Allis discovered evidence they believed to be related to the murder of Mr. Sharwani (7:4). That evidence included a 9-mm Hi Point pistol and a mask similar to those worn by the robbers (7:4). Six individuals were arrested and because of their statements and additional police investigation Kenneth Thomas and Jerica Cotton were identified as the shooter and getaway driver, respectively, in the Citgo robbery (7:5-8). Mr. Thomas and Ms. Cotton eventually admitted their roles in

both robberies, although both repeatedly lied to law enforcement about the details (7:5-10).

Mr. Malone was alleged to be connected to the apartment across the hall from Mr. Thomas (7:5-8). A DOC offender sheet with Mr. Malone's name and photo was found in that apartment (7:5). Law enforcement interviews of Mr. Thomas, Ms. Cotton, and the other residents of the apartments located at 5861 West Washington in West Allis resulted in their piecing together a narrative of what had allegedly occurred on the night of the Citgo robbery.

Ms. Cotton and Mr. Thomas told law enforcement Mr. Malone was the second suspect at both robberies, although they did not know his name and described him as a big bald black man (7:6-10). Based on the DOC offender summary with Mr. Malone's name and a photo of a bald black man, law enforcement suspected Mr. Malone of being the second robber at both the Brookfield and Waukesha robberies. A warrant was issued for his arrest and he was ultimately apprehended and charged with felony murder for allegedly participating in the robbery that caused the death of Mr. Sharwani.

On September 25, 2015 the State filed a motion to admit "other acts" evidence and a brief in support of the motion (29, 30). The State sought to admit evidence of the January 10, 2015 robbery at the 7-11 store in Brookfield at

Mr. Malone's trial. The State alleged the Brookfield robbery was similar to the robbery at the Waukesha Citgo station that formed the basis for Mr. Malone's felony murder charge (*Id.*). The State claimed the evidence was relevant to identity, intent and plan (*Id.*).

A motion hearing was held on December 10, 2015 (88). The State summarized the evidence it sought to introduce, listed the similarities between the crimes, and argued that the evidence was admissible (88:3-9). Attorney Bihler argued the Brookfield robbery evidence did not identify Mr. Malone as the perpetrator at the Waukesha Citgo, and the only evidence of his involvement was the testimony of co-actors who were testifying in exchange for deals (88:9-11). The court found the evidence was being offered for a proper purpose, it was relevant to identifying Mr. Malone, and any undue prejudice could be dealt with through a curative jury instruction (88:13-24). The motion was granted (88:24).

Mr. Malone's case proceeded to trial on February 15, 2016. Ms. Cotton testified that she drove Mr. Malone and Mr. Thomas to the scenes of both the Brookfield robbery on January 10 and the Waukesha robbery on January 13 (91:195-200). Mr. Thomas testified that he, Ms. Cotton, and Mr. Malone were involved in both robberies (92:38-75).

Detective Feyen of the City of Waukesha Police

Department also testified. He detailed the procedure used to obtain and duplicate video evidence from the Waukesha and Brookfield robberies, as well as surveillance video from the apartment building the defendants allegedly traveled from and to in order to commit the robberies (91:63-86). As part of that process, he compiled what he referred to as montage movies in which the various surveillance camera footage was combined into one continuous film for each robbery (91:71, 82). Portions of the montage from the robbery and shooting in Waukesha were played for the jury with Det. Feyen identifying what was being shown as it occurred (91:91-93). The montage video from the Brookfield 7-11 was played in a similar fashion, but that video was played in its entirety (*Id.* at 102-08).

The State provided the defense with copies of audio and video recordings related to the case in response to the defense's discovery demand (82:6-7). One of those discs contained the full surveillance footage from the Brookfield robbery (82:7). The suspect alleged to be Mr. Malone exposes his hand in one portion of the video (82:11). The hand is white and Mr. Malone is black (82:11). The visible portion of the suspect's face appears to have a skin tone matching that of the exposed hand (68:17-20). Further, Mr. Malone has tattoos on his hands and the suspect in the

video does not. Detective Feyen omitted the portion of the video showing the second suspect's white hand from the montage he created that was used at trial as Exhibit 11 (82:13-14). Attorney Bihler did not object to the edited footage being shown and did not himself show the omitted portion to the jury (82:13, 14). The video clip showing the second robber's hand was never played for the jury.

Mr. Malone was convicted after a four-day trial. On April 21, 2016 he was sentenced to twenty-five years of initial confinement and ten years of extended supervision, consecutive to any other sentence (86:43-44). He filed a timely notice of intent to pursue post-conviction relief on April 25, 2016 (50). Undersigned counsel filed a timely motion for post-conviction relief on January 23, 2017 (68). The motion sought a new trial on four grounds:

1. Evidence and testimony relating to the robbery of the Brookfield 7-11 should not have been admitted as "other acts" evidence.

2. In the interests of justice on the grounds that the real controversy was not fully tried and a miscarriage of justice occurred.

3. Attorney Bihler provided ineffective assistance by failing to introduce video evidence showing that the second suspect in the Brookfield 7-11 robbery was white. This failure occurred at both the "other acts" motion hearing and at Mr. Malone's jury trial. He also failed to object to the State's use of the prejudicially edited video at trial.

4. The State's conduct in editing exculpatory footage

> out of Exhibit 11 and its false assertion that no activity was omitted from the video violated Mr. Malone's right to due process.

(68:3-4).

The court ordered a scheduling conference to take place on February 3, 2017. The State argued all of Mr. Malone's arguments had to be raised at the court of appeals except for the ineffective assistance of counsel claim. The court set the case for a *Machner* hearing on the ineffective assistance of counsel claim and allowed the parties to submit written arguments as to whether the other claims could be heard by the trial court (*See* 71, 74).

The *Machner* hearing took place on March 29, 2017 (82). Doug Bihler, Mr. Malone's trial attorney, testified he believed he had a copy of the video footage from the Brookfield robbery when the State filed its other acts motion, and that he objected to the motion (82:7). He also believed he reviewed the video footage prior to the motion hearing (82:8). That footage had multiple camera angles and he watched every video on the disc (82:8-9).

Defense counsel had the video disc from the Brookfield robbery marked as Defense Exhibit 1 and it was admitted into evidence (82:10, 38). A video clip identified as 20150111_0001_0317_102 was then played from that disc (82:10). The clip showed the two suspects from the

Brookfield robbery (82:10-11). Attorney Bihler acknowledged that one of the suspects, alleged to be Mr. Malone, revealed his bare hand in the clip, and that the hand appeared to be white (82:11, 13-14). Mr. Malone is black.

Attorney Bihler further testified that there was no reason why he did not use that clip at the motion hearing (82:11). One of his arguments against the other acts motion was that the evidence from the Brookfield robbery did not identify Mr. Malone as one of the perpetrators (88:9-11, 82:11). Attorney Bihler admitted that this clip would have supported his argument and that he had no strategic reason for not playing it (82:11-12).

Attorney Bihler continued to review the discovery materials between the motion hearing and Mr. Malone's jury trial, including the video footage (82:12). He testified that he believed he again reviewed the clip showing the robber alleged to be Mr. Malone revealing his bare hand after the motion hearing but before trial (82:12).

Both of Mr. Malone's co-defendants testified that he was the second suspect at both robberies (82:13, 91:195-200, 92:38-75). Mr. Thomas admitted to robbing both stores and shooting Mr. Sharwani (92:37, 67). Ms. Cotton admitted to being the getaway driver (91:199-200). Attorney Bihler acknowledged the video clip in question supported the

defense theory that Mr. Malone was not the second robber and undermined the codefendant testimony (82:13). He admitted he should have shown this clip at trial and had no reason for failing to do so (82:13).

Attorney Bihler did not object to the State's failure to include the exculpatory footage of the suspect's hand in Exhibit 11 (82:13-14). His explanation for failing to object was as follows:

> I didn't think there was any basis to object for – In hindsight, I don't know that there's a basis to object. And at the time I didn't think of it, objecting on that basis. And I have the right to bring forward any video in my part of the case or during cross examination, which you know, I could have done and obviously I didn't do. I did not show the segment that you're referring to.

(82:14). He went on to explain that showing the clip would have aided his theory that the second robber was white:

> I think it would have helped. I know there was a portion of the State video that showed the robber who we alleged to be white that showed his face that I believe in the cashier station. I remember spending some time reviewing that video and pausing it and cross examining a police officer who had investigated the case, a female officer. I don't remember her name. I think if I used the video that you were talking about, that would have aided my cross examination.

(82:14). He also confirmed that the clip showing the robber's bare hand was not included in the compilation video shown by the State at Mr. Malone's trial (82:15-16).

The State tried to show that the video was distorted

(82:17-18). The camera in question showed the glass entrance door and windows facing the gas pumps outside (82:22). Attorney Bihler acknowledged that it appeared bright in the video (82:18). However, when Attorney Opper asked him if the lighting appeared distorted, he said he did not know if it was distorted or if it was an accurate depiction of the store's artificial lighting (82:18).

On redirect, Attorney Bihler recalled there being a canopy above the gas pumps and that the video depicted the robbers fleeing the scene by running from the light under the canopy to the darkness (82:22-23). He could not say if the video was distorted but had no reason to doubt the accuracy of the lighting as depicted in the video (82:23).

The State tried to show that the robber's hand was actually gloved (82:18-19). Attorney Bihler disagreed and said it did not appear to be gloved to him (82:19). He acknowledged the robber's face was partially covered with "a scarf or something" but the exposed portion appeared Caucasian (82:19-20). Attorney Bihler cross-examined Det. Feyen at trial regarding the portion of the robber's face not covered by the scarf appearing Caucasian and admitted it was a key component of his defense (82:20-21). He also stated it would have helped his argument to show the clip of the hand because his defense was that Mr. Malone was not

the second robber (82:21).

On cross, Attorney Bihler admitted that there were cell phone records that suggested Mr. Malone was in Brookfield at the time of the robbery and that two accomplices testified that he was the second robber (82:21-22). On redirect, he testified that the cell phone records the State referred to were never actually connected to Mr. Malone (82:23). He confirmed he had objected at trial when the State referred to the phone as Mr. Malone's, and the objection was sustained (82:23; 91:246, 248-63). In fact, the court ordered the testimony struck and the exhibit redacted to remove Mr. Malone's name and instructed the jury regarding the change (91:263-65). Attorney Bihler testified the cell phone evidence pointed to the co-defendants, and it was the testimony of the co-defendants that was the primary evidence against Mr. Malone (82:23). He further testified that the clip showing the robber's hand undermined the co-defendant's testimony (82:23-24).

The State did not call any witnesses. The defense argued that Attorney Bihler admitted he should have used the clip and that the clip undermined the primary evidence against Mr. Malone (82:25). The clip also would have made Attorney Bihler's trial argument that the second robber was white far more effective (82:25-26). Mr. Malone alleged

Attorney Bihler was ineffective for failing to show the clip at the other acts motion hearing and at trial and Attorney Bihler admitted he should have done so (82:26).

Finally, Mr. Malone argued that the jury's request to view Exhibit #11 in its entirety during deliberations and to view it from close up showed that the jury was questioning the identity of the suspect (82:26-27). The defense argued that Attorney Bihler's failure to play the clip showing the robber's hand at the other acts hearing and at trial constituted deficient performance, and that Mr. Malone was prejudiced by having the other acts admitted and by being convicted in a case where the jury was clearly questioning the identity of the suspect (82:26-27).

The State argued that there was no deficient performance because Attorney Bihler objected to the use of the other acts evidence when the motion was filed, and the video was a "bleached-out version of the actual color of the surroundings that are depicted in the video" (82:27). The State claimed that it could not be stated "with certainty" that the second robber was white (82:27-28). According to Attorney Opper, there was also no deficient performance because Attorney Bihler raised the issue of the second robber's race at trial and effectively cross-examined the co-defendants and the detective who made the

video (82:27-28). The State argued that there was no prejudice for largely the same reasons, that Attorney Bihler argued at trial that the robber was white (82:29).

On rebuttal, Mr. Malone pointed out that Attorney Bihler did argue that the second suspect was white but his failure to show video proof of that to the jury was inexcusable, and that showing the video would be far more effective than simply arguing that the robber might have been white (82:29-30). The video showed not just the portion of skin around the robber's eyes and the bridge of his nose that was partially visible in the edited video shown by the State at trial, it also showed the robber's hand (*see* 68:17-20). Being able to show the jury that the robber's skin tone on his hand matched that of his face would have been far more effective than having the jury guess based off only a partially obscured face (82:29-30).

The trial court denied Mr. Malone's request for a new trial based on his argument that the other acts motion should not have been granted. The court held that a decision had already been made by the trial court and that it was now an issue for the court of appeals (82:31).

The court next addressed whether Mr. Malone was entitled to a new trial in the interests of justice because a miscarriage of justice occurred and the court would not

have admitted the other acts evidence had it seen the video clip (82:31-32). The court stated that the existence or nonexistence of the video clip would have had no impact on the decision to admit the other acts evidence (82:32).

Finally, the court held that Attorney Bihler's failure to utilize the video clip at either the other acts motion hearing or at Mr. Malone's trial was not deficient performance (82:34-36). This was because Attorney Bihler did attempt to show that the second robber was white at trial, and the court found that a reasonable juror could not conclude the robber was white based on the video (82:34-36). As a result, Mr. Malone was not prejudiced by Attorney Bihler's failure to use the clip or object to the State's editing of the video shown to the jury (82:36).

The court did not address Mr. Malone's request for a new trial on the ground that the State denied him his due process right to a fair trial by editing exculpatory footage out of the exhibit shown to the jury and then falsely testifying that nothing had been omitted. The motion was denied in all respects, Mr. Malone filed a timely notice of appeal, and this appeal follows.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN ADMITTING OTHER ACTS EVIDENCE

The State sought to admit evidence of the Brookfield 7-11 robbery at Mr. Malone's trial for the felony murder occurring at the Citgo Station in Waukesha (29). Other acts evidence is permitted under Wis. Stat. § 904.04(2)(a) when that evidence is offered for purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The State argued that evidence of the Brookfield 7-11 robbery was relevant to establish Mr. Malone's identity as the second suspect at the Waukesha Citgo robbery/homicide as well as to show intent and a common plan (88:7).

The court granted the State's motion to introduce the other acts, and evidence of the Brookfield robbery was used at Mr. Malone's trial. Mr. Malone argued in his post-conviction motion that the evidence should not have been admitted, and he made different arguments than his trial attorney had made (68:4-6). The court found that the issue had been decided and Mr. Malone's arguments should be addressed to the court of appeals (82:30-31).

Standard of Review

> The applicable standard for reviewing a circuit court's admission of other acts evidence is whether the court exercised appropriate discretion. An appellate court will sustain an evidentiary ruling if it finds that the circuit court examined the relevant facts; applied a proper standard of law; and using a demonstrative

> rational process, reached a conclusion that a reasonable judge could reach.

State v. Sullivan, 216 Wis.2d 768, 780-81, 576 N.W.2d 30 (1998) (internal citations omitted).

Findings of Fact

At the motion hearing the court found that this evidence was offered for proper purposes, those being identity, intent, and plan (88:15, 20). The court next evaluated whether the evidence related to a fact of consequence and whether it had probative value (88:15). The defense objection was that the proffered evidence did not identify Mr. Malone as the perpetrator of the Brookfield robbery (88:16). The court found that there were witnesses who could testify to the relative size of the suspects, and mentioned the similarities between the two incidents that were identified by the State as set forth below (88:17-21). The court found the evidence to be relevant to the identity of the suspect in the Waukesha robbery (88:21).

The final factor was whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice (88:16). The court found there was a danger of the jury relying on the evidence for improper purposes, but a curative jury instruction would address that issue (88:21-23).

Argument

Mr. Malone alleges the trial court erred in granting the State's motion to admit other acts evidence from the Brookfield 7-11 robbery. Other acts evidence is admissible to show identity if it has "such a concurrence of common features and so many points of similarity with the crime charged that it can reasonably be said that the other acts and the present act constitute the imprint of the defendant." *State v. Gray*, 225 Wis.2d 39, 51, 590 N.W.2d 918 (1998) (internal quotations omitted).

The State argued the evidence was admissible to establish identity because the two offenses had the following similarities:

1. The two offenses involved the same two co-defendants in the same roles;
2. The suspects wore gloves and concealed their faces;
3. The same 9-mm handgun was used and shots were fired in both offenses;
4. The suspects brought the gun and methods of disguise with them to the robberies;
5. The targets of the robberies were convenience stores or gas stations;
6. Both robberies occurred near closing time; and
7. Both robberies occurred in a small geographic area.

(30:2-3, 88:4-7).

This seems like a substantial number of similarities.

However, aside from the evidence that the same two co-defendants were involved in the same roles and the evidence linking the gun to both crimes (which was not used), all of those similarities are extremely common facets of armed robbery. Two armed convenience store robberies at night with two masked robbers and a getaway driver does nothing to identify Mr. Malone or anyone else. It is simply too common a fact pattern. The State did not introduce any evidence regarding the frequency of robberies in the areas where these crimes occurred, so it cannot be said whether the proximity of the two robberies is even relevant.

The State's motion also claims that a shotgun was used in the Brookfield robbery but only a handgun in the Waukesha case (29:2). The robbers stole lottery tickets from the Brookfield store but not from the one in Waukesha. (*See* 7:2-4, 29:2-4). Lastly, all robbers who wear masks and carry guns bring the masks and guns with them to the robbery. Those items are never acquired by the robbers at the scene of the crime. However, the facial coverings used in these cases were different. In the Brookfield robbery, the suspects used ripped up shirts while Halloween masks were used in Waukesha (29:2; 92:48-49, 69; Exhibit 10, 11). That does not indicate the robberies were committed by the same people. None of the similarities uniquely identify Mr.

Malone such that it can be said that they "constitute the imprint of the defendant." *State v. Gray*, 225 Wis.2d 39, 51, 590 N.W.2d 918 (1998).

The fact that Mr. Thomas and Ms. Cotton were involved in both robberies does not implicate Mr. Malone, and it was Mr. Thomas who fired the shots at the clerk in both robberies (92:37, 72). It was also Mr. Thomas who brought the gun to both robberies and provided the masks (*Id.*). Any evidence that the same gun was used in both robberies does not identify Mr. Malone as a participant in either one.

The State and the court relied on *State v. Gray*, 225 Wis.2d 39, 590 N.W.2d 918 (1999) for the admissibility of unproven prior acts. However, *Gray* required significant evidence that the same perpetrator committed both acts:

> All the prescriptions, the uncharged forged prescriptions and the prescription that is the basis of count one, are for the same narcotic—Hydrocodone or Hycodan syrup. Several of the patients' and doctors' names are the same. All of these prescriptions were filled at the same pharmacy as was the prescription on which count one is based. All the prescriptions were filled within a five-month period.

Id. at 52-53. In the uncharged case, Gray "told the police officer the same type of story that he told the arresting officers regarding the current charge—that he was picking the prescription up for a friend, and then he gave a non-existing residential address." *Id.* at 54. One of the

charged counts was for a forged prescription that had Gray's fingerprint on it and the State proved the same person wrote the charged and uncharged prescriptions—including the one with Gray's fingerprint on it. *Id.* at 55-56, 62. The identity of the suspect was tied to the charged counts by fingerprint and handwriting analyses. That evidence uniquely identifies the perpetrator in a way that vague similarities between two offenses do not.

The only evidence connecting Mr. Malone to the Brookfield case came from codefendants who got beneficial plea offers in exchange for their testimony. This is insufficient to make that robbery relevant to Mr. Malone's guilt in the Waukesha case-it is the similarity between the offenses themselves that must be established. *State v. Kuntz*, 160 Wis.2d 722, 746, 467 N. W.2d 531 (1991).

Although there were some similarities between these two incidents, they were primarily similarities that occur in large numbers of armed robberies. The details of the two robberies were significantly different. Given that the similarities between the two robberies were general, vague, and common to many robberies, they certainly did not have "such a concurrence of common features and so many points of similarity with the crime charged that it can reasonably be said that the other acts and the present act constitute

the imprint of the defendant." *State v. Gray*, 225 Wis.2d 39, 51, 590 N.W.2d 918 (1998).

Evidence of the Brookfield robbery was not relevant as Mr. Malone was not sufficiently identified as the perpetrator. At the post-conviction motion hearing, the court reviewed the video of the second suspect exposing his hand and found his race could not be proven (82:35). If the court was unable to tell whether the second robber was black then it is difficult to imagine how the evidence was sufficient to identify Mr. Malone as the perpetrator. Further, the court's rationale that a curative instruction would dissuade any prejudice because juries are presumed to understand and follow the instructions would render it impossible for the danger of unfair prejudice to ever substantially outweigh the probative value of the evidence because a curative instruction would *always* be sufficient.

The State's other acts motion should not have been granted. Mr. Malone asks that the trial court's decision granting the motion to admit evidence of the Brookfield robbery be reversed and a new trial ordered.

II. MR. MALONE IS ENTITLED TO A NEW TRIAL IN THE INTEREST OF JUSTICE

Mr. Malone argued he was entitled to a new trial in the interest of justice (68:4, 6-10). "[C]riminal

defendants may request a new trial in the interest of justice as part of their postconviction motions and appeal under § 974.02 and § (Rule) 809.30." *State v. Henley*, 2010 WI 97, ¶65, 328 Wis. 2d 544, 787 N.W.2d 350. "[A] new trial may be ordered in either of two ways: (1) whenever the real controversy has not been fully tried; or (2) whenever it is probable that justice has for any reason miscarried." *State v. Hicks*, 202 Wis.2d 150, 159-60, 549 N.W.2d 435 (1996).

Mr. Malone argued that he was entitled to a new trial under both prongs (68:7-10). The State objected and argued that this issue must be raised directly with the court of appeals. However, in its written argument the State claimed that the real controversy was fully tried and justice was not miscarried because Attorney Bihler did argue the second robber was white and the jury did not believe it (74:2-3). The State also argued that the disputed video did not prove that the second robber was white (74:2-3).

The court recognized that a miscarriage of justice occurs when there is a substantial probability a new trial would produce a different result (82:31). It also found the existence of the video showing the robber's hand would have had no impact on its decision to grant the State's motion to admit evidence of the Brookfield robbery (82:32). While discussing Mr. Malone's ineffective assistance of counsel

claim, the court found there was no substantial probability of a different result on retrial:

> I don't think a reasonable person or any reasonable juror could reach that conclusion [that the robber was white] from a reasonable standpoint looking at that video. Anyone can give an opinion or impression of the race of an individual from that, but I don't think it's definitive that somebody can reach the conclusion absolutely and conclusively that the individual was one race or the other based upon what was depicted in that video. So the lack of existence of that particular clip—clip in front of the jury I don't believe was of any substantial impact, looking at totality of all the other evidence, the cross examination and the attack that Attorney Bihler launched into with respect to the credibility of the other witnesses and the ability to identify off the video.

(82:35).

Mr. Malone also argued he was entitled to a new trial because the real controversy regarding the identity of the second suspect was not fully tried (68:8-9). The court denied this portion of the motion without discussing it.

A. The Real Controversy Regarding the Second Suspect's Identity Was Not Fully Tried

> This court has concluded that the real controversy was not fully tried in two situations. *State v. Hicks,* 202 Wis.2d 150, 160, 549 N.W.2d 435 (1996). First, when the jury was erroneously denied the opportunity to hear important evidence bearing on an important issue in the case. *Id.* Second, when the jury had before it evidence not properly admitted that 'so clouded' a crucial issue that it may be fairly said that the real controversy was not fully tried. *Id.*

State v. Avery, 2013 WI 13, ¶ 102, 345 Wis. 2d 407, 826

N.W.2d 60. Importantly, a defendant asserting that the real controversy has not been fully tried does not need to show a probability of a different result on retrial. *State v. D'Acquisto*, 124 Wis. 2d 758, 763, 370 N.W.2d 781 (1985).

The identity of the second suspect in both robberies was the only crucial issue at trial. Attorney Opper noted this in her closing: "So what's this case about, ladies and gentlemen? You just heard a very long explanation of the law from Judge Carter. I can narrow it down to one sentence: Who is robber number two?" (93:66).

Video showing the second suspect at the Brookfield robbery was not Mr. Malone is unquestionably important evidence. Mr. Malone is black and the jury was denied the opportunity to see video and still images showing that the second suspect was white. The real controversy was not tried because "the jury was erroneously denied the opportunity to hear important evidence bearing on an important issue in the case." *State v. Hicks,* 202 Wis.2d 150, 160, 549 N.W.2d 435 (1996).

This denial occurred because the State's witness, Det. Feyen, edited out that portion of the video when he created the montage for the jury at trial (*See* Trial Exhibit 11, PCM Exhibit 1). Because video evidence showing Mr. Malone was not the second suspect in the Brookfield robbery was

omitted from the montage, "the jury had before it evidence not properly admitted that 'so clouded' a crucial issue that it may be fairly said that the real controversy was not fully tried." *See Avery*, 2013 WI 13 at ¶102.

Although the clip showing the robber's exposed hand was omitted from Exhibit 11, Attorney Bihler paused the video during Exhibit 11 on a frame showing the robber's partially masked face and asked Detective Feyen about the race of the suspect:

> Q: What we see is the bridge of the person's nose and we see basically their -- their eyes. Would that be a fair statement?
> A: Yes.
> Q: And would it be fair -- Would it be a fair statement to say that that person has a Caucasian complexion in that photograph?
> A: I wouldn't make any determination of race on that picture.

(91:110). Detective Feyen was not asked if he made a determination as to race based on any *other* picture. This would have been a perfect opportunity for Attorney Bihler to discredit the officer by showing the deleted clip of the robber's exposed hand and pausing the video on that clip instead (*see* 68:17-20). Nevertheless, Det. Feyen was asked by Attorney Opper if the video was altered in any way:

> Q: Did you alter the content in any way?
> A: No. Outside of making – I did cut some of the video where there was no activity.
> Q: Okay.
> A: If you want us to call it altering, but there

> was some areas like, again, the one camera shows no activity in the gas pumps. Disregard that. There was no activity going on on that particular video. I eliminated that to make the movie montage.

(91:82-83).

Detective Feyen falsely testified that the only video eliminated from the montage was video with no activity. The truth is he eliminated the portion of the video showing the suspect to be white when Mr. Malone is black.

Detective Feyen's editing of the video denied the jury the opportunity to view important evidence on a crucial issue in this case—the identity of the suspect, and the possibility that he was a different race than the defendant. This erroneous denial resulted in the real case or controversy not being fully tried, and Mr. Malone is entitled to a new trial as a result. *State v. Hicks,* 202 Wis.2d 150, 160, 549 N.W.2d 435 (1996).

The video and testimony regarding the Brookfield robbery was also improperly before the jury (because it did not identify Mr. Malone) and it "so clouded" the crucial issue of identification that it can be fairly said the real issue was not tried. *See Avery*, 2013 WI 13 at ¶102. Mr. Malone is entitled to a new trial on this basis as well.

While the trial court found that no reasonable juror could definitively reach the conclusion absolutely and

conclusively that the second suspect was white (82:35), a defendant asserting that the real case or controversy was not fully tried does not need to who any likelihood of a different result on retrial. *State v. D'Acquisto*, 124 Wis. 2d 758, 763, 370 N.W.2d 781 (1985). The trial court erred in denying this aspect of Mr. Malone's postconviction motion without discussion, and it applied the wrong standard in requiring absolute, definitive, and conclusive proof of a different result on retrial when no likelihood need be shown at all. *Id.*

B. A Miscarriage of Justice Occurred

A miscarriage of justice occurs if "there is a substantial probability that a new trial would produce a different result." *State v. Kucharski*, 2015 WI 64, ¶5, 363 Wis.2d 658, 866 N.W.2d 697. Mr. Malone alleged that a new trial—either absent the other acts evidence or including the full video from the Brookfield 7-11—would likely produce a different result.

Mr. Thomas admitted his involvement in both the Waukesha Citgo robbery and the Brookfield 7-11 robbery. The primary issue was the identity of the second robber, alleged to be Mr. Malone. The State introduced video and testimony regarding the Brookfield robbery to establish Mr. Malone's identity as the second robber in the Waukesha

case. The State's argument was that Mr. Thomas, Mr. Malone, and Ms. Cotton had a common plan to go to the Waukesha/Brookfield area to rob convenience stores. The Brookfield evidence was also purportedly admitted to show the identity of Mr. Malone at both robberies.

Detective Feyen's compilation video was admitted into evidence as Exhibit 11 and was published in its entirety to the jury (91:102-08). Attorney Opper also referenced the Brookfield robbery in her closing and stated Exhibit 11 exactly corroborated Mr. Thomas's testimony that Mr. Malone was the second robber (93:76-77). As noted, Det. Feyen omitted the portion that shows the robber's white hand.

Mr. Thomas and Ms. Cotton testified that Mr. Malone was the second suspect at the Brookfield and Waukesha robberies. The omitted video would have undermined their testimony and cast doubt as to whether they were telling the truth about Mr. Malone being the second suspect in the Waukesha case. Had the jury seen that, it easily could have concluded Mr. Malone was not the second robber at the 7-11 and therefore not the second robber at the Citgo.

Importantly, during deliberations the jury asked to view Exhibit 11 a second time, and even asked that they be allowed to view it up close (93:122-28). The Court allowed the jurors to do so, and they again viewed the

prejudicially edited video of the Brookfield robbery. Juries are presumed to follow the instructions of the court, *State v. LaCount*, 2008 WI 59, ¶ 23, 310 Wis. 2d 85, 750 N.W.2d 780, and the jury had been instructed as to the permissible uses for that evidence: it could be considered only for intent, plan, and identity (93:62-63).

The only conceivable reason for the jury's request to view the video up close is that they were questioning Mr. Malone's identity as the suspect. There is no logical reason to need to see the video up close to discern something about the suspects' intent or plan. Had the jurors been allowed to see the portion of the video showing the suspect to be white their questions regarding identity would have been answered and an acquittal would have resulted. Mr. Malone is entitled to a new trial because justice was miscarried.

III. MR. MALONE'S TRIAL ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE

Mr. Malone maintains that his attorney, Doug Bihler, provided ineffective assistance at the hearing on the State's motion to introduce other acts evidence as well as at trial. Attorney Bihler was aware of the video clip from the Brookfield 7-11 robbery in which the suspect alleged to be Mr. Malone revealed his bare hand and he did not present

the video when he argued that it did not identify Mr. Malone. At trial, Attorney Bihler argued that Mr. Malone was not the second suspect in either robbery, that the accomplices were lying about Mr. Malone's involvement, and that the second suspect was white. However, he did not show the video clip that contained the most powerful evidence in support of those arguments. He also failed to object when the State played Exhibit 11, or when Det. Feyen falsely testified that no activity was edited out of the video.

> The *Strickland* Court set forth a two-part test for determining whether counsel's actions constitute ineffective assistance. The first test requires the defendant to show that his counsel's performance was deficient. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687, 104 S.Ct. at 2064. Review of counsel's performance gives great deference to the attorney and every effort is made to avoid determinations of ineffectiveness based on hindsight. Rather, the case is reviewed from counsel's perspective at the time of trial, and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms. *Id.*
>
> Even if deficient performance is found, judgment will not be reversed unless the defendant proves that the deficiency prejudiced his defense. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

State v. Johnson, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

> In order to demonstrate that counsel's deficient performance is constitutionally prejudicial, the

> defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052. The focus of this inquiry is not on the outcome of the trial, but on "the reliability of the proceedings." *State v. Pitsch,* 124 Wis.2d 628, 642, 369 N.W.2d 711 (1985).

State v. Thiel, 2003 WI 111, ¶ 20, 264 Wis. 2d 571, 665 N.W.2d 305. When a defendant alleges multiple deficiencies by trial counsel, prejudice should be assessed based on the cumulative effect of these deficiencies. *Id.* at ¶ 59.

Standard of review

> The Standard of review of the ineffective assistance of counsel components of performance and prejudice is a mixed question of law and fact. Thus, the trial court's findings of fact, "the underlying findings of what happened," will not be overturned unless clearly erroneous. The ultimate determination of whether counsel's performance was deficient and prejudicial to the defense are questions of law which this court reviews independently.

State v. Johnson, 153 Wis. 2d 121, 127-28, 449 N.W.2d 845 (1990) (internal citations omitted).

A. OTHER ACTS HEARING

Attorney Bihler testified that he had the video disc containing the footage of the Brookfield 7-11 robbery prior to the other acts motion hearing (82:7). He also testified

he had viewed the clip in which the suspect alleged to be Mr. Malone revealed his hand (82:11). Nevertheless, he failed to play that clip for the court to demonstrate that Mr. Malone was not the second suspect (82:11). He also failed to make any argument that the video contradicted the statements of the accomplices the State used as an offer of proof to get the evidence admitted. He testified he had no strategic reason for failing to play the clip and that it would have supported his argument had he done so (82:11).

Attorney Bihler's performance at the other acts motion hearing was deficient. It was objectively unreasonable for him to decline to introduce evidence that Mr. Malone was not the second robber at the Brookfield 7-11. He admitted that the evidence would have been helpful, it would have bolstered the argument he was already making, and that he had no reason not to introduce it. The failure to introduce known exculpatory evidence constitutes deficient performance. *See State v. Love*, 2005 WI 116, ¶ 38, 284 Wis. 2d 111, 700 N.W.2d 62.

B. TRIAL

> The credibility of the complaining witness was paramount to this case. In this situation, trial counsel was aware of the need to locate any evidence or information to impeach the complainant's testimony, regardless of what was found in the discovery. The case was a classic instance of the "he-said-she-said" dilemma.

State v. Thiel, 2003 WI 111, ¶ 46, 264 Wis. 2d 571, 665 N.W.2d 305. As in *Thiel*, the credibility of the witnesses was paramount in this case. Attorney Bihler was aware of the need to impeach the witnesses' testimony. Unlike *Thiel*, however, he did not need to look outside the discovery materials he received from the State. The evidence he required was given to him, he viewed it, and he inexplicably failed to use it.

The failure to introduce evidence beneficial to the defense is deficient performance in the absence of a reasonable strategic decision. *See Toliver v. Pollard,* 688 F.3d 853, 862 (7th Cir.2012); *Goodman v. Bertrand,* 467 F.3d 1022, 1030 (7th Cir.2006); *State v. Jenkins*, 2014 WI 59, ¶ 41, 355 Wis. 2d 180, 197, 848 N.W.2d 786, 794–95 *State v. White,* 2004 WI App 78, ¶¶ 20–21, 271 Wis.2d 742, 680 N.W.2d 362. This is particularly true where the evidence would have gone to a key issue in the defense. *Id.*

In *State v. Zimmerman*, 2003 WI App 196, 266 Wis. 2d 1003, 669 N.W.2d 762 trial counsel failed to introduce DNA evidence or cross-examine the detective regarding exculpatory test results. *Id.* at ¶ 38. As in this case, trial counsel admitted he had no strategic reason for failing to introduce the evidence and admitted he had made a mistake. *Id.* The court found his performance deficient.

Id. at ¶ 40. The same is true here. Attorney Bihler admitted this video was consistent with his defense, would have assisted his arguments, that he should have introduced the video at trial, and that he had no reason not to use it. There is no reasonable justification for his failure and his performance was deficient as a matter of law.

Attorney Bihler's failure to object to the State's use of the prejudicially edited video likewise constituted deficient performance. He testified he did not think he had grounds to object (82:15). The court found he admitted he could have objected (82:34). He did not have any strategic reason for failing to object to the edited video as being unfairly prejudicial, incomplete, misleading, or confusing as to the issue of identity. *See* Wis. Stat. § 904.03.

Attorney Bihler's failure to object was not due to a failure to recognize that the exculpatory footage had been edited out of the State's exhibit. He testified that he did not think he had a basis to object at the time, which necessarily meant that he noticed the omission and remained silent. "The *Strickland* Court outlined certain basic duties that an attorney owes the criminal defense client. Among those is the duty to "bring to bear such skill and knowledge as will render the trial [or proceeding] a reliable adversarial testing process." 466 U.S. at 688, 104

S.Ct. at 2065 (citations omitted)." *State v. Smith*, 207 Wis. 2d 258, 273-74, 558 N.W.2d 379 (1997).

In *Smith*, the issue was defense counsel's failure to object to the State's violation of the plea agreement. *Id.* at 274. As in this case, "[n]o further information or investigation was required to enable defense counsel to offer an objection." *Id.* Also like *Smith*, the failure to object was inconsistent with the defendant's strategic choices. *Id.* The *Smith* Court held that "[t]he failure to object constituted a breakdown in the adversarial system," and was thus deficient performance. *Id.* There was no reasonable justification for Attorney Bihler's failure to object to the prejudicially edited video and his failure to do so constituted deficient performance.

C. Prejudice

Mr. Malone was prejudiced by Attorney Bihler's failure to introduce the clip showing the second suspect's hand. Attorney Bihler admitted it would have been helpful in impeaching the testimony of the codefendants, who had stated Mr. Malone was the second robber (82:14). It also would have undermined Det. Feyen's credibility after he testified he had not omitted any activity when he created Exhibit 11. The testimony of the codefendants was the primary evidence against Mr. Malone (82:23). Even the cell

phone records used in this case were not tied to Mr. Malone and depended on the testimony of the codefendants (82:23; 91:246, 248-65). Attorney Bihler could have attempted to show that the unidentified owner of the phone the State unsuccessfully attempted to connect to Mr. Malone could have been the same person depicted in the omitted video.

As pointed out at the post-conviction motion hearing, Attorney Bihler did attempt to show that the second suspect shown in Exhibit 11 was white (82:20-21, 34-35). He did so during his cross-examination of Det. Feyen (91:110). He did so again during his closing argument (94:103-04). His efforts in that regard were powerful enough to prevent the jury from convicting Mr. Malone without wanting to take a second look at Exhibit 11, and to do so from close up (94:122). The only means of seeing the suspect's race in Exhibit 11 was to look at the small portion of his face left unobscured by the scarf. Had Attorney Bihler utilized the clip showing the robber's hand the jury would not have needed to view the video up close to determine race.

Although the trial court found the lighting in the video to be too "washed out" for a reasonable juror to absolutely, definitively, and conclusively determine the race of the suspect (82:35), that was the incorrect standard. Mr. Malone need only inject reasonable doubt to

show a reasonable probability of a different result. *State v. Harvey*, 2002 WI 93, ¶ 41, 254 Wis. 2d 442, 647 N.W.2d 189 (quoting *State v. Dyess,* 124 Wis.2d 525, 544-45, 370 N.W.2d 222 (1985)). Further, whether the omitted clip shows the second suspect to be a white man was a question for the jury to decide. *See State v. Guerard*, 2004 WI 85, ¶ 49, 273 Wis.2d 250, 682 N.W.2d 12.

In *Guerard*, defense counsel failed to introduce evidence of the defendant's brother Daniel's out-of-court confessions. *Id.* at ¶ 3. The Supreme Court found trial counsel's performance to be deficient and prejudicial:

> Despite the strength of the victim's testimony and the existence of some inconsistency between her testimony and Daniel's confessions, the failure to put before the jury Daniel's hearsay statements inculpating himself and exculpating Guerard creates a reasonable probability of a different result at trial. The jury would have had to determine the weight and credibility to assign to Daniel's confessions, and might have convicted Guerard anyway. But the failure to introduce Daniel's admissible confessions exculpating Guerard undermines our confidence in this verdict. There is a reasonable probability that the jury would have viewed Daniel's hearsay confessions as creating a reasonable doubt about Guerard's involvement as the perpetrator of these crimes.

State v. Guerard, 2004 WI 85, ¶ 49, 273 Wis. 2d 250, 682 N.W.2d 12. As in *Guerard*, the jury would have had to view the evidence and determine the weight it should be given in identifying the perpetrator. The fact that the jury

requested a closer look at Exhibit 11 shows that the jurors were not immediately convinced of Mr. Malone's guilt. They were questioning his identity as the suspect. After viewing Exhibit 11 a second time the jury found him guilty. As in *Guerard*, the jury may have convicted him anyway had it seen the omitted footage. However, the failure to introduce stronger exculpatory evidence when the jury was already questioning Mr. Malone's identity as a suspect undermines confidence in the verdict. There is a reasonable probability that the jury would have had reasonable doubt had it seen the footage showing the suspect's hand.

This is particularly true considering the video would have undermined the key witnesses' testimony that Mr. Malone was the second suspect in both robberies. Attorney Bihler tried impeaching them with the fact they received beneficial plea offers in exchange for testifying against Mr. Malone (92:99-101, 117-19; 93:93-95, 99, 102-105), but this would have been a visual demonstration discrediting their testimony. He had also attacked the witnesses' credibility by showing they had repeatedly lied to law enforcement (91:203-04, 207-08, 210; 92:84, 92-93, 97-98, 102-07, 111, 121; 93:91-105). The omitted video would have further bolstered his attacks on their honesty.

The prejudice to Mr. Malone is the same regardless of

whether the deficient performance is rooted in Attorney Bihler's failure to use the video clip showing the second suspect's hand or his failure to object to the State's omission of the clip. Realistically, Attorney Bihler would have had to use the omitted clip to show that the State's exhibit did not contain the disputed footage. Either way, the jury was deprived of the ability to evaluate the evidence and determine whether Mr. Malone was the second suspect. Attorney Bihler's failure to object allowed the State's assertion that Exhibit 11 was a complete and accurate portrayal of the Brookfield robbery to go uncontested, prevented the impeachment of witnesses, and deprived Mr. Malone of his right to have the jury determine the identity of the second suspect. The trial court's determination that Attorney Bihler's performance was not deficient and that Mr. Malone was not prejudiced is erroneous. Mr. Malone asks that the denial of his postconviction motion be reversed and a new trial ordered.

IV. THE STATE DENIED MR. MALONE HIS DUE PROCESS RIGHT TO A FAIR TRIAL

Findings of Fact

The trial court denied this aspect of Mr. Malone's motion without a hearing and without specifically commenting on it. However, there were some relevant

findings of fact. The court found the video clip admitted as Exhibit 1 at the post-conviction motion hearing was not included as part of Exhibit 11 at trial (82:31-32). Because the State created Exhibit 11, (82:34), the court also necessarily found that the State omitted the footage.

Standard of Review

> "Whether state action constitutes a violation of due process presents a question of law, which this court decides independently...." *State v. Neumann,* 2013 WI 58, ¶ 32, 348 Wis.2d 455, 832 N.W.2d 560. We uphold the circuit court's findings of historical fact unless they are clearly erroneous. *State v. Felix,* 2012 WI 36, ¶ 22, 339 Wis.2d 670, 811 N.W.2d 775.

State v. Luedtke, 2015 WI 42, ¶ 37, 362 Wis. 2d 1, 24, 863 N.W.2d 592.

In his post-conviction motion, Mr. Malone argued that the State misrepresented Exhibit 11 as a complete and accurate depiction of the robbery of the Brookfield 7-11 store when exculpatory footage had actually been omitted (68:14). Detective Feyen made the exhibit at the request of the State for use at trial, and he was acting as an agent of the State when he did so. He specifically testified that he did not omit any activity from the exhibit (91:82-83). Detective Feyen's assertion that no activity was omitted from the compilation was untrue, as the clip in which the second suspect reveals his hand was omitted.

Attorney Opper requested that the video be made, introduced it as an exhibit, moved for its admission into evidence, and published it to the jury (91:71, 80, 84, 102-08). She had an obligation to ensure that her exhibit and her witness's testimony regarding the exhibit were accurate. Detective Feyen's editing of the video, his false testimony that no activity was omitted, and Attorney Opper's use of the edited video at trial each constitute misconduct by State authorities that deprived Mr. Malone of his due process right to a fair trial.

Mr. Malone acknowledged in his post-conviction motion that there was no proof Det. Feyen intentionally omitted the exculpatory footage or intentionally testified falsely when he stated he only omitted footage that did not show any activity (68:15). Mr. Malone also acknowledged there was no proof that Attorney Opper was aware that exculpatory footage was omitted or that Det. Feyen had testified falsely (68:15). Mr. Malone asserts that his due process right to a fair trial was nevertheless violated, even if their conduct was merely negligent. *Smith v. Phillips*, 455 U.S. 209. 219 (1982)("Past decisions of this Court demonstrate that the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial not the culpability of the prosecutor.").

There is no question that it was improper for Det. Feyen to omit exculpatory footage from a video and then falsely testify that no activity was edited out. The same is true for Attorney Opper's use of such an exhibit. There is no justification for it and no serious argument has been made that it was proper.

Mr. Malone argues the State's conduct denied him the fundamental fairness inherent in the Due Process Clause:

> In *United States v. Valenzuela-Bernal,* 458 U.S. 858, 872, 102 S.Ct. 3440, 3449, 73 L.Ed.2d 1193 (1982), the United States Supreme Court stated:
>
> "Due process guarantees that a criminal defendant will be treated with 'that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial.' *Lisenba v. California,* 314 U.S. 219, 236 [62 S.Ct. 280, 290, 86 L.Ed. 166] (1941)."

State v. Disch, 119 Wis. 2d 461, 469-70, 351 N.W.2d 492 (1984). In *Disch*, the Court held the State's failure to produce a six-month-old blood sample for alcohol retesting, absent any demonstration that the sample was material to guilt or innocence, did not violate due process. *Id.*

Rather than the failure to produce evidence for testing, this case involves the State's prejudicial editing of evidence and then falsely denying the same had occurred. The omitted footage relates to the identity of the second

suspect and to the credibility of the State's chief witnesses and is clearly material to guilt or innocence. The State's omission of the video clip and subsequent testimony that no activity was omitted from Exhibit 11 denied Mr. Malone his right to a fair trial. Not only was the jury prevented from viewing important evidence that was material to guilt or innocence but it was also falsely assured that this evidence did not exist.

"Due process guarantees the accused a fair trial, and any violation of fundamental fairness will constitute a denial of that guarantee." *State v. Disch*, 119 Wis. 2d 461, 477, 351 N.W.2d 492 (1984); *see also State ex rel. Lyons v. De Valk*, 47 Wis. 2d 200, 205, 177 N.W.2d 106 (1970) ("Fair play is an important factor in the consideration of due process of law. Truly, the concern of due process is fundamental fairness.")(footnotes omitted); *Piper v. Popp,* 167 Wis.2d 633, 650, 482 N.W.2d 353 (1992) ("[t]he Fourteenth Amendment bars a state from denying any person a fundamentally fair trial."). It is fundamentally unfair for the State to omit exculpatory footage from an exhibit and then inform the jury that no activity was edited out. The use of such an exhibit cannot be described as "fair play" or an act of "fundamental fairness." Mr. Malone was entitled to have the jury view all the footage and to have

the jury determine the identity of the second suspect. The omission of this footage prevented that from occurring.

Mr. Malone is entitled to a new trial even if he is required to show that the State's conduct substantially influenced the trial's result. It has already been established that this evidence had an important bearing on identity, a critical fact at Mr. Malone's trial. Had the State not omitted the exculpatory footage the video would have been equally powerful in establishing that Mr. Malone was not the second robber. It would have shown Mr. Thomas and Ms. Cotton were not being truthful about Mr. Malone's involvement in the Brookfield robbery and would have cast serious doubts on their testimony that he was involved in the Waukesha case. Their testimony was the only evidence linking Mr. Malone to anything criminal whatsoever. The result of the trial was substantially influenced by the State's omission of exculpatory evidence that would have discredited that testimony.

The importance of the jury's request to view the video a second time, up close, cannot be overstated. The jurors were questioning Mr. Malone's identity as the second suspect in that robbery and the State's conduct deprived the jury of the truth it sought. As a result, Mr. Malone was denied a fair trial.

The trial court found the whites in the video were washed out (82:33) and that "I don't think it's definitive that somebody can reach the conclusion absolutely and conclusively that the individual was one race or the other based upon what was depicted in that video." (82:35).

Mr. Malone is not required to show "definitively," "absolutely," and "conclusively" that the second suspect in the video is white. That is a question for the jury to decide, and the jury was deprived of its right to make that determination because the State edited the footage out of the exhibit shown at trial. The trial court erred in imposing this standard. As it relates to Mr. Malone's due process argument, he is required to establish the State's conduct was improper. The trial court did not rule on this aspect, nor did it rule on whether the improper conduct denied Mr. Malone the right to a fair trial.

It is fundamentally unfair for the State to introduce a video from which exculpatory footage has been omitted. That fundamental unfairness is compounded exponentially when the State's witness, an experienced detective, testifies he made the video compilation and then falsely testifies he did not omit any activity. The fact that Mr. Malone's attorney could have introduced the omitted clip and cross-examined Det. Feyen regarding its omission, and

further cross-examined the co-defendants regarding the clip has no bearing on whether the State's action violated Mr. Malone's right to due process. "[S]ubstantive due process protects citizens against arbitrary or wrongful state actions, regardless of the fairness of the procedures used to implement them." *State v. Jadowski*, 2004 WI 68, ¶ 42, 272 Wis. 2d 418, 438–39, 680 N.W.2d 810.

The State created the exhibit, introduced it in evidence, vouched for its completeness, and published it to the jury despite having omitted exculpatory footage. The State's actions violated principles of fundamental fairness on the primary issue for the jury to determine: the identity of the robber. Any violation of fundamental fairness constitutes a violation of the right to a fair trial. *State v. Disch*, 119 Wis. 2d 461, 477, 351 N.W.2d 492 (1984). Mr. Malone is entitled to a new trial at which the jury is shown the complete footage from the Brookfield 7-11, if that evidence is admissible as other acts.

V. MR. MALONE IS ENTITLED TO DISCRETIONARY REVERSAL UNDER WIS. STAT § 752.35

Mr. Malone also seeks discretionary reversal pursuant to Wis. Stat. § 752.35, which states

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not

> been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

This request is based on the arguments already raised in the interest of justice both at the trial court and on appeal. Mr. Malone also argues that the cumulative effect of the complained errors has resulted in an unfair trial and miscarriage of justice.

"Reversals in the interest of justice should be granted only in exceptional cases." *State v. Kucharski*, 2015 WI 64, ¶ 23, 363 Wis.2d 658, 866 N.W.2d 697. The court should order discretionary reversal only "after all other claims have been weighed and determined to be unsuccessful." *Id.* at ¶ 43.

> We may grant a new trial in the interest of justice when it appears from the record that the real controversy has not been fully tried. *State v. Peters*, 2002 WI App 243, ¶ 18, 258 Wis.2d 148, 653 N.W.2d 300. We need not determine that a new trial would likely result in a different outcome. *State v. Watkins*, 2002 WI 101, ¶ 97, 255 Wis.2d 265, 647 N.W.2d 244. Our discretionary reversal power is formidable, and should be exercised sparingly and with great caution. *Id.*, ¶ 79. Discretionary reversals because the real controversy has not been fully tried have been granted for a variety of

> reasons: for the erroneous admission or exclusion of evidence, when misunderstandings have thwarted justice, and where an erroneous jury instruction had a significantly adverse impact on the case. *State v. Thomas,* 161 Wis.2d 616, 625–26, 468 N.W.2d 729 (Ct.App.1991) (citations omitted).

State v. Williams, 2006 WI App 212, ¶ 36, 296 Wis. 2d 834, 858, 723 N.W.2d 719, 731.

This is a truly exceptional case. The State created a video exhibit that omitted exculpatory footage, and its witness testified he did not omit any activity from the video. The District Attorney argued in her closing that the video exactly matched the codefendant's testimony regarding what happened. The jury was denied the opportunity to review the omitted footage and decide for itself whether the second suspect was Mr. Malone. The real controversy over the identity of the suspect was not fully tried.

The trial court found that no reasonable juror could absolutely, definitively, and conclusively determine the race of the suspect in the video (82:35). Mr. Malone was not required to meet that standard to show a substantial probability of a different outcome on retrial as part of his miscarriage of justice argument:

> The Supreme Court uses the word "probability," in the sense of likelihood. It explains that for a different outcome to be "reasonably probable" it need not be "more likely than not"; a reasonable probability of a different outcome is one that raises a reasonable doubt about guilt, a

> "probability sufficient to undermine confidence in the outcome" of the proceeding.

State v. Harvey, 2002 WI 93, ¶ 41, 254 Wis. 2d 442, 647 N.W.2d 189 (quoting *State v. Dyess*, 124 Wis.2d 525, 544-45, 370 N.W.2d 222 (1985)).

The trial court's finding that it was impossible to tell the race of the suspect in the omitted video clip was clearly erroneous. The lighting in the video is bright; however, there are dark colored items depicted in the video. This includes the black door frames, the black rug or floor mat, and the clothing of the suspects. The status of the lighting in the video did not cause any of those objects to change from dark colored to light. It was only the skin of the second suspect that supposedly appeared lighter because of the "washed out" video.

The State did not have any kind of video expert testify as to how or whether the lighting affected the appearance of the suspect, and there is no reason to believe that the video does not depict what it appears to depict. Dark-colored objects show up as dark colored, and light-colored objects show up as light. The court's finding that the "washed out" lighting made a black man appear white is unsupported and clearly erroneous.

Whether the omitted video clip showed a white or black man was ultimately a question for the jury to decide. The jury had the right to view all the evidence and Mr. Malone had a right to have this issue decided by the jury. That was taken away by the State, the error was compounded by Det. Feyen's assertion that no activity was omitted from the video, and Mr. Malone's attorney failed to either object to the omission or show the clip himself. If the trial court was truly unable to determine the race of the suspect after viewing the omitted video clip then there is a reasonable doubt that the man in the clip was black. A reasonable doubt that he was black equates to a reasonable doubt that the suspect was Mr. Malone.

The primary evidence against Mr. Malone was the testimony of the codefendants, who received beneficial plea offers in exchange for their testimony. They did not know Mr. Malone and did not even know his name (7:5-7; 92:120). The omitted video would have powerfully undermined their testimony. Finally, the jury asked to see the video a second time from up close during their deliberations (93:122). They were trying to determine the identity of the suspect and this video clip would have been far more effective in assisting them. There would be a substantial likelihood of a different result on retrial.

This is an exceptional case with an unusual set of facts. The strong appearance of unfairness justifies discretionary reversal if Mr. Malone's other arguments are unsuccessful.

CONCLUSION

For the above reasons and the reasons stated in his postconviction motion, Mr. Malone respectfully requests that the judgment of the circuit court be reversed, his conviction vacated, and a new trial ordered.

Respectfully submitted this 17th day of July, 2017.

_____
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in secs. 809.19(8)(b) and (c) Stats. for a Brief and Appendix produced with a monospaced font and consists of 50 pages.

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 20 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.

I further certify that the electronic and paper copies of this brief are identical.

Dated this 17th day of July, 2017.

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Brian M. Borkowicz

APPENDIX