STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2017AP1722-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT BRIAN SPENCER,

Defendant-Appellant.

On Appeal From the Judgment of Conviction and an Order Denying Postconviction Relief Entered in the Circuit Court for Milwaukee County, the Honorable Joseph Donald, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Was the evidence at trial sufficient to support the jury's guilty verdict to the offense of possession with intent to distribute a controlled substance-heroin?

   In a written decision and order, the circuit court answered: Yes.

2. Was trial counsel ineffective for failing to investigate, call witnesses, and impeach an officer?

   In an oral ruling following postconviction hearings, the circuit court answered: No.

3. Was trial counsel ineffective for failing to file a pretrial motion to suppress the evidence?

   In a written decision and order, the circuit court answered: No.

4. Was the failure of the state to disclose evidence of a disciplinary matter against Officer DeWitt for untruthfulness a *Brady* [1]violation?

   In a written decision and order, the circuit court answered: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The appellant anticipates that the parties' briefs will adequately address the issues presented. This case requires the application of well-established legal principles to the particular facts of the case. Neither oral argument nor publication is requested.

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[1] ***Brady v. Maryland***, 373 U.S. 83, 87, (1968).

STATEMENT OF THE CASE

Mr. Spencer was charged in a two-count complaint with possession with intent to deliver a controlled substance, heroin, 10-50 grams, second or subsequent offense, contrary to Wis. Stat. § 961.41(1m)(d)3 and possession of a firearm by a felon, contrary to Wis. Stat. § 941.29(2)(a). (1:1).

Mr. Spencer entered a demand for a speedy trial. (5). The case proceeded to trial and the jury found Mr. Spencer guilty on both counts. (15:1-2). Mr. Spencer filed a notice of intent to seek postconviction relief. (22). A postconviction motion was filed on July 20, 2016 (45:1-43) and the circuit court ordered briefing. (47). After a response and reply brief were filed, the circuit court denied the postconviction motion, in part, and granted an evidentiary hearing. (62:1-8; App. 102-109).

Following hearings on February 24, 2017, March 8, 2017, June 9, 2017 and July 14, 2017, circuit court, in an oral ruling, denied Mr. Spencer's postconviction motion for a new trial based on ineffective assistance of counsel. (92:33-36; App110-113). The circuit court signed the order on denying relief on July 27, 2017. (72:1; App. 101). This appeal follows.

STATEMENT OF THE FACTS

The complaint in this matter is based upon evidence obtained during the execution of a No-Knock search warrant. The complaint alleged that on July 18, 2014, officers were dispatched to Mr. Spencer's residence to execute a search warrant. (1:1). Officer Jason DeWitt observed an "African-American hand" reach over the six-foot fence and discard a "Crown Royal bag" into the neighbor's yard. (1:1). The complaint further alleged that Mr. Spencer was standing by the fence where the bag had been discarded. (1:2). 40.11

grams of heroin was recovered from the bag and a handgun was recovered during the search of the home. (1:2).

During a Mirandized interview, Mr. Spencer admitted that he had purchased the gun three to four months prior. (1:2). Mr. Spencer's judgment of conviction for Milwaukee County Case Number 2004-CF-3260 was attached to the complaint. (1:3).

Search Warrant

A "no knock" warrant to search Mr. Spencer's home, including all storage areas and people on the premises for firearms and related objects such as ammunition, lock boxes, gun cases and firearm cleaning kits was authorized on July 16, 2014. (45:28; App. 115).

According to the affidavit, within the last five days prior to application for the warrant, a reliable confidential informant (CI) observed a black revolver at Mr. Spencer's residence. (45:30; App. 117). The CI described Mr. Spencer's appearance and identified him with a booking photo. (45:31; App. 118). The CI told officers that Mr. Spencer had tried to sell him a gun, which he described as a "Tre Five Seven," which was slang for a .357 caliber handgun. (45:31; App. 118).

The affidavit for the warrant also contained Mr. Spencer's criminal history, which included a 2004 case for possession with intent to deliver cocaine, contrary to Wis. Stat. § 961.41(1m)(cm)1g; a 1996 charge for felon in possession of a firearm, contrary to Wis. Stat. § 941.29(2) and a 1985 offense for receiving stolen property, contrary to Wis. Stat. § 943.34 (c).

The affiant requested permission to execute the search in a "no-knock" fashion, stating, "this is a firearms related warrant and there is a high probability of individuals inside of

the residence being able to arm themselves with firearms." (45:33; App. 120).

Pretrial[2]

At the final pretrial conference the court asked the state about whether any of the officers listed as witnesses had any convictions or adjudications. (82:3). The state represented that it did not recognize any of the officers that it intended to call as "bad cops" but that that it would double check their backgrounds. (82:3). The court stated it was uncomfortable "going on an assumption that police officers don't have adjudications or convictions," and told the state to be prepared to tell the court about any convictions or adjudications and the nature of those, if any, on the day of trial. (82:4).

Trial

On the day of trial the case was moved to Branch 2, the Honorable Joseph Donald presiding, due to the unavailability of the Honorable Judge Carolina Stark, Branch 32. Mr. Spencer declined to file a substitution of judge and chose to proceed to trial. (83: 4-5). Neither the state nor defense counsel discussed the issue of "bad cops" that the Judge Stark ordered the state to check and report back on the day of trial.

The following are summaries of witness testimony.

Joel Susler

Officer Susler testified that he was on containment in the front of the house on the south side of the residence, and that Ryan DeWitt, Jason DeWitt, and Officer McElroy were on containment on the north side of the house in the front. (83:84). Officer Susler did not participate in the search

[2] This case was before the Honorable Carolina Stark, Branch 32, during the pretrial proceedings.

because it was his search warrant, and therefore he was in charge of the execution of it. (83: 87).

Christopher McBride

Officer McBride was involved in the execution of the search warrant at Mr. Spencer's address on North 13th St. on July 18, 2014. (83:99-100). It took place at about 4:00 p.m. (83:99-100). His assignment was "rear containment" and he approached from the north going southbound in the alley. (83:101). Officer McBride described seeing three individuals on the parking slab in the alley as he approached, and that there was a four-foot fence between the slab and the alley. (83:101).

Initially he observed a woman holding a baby standing in the middle of the yard, and then he saw a black male in a sleeveless shirt coming from the north side of the yard into his view. (83:102). He estimated that approximately 30 seconds had passed from the time the warrant was initiated and the time he observed Mr. Spencer. (83:104). According to the officer, there was a shed on the north side of the yard, a dog kennel that abutted the shed, a tree, and an additional kennel abutting the rear fence. (83:104). He testified he did not observe anyone else in the area where he observed Mr. Spencer. (83:105).

By the time the flash bang went off Officer McBride was already at the house. (83:106). Officer McBride indicated that he was not focused on contraband, but on the people on the slab, and therefore did not see anything flying through the air as he approached the house from the north. (83:109). The door from the house to the yard was not visible to him until he actually reached the yard. (83:109).

Matthew Mengel

Officer Mengel also assisted in executing the search warrant. (83:115). He was Officer McBride's partner and also assigned to rear containment. (83:116). He testified that he and his partner parked two to three houses north of the address, ran eastbound to the alley and then southbound to the rear of the target house. (83:117). He recalled seeing three males and one female in the parking area. (83:117). He also recalled observing two children, an adult male, and an adult female in the yard. (83:118). Officer Mengel indicated that he reached backyard first, and that while he was in the yard, Officer McBride secured the people in the parking area. (83:118).

According to Officer Mengel, Officer McBride was running a few feet in front of him, and on cross examination indicated that it was 10 feet in front of him. (83:118,122). When he approached the yard, he saw Mr. Spencer was standing still, just to the right of the walkway that lead from the house to the gate. (83:120). Officer Mengel testified that because of an outdoor toilet and larger vehicles parked, he was not able to see into the yard until he was immediately in the rear of the house. (83:12).

Due to the chaos, Officer Mengel could not say when the percussion grenade went off, but believed that they were just approaching the rear parking area when it went off. (83:123). At that point, Officer McBride was containing the people on the parking slab. (83:123). Officer Mengel testified that he was aware that the bag of heroin was found in the yard north of the fence, which is the direction he was coming from, but that he did not observe anything flying through the air. (83:124).

Jason DeWitt

On direct examination, Officer DeWitt testified that he was positioned on the northwest side of the home in the front yard, and that part of his duty was to make sure that no one fled or threw evidence out of the house. (84:4-5). He could see the front of the house and the north side of the house all the way down the fence line. (84: 5-6). He testified that after the tactical unit entered the home, he observed a hand reach up above the wooden fence and throw a purple-colored object into the backyard of the house to the north. (84:6). He indicated that he searched the bedroom where the gun was located and the shed, where he found four balloons, aluminum foil and sandwich baggies, as well as ammunition. (84:11-13). The heroin was located in a Crown Royal bag located in the neighbor's yard and was packaged inside two sandwich bags along with two scales. (84:21).

Officer DeWitt interviewed Mr. Spencer and Beatrice Young. (84:26). During the interview at District 3, Mr. Spencer stated that the firearm belonged to him. (84: 27).

On cross-examination, Officer DeWitt recalled that he was on the grass in the front yard when the tactical unit made entry, and he did not recall any other officer standing next to him. (84:32-33). While the tactical unit went into the home he remained positioned and saw the hand make a throwing motion over the 6-foot fence. (84:33). He saw a little part of the forearm and no tattoos. (84:34).

Officer DeWitt testified that he believed the officers on the rear containment also saw the hand, and that he observed it approximately five to ten seconds after the flash bang went off. (84:34). The bag that was thrown landed on a table in the neighbor's yard, approximately 15-20 feet from the fence. (84:34). Officer DeWitt estimated that the bag landed consistent with what he saw, and that he saw the hand in the middle of the fence between the house and the parking slab. (84:35).

Defense counsel showed Officer DeWitt Exhibits 23 and 24. (84:36). Exhibit 23 showed the backyard along the northern side of the fence, where there was a tree and two dog kennels. (84:36.). Exhibit 24 depicted the backyard of the house to the north where the bag was found. (84:36). Officer DeWitt testified that his view of the hand throwing the bag was unobstructed and that the leaves and branches from the tree did not in any way hinder his view. (84:38). He was positioned about 20-30 feet away. (85:5).

Matthew VanDrisse

Officer VanDrisse was on front containment in the southwest corner of the home, and therefore could not see into the backyard. (85:11). He inventoried items, including two digital scales. (85:13). One of the scales was located in the southeast corner of the backyard. (85:15).

Ryan McElroy

Officer McElroy was positioned on front containment on the north side of the residence. (85:21). Officer McElroy testified that he could see the north side of the house, including the fence and that he saw a hand "discard an object" over the fence. (85:21). He stated that it was at most a few seconds from the time the object was thrown and the unit made entry. (85:22). He indicated that the hand he observed was in the middle of the fence and that it made a throwing motion. (85:22-23). Officer McElroy testified that he immediately went to recover the bag, which had landed under the table. (85: 24).

Ryan DeWitt

Officer Ryan DeWitt was on front containment on the south side of the residence and did not observe anything in relation to the bag being thrown. (85: 35). He testified that he stayed on containment until everything was cleared and then went and "checked out the big bag of heroin that got tossed."

(85:35). Officer Ryan DeWitt observed the bag being photographed. (85:37). He stated that he did not observe anything of significance in the basement in relation to the firearm or controlled substances. (85:38-39). He testified that scales were recovered on the southeast fence line by the parking slab. (85: 40).

Tameka Rash

Ms. Rash testified for the defense. She was Mr. Spencer's live-in girlfriend at the time the warrant was executed. (86:59). She indicated that on the day of the warrant she was outside with Kenneth Wooten, Jerry Little and man named Al, and a woman named Mia. (86:61). When she heard a "boom," she thought that someone was shooting, at which point she ran into the house. (86:61). At the time she ran in, Mr. Wooten was in the alley working on cars, and Al, a neighbor who had stopped by, was in the yard. (86:61). Jerry, also a neighbor, had stopped over, and was working on cars when the loud bang occurred. (86:62). Ms. Rash testified that Kenneth Wooten frequently used their parking slab to work on cars, and that it was not uncommon to for Al and Jerry to stop by. (86:62-63).

Ms. Rash indicated that when she heard the "boom," Mr. Spencer was in the bathroom in the house and that she was aware he was in the restroom because her children told her. (86:63). When the police told Ms. Rash that they were looking for a gun, she told them where it was. (86:64).

Ms. Rash testified that as she was running into the home Mr. Spencer was running out of the home and that he was not carrying anything. (86:64-65). Ms. Rash indicated that the shed was open and unlocked the day the warrant was executed, but that it is locked when they are not using it. (86:66). Ms. Rash told the police the gun was hers. (86:66).

In relation to her observations of the yard, Ms. Rash testified that she did not see anyone in the yard move after the

bang went off because she immediately ran into the house because of the kids, including her infant in her bouncer. (86:67). She did not see or hear any officers approaching when she heard the bang. (86:68). Ms. Rash testified that the gun was there for protection and that she had asked Mr. Spencer to take it out of the house. (86:71-72).

Ms. Rash denied making any statement regarding telling Mr. Spencer to stop "messing with that stuff." (86:72). She indicated that Mr. Spencer had used in the past but that she told police that they did not have to have drugs around because they make enough money to provide for their kids. (86:73). Ms. Rash clarified that she told officers that Mr. Spencer had done drugs in the past and that the officer responded by saying that "Robert doesn't listen to you, does he?" Ms. Rash again denied saying that she told Mr. Spencer to "stop messing with that stuff."(86:75-76).

Robert Spencer

Mr. Spencer testified that prior to flash bang, he was sitting on the deck in the yard with Tameka Rash, his daughter Beatrice, and "Big Man" who he identified as Albert. (86:80-81). According to Mr. Spencer, Kenneth and Jerry were on the parking slab working on cars. (86:81). Mr. Spencer said that all of the guys present that day came by every now and then to grill and hang out, and that there were visitors every other day. (86:81).

Mr. Spencer testified that the shed was open that day because he was planning to barbeque, and that anyone in the yard had access to it. (86:84). Mr. Spencer testified that he was in the bathroom when he heard the "boom" from the percussion grenade, and that until he heard them shouting "police" he believed someone was shooting the house. (86: 86). Mr. Spencer testified that he went out the back when he heard police yelling at his daughter to get on the ground and she had a baby in her arms. (86:87). Mr. Spencer denied have any object, including a purple bag, in his hands. (86:87).

Mr. Spencer indicated that prior to the flashbang, Albert and his daughter were in the yard with him, but that when he went outside after hearing the bang, Albert was no longer inside the yard. (86:88). He stated that the scales that were found in plastic bags were located by where the vehicles were parked in the alley. (86:87)

Mr. Spencer testified that he swore at officers because he felt they were being rough with his daughter. (86:89-91). The detective let his daughter sit and Mr. Spencer then got on the ground. (86:89-91). The detective told him that the "dope" was his as they had a search warrant for his house. (86:91). Mr. Spencer testified that he has a sleeve of tattoos with his kids initials and family tree and that he is 5'7" tall. (86:92) Mr. Spencer indicated that the Crown Royal bags found in the shed had bottles in them, as did the ones in the basement. (86:92). Mr. Spencer testified that bags and balloons were for the kids. (86:93). There was approximately $600-$700 located in the home, which Mr. Spencer testified were for payment of bills. (86:93).

On cross-examination, Mr. Spencer testified that when the bang went off he started to go and look for his gun, until he heard that it was police, at which time he went out to the yard. (86:96). Mr. Spencer stated that he told officers the gun was his as they had threatened to arrest his wife and call child protective services. (86:95). Mr. Spencer confirmed during cross-examination that at the time he ran out to the yard, Albert was outside the four-foot fence. (86:98).

After Mr. Spencer's testimony, trial counsel was unsure if Mr. Spencer's daughter was present, and so the court gave him time to check on additional witnesses. (86:101). After discussion about verdict forms, defense counsel told the court it would not present any additional witnesses. (86:103).

Rebuttal witness

The state called Officer Susler as a rebuttal witness. (86:104).Officer Susler testified about his conversation with Tameka Rash regarding the firearm. (86:105). He also testified that Ms. Rash told stated that there was no need for money from drug sales. (86:106). Officer Susler indicated that Mr. Rash was crying uncontrollably and that when she made the statement, she was barley speaking. (86:106). Officer Susler denied that he or any officer questioned Ms. Rash about who the drugs belonged to and whether Mr. Spencer was engaged in drug dealing. (86:106-107).

Jury Verdict

After deliberation, the jury convicted Mr. Spencer of both counts as charged. (86:152).

Sentencing

The circuit court sentenced Mr. Spencer to fifteen years of imprisonment on count one, possession with intent to deliver a controlled substance-heroin, divided into ten years of confinement followed by five years of supervision. (87:38). On count two, felon in possession of a firearm, the circuit court sentenced Mr. Spencer to five years of imprisonment; divided into two years of confinement, followed by three years of supervision. (87:38). The circuit court ordered the sentences to run concurrent to one another. (87:38).

Postconviction Proceedings

Mr. Spencer filed a postconviction motion alleging ineffective assistance of counsel, a ***Brady*** violation, and challenging the sufficiency of the evidence. (45:1-43). Following additional briefing, the circuit court issued a written decision and order denying relief on the basis of failure to file a suppression motion, the alleged ***Brady***

violation, and the sufficiency claim. (62:1-8; App. 102-109). The details of the court's decision will be discussed below.

The circuit court did, however, order a ***Machner***[3] hearing in relation to Mr. Spencer's claim that trial counsel was ineffective for failing to publish an exhibit to the jury and failing to investigate and call additional witnesses. (62:8; App. 109).

Trial counsel's testimony

Trial counsel testified in these postconviction proceedings. Counsel testified that in preparation for this case he met with Mr. Spencer a number of times, as well as with Ms. Rash. (88:11). He recalled going out to the scene of the incident and believed that he took photos of it with his cell phone to see the vantage point from the front. (88:12). Counsel stated the he believed, or thought, or knew that he spoke with Mr. Spencer's daughter at one point, and that she would have been willing to testify. (88:12).

Trial counsel, who was appointed by the State Public Defender, (88:9) handled all investigation in this matter, and had not hired an investigator. (88:13). In relation to interviewing or locating other witnesses, counsel testified that he personally went to knock on the door of the two witnesses that were neighbors. (88:13). He stated that he left a business card, but was not sure if he left a note. (88:13).

He believed that he did have contact with either Albert Medley or Kenneth Wooten during this case. (88:13). He believed that the contact took place at the preliminary hearing, or a "different one" and he could not recall if he "actually spoke to them about the case or about Mr. Spencer." (88:13).

Counsel agreed that it "may have" been beneficial to speak with them since they were witnesses to the events, but

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that he did not have any communications with the witnesses prior to trial. (88:14). He did, however, include both Albert Medley and Kenneth Wooten on his witness list as he thought he may potentially call them to testify. (88:14).

Counsel admitted he did not subpoena either witness, and when asked why, indicated that he did not do so because "they may have been involved in the crime." (88:15). He also stated that he believed that if he had called them to testify, they would have testified consistently with their statements to the police. (88:15). However, he was unsure whether they gave statements to the police and when asked if he could have any way of knowing what they would say if neither he, nor the police interviewed them, trial counsel thought they could basically testify about the "sequence of events." (88:16).

When asked about why he didn't call those two witnesses, trial counsel responded by stating that originally he believed their testimony would have been consistent with what is in the reports, but knowing that there were no statements from either witness, he did not call them because "based on his own investigation and review of the evidence, their testimony would have been fairly consistent with what was contained in the police reports." (88:21). Counsel agreed that he could not have known that as he had not spoken to either witness. (88:21-22).

Trial counsel's primary goal was just to establish that these two people were in the yard. (88:23). He believed the witnesses may have denied involvement and the jury would have found them credible. (88:23-24). Had these two witnesses been at trial, counsel would have examined them about positioning and timing of events. (88:24). Counsel agreed that it was important to get testimony about the positioning and timing of events because that was "precisely" what the police relied on to conclude Mr. Spencer possessed the drugs. (88:25).

In relation to Ms. Young, trial counsel could not specifically recall speaking with her, but believed that he did. (88:28-30). Trial counsel did not call her as a witness and did not issue a subpoena for her. (88:31). He indicated that he did not call her because she was maybe in the gallery during testimony and then stated that her statement to the police was inconsistent. (88:31-32). Counsel admitted that it would have been useful to have Ms. Young establish that Mr. Spencer was in the house at the time of the flash bomb as that was consistent with other testimony. (88:33).

He did not view Ms. Young's potential testimony as helpful. (89:15). Counsel testified that Ms. Young's statements were inconsistent, but then later testified that he does not know if she gave more than one statement and that the one she did give was not inconsistent. (89:15, 24-26).

Counsel also admitted that he tried to establish that Mr. Spencer was in the house at the time the officers saw the bag being tossed and therefore could not have thrown it. (88:35-36).

Regarding Officer Jason DeWitt's testimony that he had an unobstructed view, counsel's strategy was to cast doubt on positioning and whether the officer really saw a hand or not as he believed it to be questionable. (88:38). He also agreed that there was a large tree over the fence line where the officer saw the hand tossing the bag. (88:38-39). He did not believe the pictures were essential to advance his theory. (88:40).

In further proceedings, Albert Medley testified. Mr. Medley testified that he knew Mr. Spencer well and that he went to his house often for barbecues. (91:9). He stated that he heard what sounded like a gunshot and that when he heard that sound, he was in the backyard. (91:9). He could not recall whether Mr. Spencer was in the house or in the yard at the time of the noise because several years had passed since the incident. (91:10).

He did not recall ever speaking with attorney Pierce, only a "lady" that told him he did not have to come to court. (91:12-13).

Regarding the day of the incident, Mr. Medley testified that he had become disoriented and the next thing he knew MPD was coming at him with guns telling him to get down. (91:13). He stated that he was in the alley when he was ordered to the ground. (91:14).

When the bang went off, Mr. Medley was inside the backyard, having just returned from picking up either beer or cigarettes. (91:15). He knew another person there, believed to be a Brian West, and his roommate, Jerry Ollie was in the back working on cars. (91:15). He testified that there were maybe five or six adults in the area at the time of the incident. (91:16).

Investigatory Mark Natwick testified that he dropped a card at Mr. Medley's house and then spoke with him on the phone. (91:25). Investigator Natwick indicated that Mr. Medley indicated that he socialized with Mr. Spencer often. (91:26). Mr. Medley told the investigator that he had just returned from getting cigarettes when the bang went off and that he told him that Mr. Spencer was in the house at the time because he had asked Mr. Spencer for a beer. (91:26). Further, Mr. Medley told the investigator he had never met with Mr. Spencer's attorney.

Mr. Natwick also testified that he took a picture of the property and described that picture, which the court received into evidence. (91:30).

Finally, Mr. Spencer's daughter, Beatrice Young, testified. (92). She stated that on the day of the incident, she was at her father's house to get her car fixed. (92:7). She stated that when the police arrived, her dad was inside the house. (92:7). She clarified that when the bomb when off he was inside and came running outside. (92:8).

She believed that there were ten to twelve people there, including adults and children. (92:8). She testified that she never spoke to her dad's lawyer and was not interviewed by him, nor did she ever get a call or a letter. (92:9). She stated she was not present for her father's trial. (92:15).

Postconviction Court Ruling

In a written decision and order partially denying the postconviction motion and granting the motion for an evidentiary hearing, the circuit court held that while the evidence in this case is circumstantial, it was "more than sufficient . . . . for the jury to find beyond a reasonable doubt that the heroin belonged to [Mr. Spencer]." (62:8; App. 109).

The circuit court also held that even if there was insufficient reasonable suspicion for the no-knock warrant, the good-faith exception applied, and therefore Mr. Spencer was no prejudiced by his attorney's failure to file a motion to suppress the evidence. (62:4-5; App. 105-106).

In relation to Mr. Spencer's argument that he is entitled to a new trial because of a ***Brady*** violation, the circuit court held that the evidence was no "material" for purposes of establishing a violation and is not sufficient to show prejudice under Strickland. (62:6; App. 107). The support this decision, the circuit court noted that Officer Jason DeWitt's suspension for being intentionally untruthful was modified to the reduced charge of "failure to be attentive and zealous in the discharge of his duties," thereby reducing the probative value of the evidence. (62:6; App. 107).

The circuit court further reasoned that although this officer's observations were important to the inference that Mr. Spencer discarded the bag, because another officer also observed a hand, it is insufficient to show the probability of a different outcome. (62:6; App. 107).

After hearing all the testimony at the postconviction motion hearings, in an oral ruling, the circuit court ruled that trial counsel had not been ineffective. (92:35; App. 112). The circuit court identified the two-prong test for a claim of ineffective assistance of counsel. (92:33; App. 110). The court stated, "All parties recognize that this was a very circumstantial case. In fact Mr. Pierce [trial counsel] testified that he understood that." (92:33; App. 110).

The circuit court determined that Attorney Pierce investigated and went to the scene. (92:34; App. 111). He made an attempt to knock at the doors of witnesses and left a card. (92:34; App. 111). At trial he did cross-examine witnesses. (92:34; App. 111).

Ultimately, the court decided that even if Mr. Peirce was deficient in not speaking to the witnesses, he failure to do so did not prejudice the outcome since their testimony in the postconviction hearings was not "necessarily consistent" with one another. (92:34; App. 111). This issue "is going to be whether or not the jury believed any testimony from witnesses that Mr. Spencer was in the house. Testimony . . . . at trial was that Mr. Spencer was in the yard . . . . Given all that Mr. Peirce was not deficient and this did not prejudice Mr. Spencer in any way and did not undermine the outcome of the trial." (92:34-35; App. 111-112).

ARGUMENT

I. The Evidence at Trial was Insufficient to Conclude Beyond a Reasonable Doubt that Mr. Spencer Possessed a Controlled Substance with an Intent to Deliver it.

Due process demands that the prosecution prove each and every element of a charged offense beyond a reasonable doubt. ***In re Winship***, 397 U.S. 358, 365 (1970); ***State v. Harvey***, 2002 WI 93, ¶19, 254 Wis. 2d 442, 647 N.W.2d 189.

The Wisconsin jury instructions define a "reasonable doubt" as follows"

> [t]he term 'reasonable doubt' means a doubt based upon reason and common sense. It is a doubt for which a reason can be given, arising from a fair and rational consideration of the evidence or lack of evidence. It means a such a doubt as would cause a person of ordinary prudence to pause of hesitate when called upon to act in the most important affairs of life.

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On appeal, a court must reverse a defendant's conviction where the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

This issue in this case is whether there was sufficient evidence for a jury to conclude beyond a reasonable doubt that Mr. Spencer possessed heroin with the intent to deliver. Here, the only evidence presented by the state identifying Mr. Spencer as the person in possession of the drugs was testimony from officers that a hand was observed throwing a bag over the fence and that Mr. Spencer was the only male in the yard when police arrived.

Due process demands that the prosecution prove each element of a charged offense beyond a reasonable doubt. ***In re Winship***, 397 U.S. 358, 365 (1970); ***State v. Harvey***, 2002 WI 93, ¶19, 254 Wis. 2d 442, 647 N.W.2d 189. The Wisconsin jury instructions define a "reasonable doubt" as follows:

> [t]he term 'reasonable doubt' means a doubt based upon reason and common sense. It is a doubt for which a reason can be given, arising from a fair and rational consideration of the evidence or lack of evidence. It means a such a doubt as would cause a person of ordinary prudence to pause of hesitate when called upon to act in the most important affairs of life.
>
> Wis JI-Criminal 140.

On appeal, this Court must reverse a defendant's conviction where the evidence, viewed most favorably to the State and the conviction, is so lacking in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

Even if circumstantial evidence also supports an equally reasonable theory consistent with innocence, a conviction may rest entirely on that circumstantial evidence. ***Id***. at 501. A jury may draw reasonable inferences from circumstantial evidence, as long as the evidence supports those inferences. ***State ex rel. Kanieski v. Gagnon***, 54 Wis.2d 108, 117, 194 N.W.2d 808, 813 (1972). The standard of review remains the same regardless of whether the conviction relies upon direct or circumstantial evidence. ***Poellinger***, 153 Wis. 2d at 503. Therefore, in reviewing this matter, this Court must determine whether the jury's conclusion was a reasonable one.

To convict Mr. Spencer of possession with intent to deliver a controlled substance (heroin), the State was required to prove four elements: (1) Mr. Spencer possessed a substance, (2) the substance was heroin, which is a controlled substance whose possession is prohibited by law, (3) Mr. Spencer knew or believed the substance he possessed was heroin, a controlled substance, and (4) Mr. Spencer intended

to deliver the substance. *See* Wis JI-Criminal 6035[4]; Wis JI-Criminal 920 ("Possession means that the defendant knowingly had actual physical control of the item.")

In this case, the evidence did not prove beyond a reasonable doubt that Mr. Spencer knowingly possessed the bag of heroin. There were no fingerprints or DNA evidence recovered from the bag or baggies containing heroin. Likewise, there were no fingerprints or DNA evidence recovered from any of the items found in Mr. Spencer's backyard, such as the digital scales or other alleged paraphernalia.

There was no eyewitness testimony that Mr. Spencer actually possessed the heroin. Officers testified that a bag was thrown over the fence, but only a hand was seen. (84:6; 85: 21). Officers testified that Mr. Spencer was in the backyard when they approached, but one officer indicated that Mr. Spencer was coming from the north side of the yard where the bag was thrown, and that he observed this about 30 seconds from the execution of the warrant (83:102-104). Another officer testified that when he came up the backyard he saw Mr. Spencer standing still, not coming from any particular direction. (83:120). That same officer believed that the flash bomb went off as he approached the yard. (83:123). Both of those officers observed things differently in relation to timing of the flash bomb and which individuals they observed; thereby demonstrating the general chaotic nature of the events and the unreliability of the memories of the eye witnesses.

Moreover, the scales were found in the yard near the alley and not in the house or even in the shed. The additional items, which included baggies and balloons are not unusual household items, particularly with nine children. Accordingly,

[4] This jury instruction includes the lesser possession, which is not an issue in this case.

it is not a reasonable inference that these household items alone are indicative of Mr. Spencer dealing heroin.

At best, the collective testimony and various versions of events as testified to by the officers show a chaotic scene with many individuals moving around and loud noise from the flash bomb.

In addition to the problems with the proof of possession, there was no evidence to show that Mr. Spencer had any knowledge of what was contained in the bag. Even believing that Mr. Spencer tossed the opaque bag over the fence, there is nothing to show that he knew what was contained therein. During its closing, the state argued to the jury that Mr. Spencer's knowledge is demonstrated by his discarding the bag. (86:133). Discarding a bag does not prove Mr. Spencer knew there was a controlled substance or what that controlled substance was.

Even looking at the evidence in the light most favorable to the state, the evidence was not sufficient to prove Mr. Spencer guilty beyond a reasonable doubt.

II. Mr. Spencer Received the Ineffective Assistance of Counsel at Trial.

A. Legal Principles.

In a claim of ineffective assistance of counsel, the defendant bears the burden to establish both that trial counsel performed deficiently, and that the deficient performance was prejudicial. ***State v. Zimmerman***, 2003 WI App. 196 ¶ 33, 266 Wis. 2d 1003, 669 N.W.2d 762. In order to establish deficient performance, a defendant must show that counsel "made errors so serious that counsel was no functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

The standard by which to measure an attorney's representation is "reasonableness under prevailing professional norms." ***Id***. at 288; ***State v. Thiel***, 2003 WI 111 ¶19, 264 Wis.2d 571, 665 N.W.2d 305. Because there is a strong presumption that counsel acts reasonably under professional norms, a defendant must overcome that in order to prove deficient performance. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

Once deficient performance is established, the second prong of the analysis is to demonstrate prejudice. ***Zimmerman***, 266 Wis. 2d 1003, ¶ 33. To establish prejudice, a 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." ***Strickland***, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id***. When there are multiple instances of deficiencies are alleged, prejudice should be assessed by the cumulative effect of the deficiencies. ***Thiel***, 264 Wis. 2d 571 ¶59.

B. Trial counsel performed deficiently by failing to publish exhibit 23 to the jury and failing to call additional witnesses whose testimony would have placed Mr. Spencer in the house at the time the percussion grenade went off.

As acknowledged by the circuit court, Mr. Spencer was convicted on the basis of circumstantial evidence. (92:33; App. 110). Defense counsel's conduct at trial constituted deficient performance.

1. Counsel's failure to attack Officer DeWitt's credibility in relation to his ability to see the bag being tossed was deficient.

The circuit court determined that the exhibits 23, 24 and the photo taken by the investigator demonstrate that the officers could not have seen the bag being thrown over the fence. (62:8; App. 109).

While matters of trial strategy are generally left to counsel's professional judgment, counsel may be found ineffective if the strategy was objectively unreasonable. *See* ***State v. Felton***, 110 Wis. 2d 485, 501-03, 329 N.W.2d 161 (1983).

Trial counsel testified that he did not think it was necessary to show the jury pictures of the scene, despite getting Officer DeWitt to commit on cross-examination that he had an unobstructed view of the fence line. (88:38-40). It is unreasonable for trial counsel not to used available evidence to demonstrate that Officer DeWitt's testimony that his view was unobstructed was incredible, given that there was a large tree hanging over the fence. *See* ***State v. Thiel***, 2003 WI 111, ¶¶46, 50, 264 Wis. 2d 571, 665 N.W.2d 305 (concluding that "it was objectively unreasonable for [defendant]'s counsel not to pursue further evidence to impeach" the alleged victim).

2. Counsel's failure to investigate and call additional witnesses at trial was deficient.

Trial counsel could not recall many details of his work in this case, and his testimony regarding his decision-making for not calling certain witnesses was inconsistent. Ultimately, he testified that he never spoke with Mr. Medley, Mr. Wooten and could not recall whether he spoke with Ms. Young. None

of these witnesses were subpoenaed to testify at trial. (88:11-22; 28-31).

During postconviction proceedings, both Ms. Young and Mr. Medley testified that Mr. Spencer was inside the house when the flash bomb went off. (91:10; 92:8). Mr. Medley placed himself inside the backyard just before the flash bomb went off (91:15, 26), which was consistent with Mr. Spencer's testimony. (86:80-81).

Counsel testified that his goal was to create doubt by showing that other people were in the yard and that positioning of people and timing was crucial since that was "precisely" what police relied on to conclude Mr. Spencer threw the bag of drugs. (88:23-25). Accordingly, Mr. Medley's own testimony, confirming Mr. Spencer's, was crucial for the jury to hear.

Counsel's purported strategic reason for not calling the witnesses is unreasonable, as it was impossible for him to determine the usefulness of their testimony without interviewing them. (88:21-22). "[O]nly choices made after a reasonable investigation of the factual scenario are entitled to a presumption of validity." ***Strickland***, 466 U.S. at 690-91).

Had counsel done more than leave a card at a residence, which he could not be entirely sure he did, he would have been able to evaluate the statements from these witnesses and use them to further his theory of defense. Failure to use evidence to further his theory constitutes deficient performance. Contrary to the circuit court's reasoning, Mr. Spencer was entitled to more than cross-examination and a card left at an address.

C. Counsel's errors prejudiced the outcome of the trial.

When assessed cumulatively, counsel's errors undermine confidence in the outcome of the trial. When there are multiple instances of deficiencies are alleged, prejudice should be assessed by the cumulative effect of the deficiencies. ***Thiel***, 264 Wis. 2d 571 ¶59. Prejudice is not just whether there would have been acquittal, but whether counsel's acts or omissions undermine confidence in the result. ***Id***. ¶ 20.

The circuit court incorrectly concluded that there could be no prejudice because there were some inconsistencies in the witnesses statements and the jury had heard testimony (from officers) placing Mr. Spencer in the yard. (92:35; App. 112).

Here, counsel's failure to impeach Officer DeWitt with the photo demonstrating that he did not have a clear and unobstructed view, as well as his failure to investigate witnesses and subpoena them for trial constitute deficient performance. The circuit court cannot determine that the jury would have found these witnesses incredible. Moreover, in the very least, the jury would have heard that Mr. Medley was also in the yard, and had it been shown that from Officer DeWitt's vantage point there was a tree on the fence line, the credibility of what he observed would have been called into question.

Collectively, these errors undermine the confidence in the outcome because the jury was missing evidence that was essential, particularly in light of the fact that this case relied almost exclusively on observations related to the timing of events and where people were positioned. Because these cumulative errors undermine confidence in the outcome, Mr. Spencer is entitled to a new trial.

III. A Hearing is Necessary to Determine Whether Suppression of the Evidence was the Remedy for a "No Knock" Warrant Lacking Reasonable Suspicion.

The United States and Wisconsin Constitutions protect the right of individuals to be free from unreasonable searches and seizures. U.S. Const. amend. IV; Wis. Const. art. I, § 11. Here, the police violated Mr. Spencer's constitutional rights by executing a "no-knock" warrant that lacked "reasonable suspicion that knocking and announcing their presence under the particular circumstances would dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." ***Richards v. Wisconsin***, 520 U.S. 385, 394 (1997).

Because trial counsel never filed a suppression motion before Mr. Spencer went to trial, this issue was waived, and must be reached on appeal through an argument that counsel was constitutionally ineffective. Mr. Spencer's right to the effective assistance of counsel is guaranteed by the state and federal constitutions. U.S. Const. amend. VI; Wis. Const. art. I, § 7. To prove that he was denied the effective assistance of counsel, Mr. Spencer must show that (1) trial counsel's performance was deficient; and (2) he was prejudiced by the deficiency. ***State v. Artic***, 2010 WI 83, ¶24, 327 Wis. 2d 392, 768 N.W.2d 430.

To prove deficient performance, Mr. Spencer must show that trial counsel's failure to file a suppression motion was not the product of reasonable professional judgment. ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). "[W]here the asserted attorney error is a defaulted Fourth Amendment claim, a defendant must first prove that the Fourth Amendment claim is meritorious." ***United States v. Stewart***, 388 F.3d 1079, 1084 (7th Cir. 2004). Therefore, to assess deficient performance, the circuit court should have held a ***Machner*** hearing to assess trial counsel's reasons for failing to file a suppression motion.

Additionally, it should have held a hearing to assess whether suppression would have been granted. At the suppression hearing, the State would bear the burden to show that there was sufficient reasonable suspicion for the "no-knock" warrant. ***State v. Payano-Roman***, 2006 WI 47, ¶ 30, 290 Wis. 2d 380, 714 N.W.2d 548.

The circuit court, however, declined to assess whether trial counsel was ineffective because it determined that there was no prejudice. (62:4; App. 105). It found that even assuming lack of reasonable suspicion, suppression was not the remedy. (62:4; App. 105). In making this determination, the circuit court reasoned that the factors outlined in ***State v. Eason***, 2001 WI 98 ¶ 17, 245 Wis. 2d 206, 629 N.W.2d 625 apply.

Specifically, the circuit court found that there were no allegations that "Judge Sanders abandoned his independent role when he signed the search warrant or that officers were dishonest or reckless in preparing the affidavit." (62:5; App. 106). The circuit court noted that the officer making the warrant application had 8 years of experience and there had been significant investigation. (62:5; App. 106). Accordingly, even if counsel had filed a motion, the court would have denied it based on the good faith exception. (62:5; App. 106).

When executing a search warrant, one requirement is that police follow the rule of announcement, which necessitates that police (1) announce their identity; (2) announce their purpose; and (3) wait for entry to be granted or denied before forcibly entering. ***State v. Eason***, 2001 WI 98 ¶ 17, 245 Wis. 2d 206, 629 N.W.2d 625 (citations omitted). The purpose of the rule is to (1) protect safety of officers and others; (2) protect limited privacy interests of the occupants; and (3) prevent property from being destroyed. ***Eason***, 245 Wis. 2d 206, ¶ 17.

The rules of announcement, however, are not inflexible. ***Richards***, 520 U.S. at 387. The police may dispense with the rule to serve their interests. ***Id***. In order to dispense with the rule, "the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." ***Id***.; *see also* ***State v. Meyer***, 216 Wis. 2d 729, 755, 576 N.A.2d 260 (1998).

Wisconsin courts have adopted the United State Supreme Court standard from ***Richards v. Wisconsin*** for when police may conduct a no-knock entry while executing a warrant. ***Meyer***, 216 Wis. 2d at 734-35. Under that standard, the police are required to show particular facts to establish reasonable suspicion and the burden is on the State to establish such particular facts. ***Id***. Just as in other Fourth Amendment issues, the State may not rely solely upon the training and prior experience of the officers, as doing so is not particularized enough to explain why a no-knock is necessary. ***Id***. at 751. Consideration of training and experience is appropriate when used in combination with particularized facts. ***Id***. However, reliance *only* on training and experience is the equivalent of permitting a blanket rule – something the Supreme Court repudiated in ***Richards v. Wisconsin***, 245 Wis. 2d ¶ 20.

In ***Eason***, the affidavit contained information about the defendant's previous arrests for aggravated assault, obstruction, larceny and assault. ***Id***. 245 Wis. 2d ¶ 4. It also contained information about the controlled substance the CI purchased from the defendant, as well as information about the officer's training and experience. ***Id***. The Wisconsin Supreme Court agreed with the circuit court and the court of appeals that the affidavit was not sufficiently particularized to establish the requisite reasonable suspicion to authorize a no-knock warrant. ***Id***. ¶ 26.

The court found that the particularized information about the arrests were vague and outdated. ***Id***. It further determined that "felony drug dealing and the officer's training and experience, cannot be relied upon without running afoul of *Richards v. Wisconsin* ***and*** *Meyer* . . . . thus the Commissioner erred in issuing a no-knock warrant." ***Id***.

Similarly, in this case the affidavit contained no particularized information aside from the selling of a firearm and Mr. Spencer's previous convictions. According to the affidavit, the CI informed the police that Mr. Spencer was attempting to see a .357 handgun. (45:31; 118). There was no allegation that Mr. Spencer made threats to harm anyone or to act with violence. There were no allegations of other armed individuals being present in the residence. The affidavit contained Mr. Spencer's convictions, which included possession with intent to deliver cocaine from 2004, possession of a firearm-felon from 1996, and a 1985 conviction for receiving stolen property. (45:31; App.118).

Like the criminal history in ***Eason***, these convictions are vague and dated, with the most recent being 10 years prior to the warrant application. Moreover, none of these offenses necessarily involves violence, nor are there any allegations of such. Removing the convictions, all that is left is the fact that Mr. Spencer wanted to sell a firearm and the officer's assertion that "due to the fact that this is a firearms related warrant [] there is a high probability of individuals inside the residence being able to arm themselves with firearms. (App. 106).

The affiant provided no specific, particularized information to support this assertion. There is no information related to Mr. Spencer being prone to acting violent or to threatening anyone, including any officer or the CI. Moreover, the police cannot be concerned about the destruction of evidence because a gun, which was the sole

object of the warrant, cannot be flushed away. Permitting a no-knock because there is information that a firearm is being sold, or based on an officer's training or experience, runs afoul of the prohibition of permitting warrants based on blanket rules. ***Eason***, 245 Wis. 2d 206, ¶26. Accordingly, there was insufficient particularized information to authorize a no-knock warrant.

In order for the good-faith exception to apply, the burden is on the State to show the process used to obtain the warrant included significant investigation and review. ***Id***. ¶74. A good-faith inquiry is limited to the "objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." ***United States vs. Leon,*** 468 U.S. 897, 923 n. 23 (1984). "The standard of objective reasonableness requires, among other things, that police officers have a reasonable knowledge of what the law prohibits." ***Leon***, 468 U.S. at 919 n. 20.

For example, an officer cannot be said to reasonably rely on a warrant that was based upon a "deliberately or reckless false affidavit or a bare bones affidavit that she or he reasonably knows could not support probable cause or reasonable suspicion." ***Id***. at 923. Here, the officers are presumed to know that a no-knock warrant requires sufficient *particularized* information to support reasonable suspicion reasonable that "knocking and announcing their presence under the particular circumstances would dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." ***Richards v. Wisconsin***, 520 U.S. 385, 394 (1997).

Contrary to the circuit court's interpretation, the warrant itself does not show any "significant" investigation. The warrant states that the CI observed a revolver inside the residence in the possession of the Mr. Spencer. (45:31; App. 118). Absent, however, are details that would result from a

"significant investigation." For example, there is nothing in the affidavit regarding where the gun was kept, whether the CI saw the gun on Mr. Spencer's person, who else lived at the home, whether any other armed individuals were observed, or whether there were other people present. It is reasonable to believe that if the officer had gotten those details from the CI, that those would have been included in the affidavit.

The details about the house's appearance from the outside is available to anyone, and is not the product of a significant investigation. Likewise, Mr. Spencer's criminal record is obtainable to anyone with access to the internet. Providing case numbers and the type of charge associated with each case is also not the product of significant investigation. The fact that an ADA reviewed the warrant should not save the warrant. An ADA, as an officer of the court, has an obligation to require further investigation where a warrant does not provide sufficient enough information. Here, the no-knock request should have been identified as lacking sufficient particularized details.

The circuit court could not have determined whether the good-faith exception applied in this case without holding a hearing, as the burden is on the State to show that the exception did apply. ***Eason***, 245 Wis. 2d 206, ¶ 74. Accordingly, this Court should remand the matter back to the circuit court for a hearing. Should the court determine the good-faith exception does not apply, then the matter must be reviewed for the ineffective assistance of counsel for failure to file the suppression motion.

IV. The State's Failure to Disclose that Officer Jason DeWitt had Previously Been Suspended for Being Intentionally Untruthful in his Capacity as a Police Officer Constituted a *Brady* Violation.

In ***Brady v. Maryland***, 373 U.S. 83, 87, (1968) the United States Supreme Court held that Due Process is violated when the prosecution suppresses favorable evidence that is material to either guilt or punishment, irrespective of the good or bad faith of the prosecution. ***State v. Harris***, 2008 WI 15, ¶ 61, 307 Wis.2d 555, 745 N.W.2d 397. Favorable evidence is that which, when used effectively, may make the difference between conviction and acquittal. ***United States v. Bagley***, 473 U.S. 667, 767 (1985).

In order to establish a *Brady* violation, a defendant must show: (1) the State suppressed the evidence in question; (2) the evidence was favorable to the defendant; and (3) the evidence was material to the determination of the defendant's guilt or punishment. ***State v. Rockette***, 2006 WI App 103, ¶ 39, 294 Wis.2d 611, 718 N.W.2d 269 (citing ***Strickler v. Greene***, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)). Without distinction, both exculpatory and impeachment evidence are considered to be evidence that is favorable to the accused. ***Strickler v. Greene,*** 527 U.S. at 281-82 (1999). Specifically, the United State Supreme Court has stated that "[w]hen the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within [the ***Brady***] rule." ***Giglio v. United States,*** 405 U.S. 150, 154 (1972). (internal quotations omitted).

In addition to showing that the withheld evidence is favorable, the burden is on the defendant to show that the evidence is material. ***Id***. "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a

probability sufficient to undermine confidence in the outcome." ***Bagley***, 473 U.S. at 682. While the state is not obligated to turn over the entire file, it must disclose evidence that is "favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." ***State v. Lock***, 2012 WI App 99 ¶ 94, 344 Wis. 2d 166, 823 N.W. 2d 378. (internal citations omitted).

The following establishes a ***Brady*** violation in this case: (1) the state failed to disclose to the defense that Officer Jason DeWitt, one of the officers that observed a bag being tossed over the fence, had been previously disciplined for intentional untruthfulness within his capacity as a police officer. (45:34-36). Specifically, Officer J. DeWitt lied about his observations in covering up for another office. (App.34-36). Moreover, at the final pretrial conference, the court specifically requested that the state "double check" the background of all potential witnesses, including the officers. (82:3-4); (2) evidence that one of the officers involved in the execution of the warrant had been untruthful in relation to covering up for another officer is favorable to Mr. Spencer as it undoubtedly impeaches that officer's credibility, and potentially raises doubt as to the credibility of the other officers; and (3) evidence that calls into question Officer J. DeWitt's credibility is material to the defense in this case because it casts doubt on the circumstances under which Officer J. DeWitt allegedly observed someone throw a bag over the fence.

Because no one directly observed Mr. Spencer possess or throw the bag, all of the evidence was circumstantial, which the circuit court agreed. (92:33; App. 110). Impeaching Officer J. DeWitt's credibility may have cast additional doubt onto the testimony of other officers as well, whose testimony about timing and positioning was critical to the question regarding whether or not Mr. Spencer was the individual who tossed the bag over the fence.

The circuit court held that the evidence pertaining to Officer Jason DeWitt's history of untruthfulness on the job was not "material" for purposes of establishing a violation and was not sufficient to show prejudice under ***Strickland***. (62:6; App. 107). To support this decision, the circuit court noted that Officer Jason DeWitt's suspension for being intentionally untruthful was modified to the reduced charge of "failure to be attentive and zealous in the discharge of his duties," thereby reducing the probative value of the evidence. (62:6; App. 107).

The circuit court further reasoned that although this officer's observations were important to the inference that Mr. Spencer discarded the bag, because another officer also observed a hand, it is insufficient to show the probability of a different outcome. (62:6; App. 107).

The circuit court unreasonably concluded that the jury could not know about the officer's original charge of being untruthful. However, evidence is admissible as to his character for truthfulness, WIS. STAT. § 906.08(2) provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility ... may not be proved by extrinsic evidence. They may, however ... if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness or on cross-examination . . . .

Moreover, the circuit court's conclusion that the evidence against Officer DeWitt was immaterial failed to consider the inconsistencies in some of the testimony.

Specifically, Officer J. DeWitt testified that he observed a hand reach up above the wooden fence and throw a purple bag. (84:6). There were, however, inconsistencies in

his version of events. For instance he testified that he saw *just* the hand that that threw the bag. (84:33). However, he also testified that he was able to see some of the forearm of the person throwing the bag. (84:34). Officer J. DeWitt testified that he did not recall any officer on containment with him on the north side of the house (84:33-34) and that when he saw the bag he told Officer McElroy who was on rear containment. (84:7) and that believed that the officers on the back containment also saw the bag being thrown over the fence. (84:6).

However, neither of the officers who testified that they were on back containment made that observation. (83:109, 124). Officer DeWitt testified that the bag landed on the table in the neighbor's yard (84:34), but Officer McElroy, who testified that he recovered the bag, said that it had landed under the table. (85:23). Officer J. DeWitt indicated that he was approximately 20 to 30 feet away and that his view was unobstructed (84:34), which is something that the state reiterated during its closing argument. (86: 129-130). Exhibit 23 depicted the backyard, specifically the north fence line, showing the dog kennels and a tree. (84:38). It is certainly questionable whether his view could have been unobstructed considering the large tree in the place where he saw the bag coming from.

The officers on back containment ran eastbound into the alley and approached from the north about two houses away, but never observed anything coming over the fence. (83:117, 109, 124). Those officers had different observations regarding the people they saw and where they saw them at the time they reached the alley and yard. There was also different testimony about the timing of the flash bang and when the officers reached the yard.

While the jury heard these inconsistencies, evidence regarding truthfulness of officers changes how the jury may view those inconsistencies. Accordingly, evidence

impeaching an officer's credibility is crucial to a case that relies heavily, if not exclusively on the observations of officers as it affects the strategy and theory of defense.

The mere fact that the officer was disciplined attacks his credibility and is admissible. The credibility of the officer's observations is critical where the case is based entirely on circumstantial evidence. As previously noted, there were discrepancies in what the officers observed. This information is admissible and material. Mr. Spencer is entitled to a new trial based on the failure to disclose this information.

CONCLUSION

For all of the reasons set forth above, Mr. Spencer respectfully requests that this Court reverse the decision of the circuit court and 1) vacate the judgment of conviction due to lack of sufficiency; 2) order a new trial due to the ineffective assistance of counsel; 3) remand for a suppression hearing; or 4) order a new trial due to the *Brady* violation.

Dated this 19th day of June.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 10,570 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 19th day of June, 2018.

Signed:

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CERTIFICATION AS TO APPENDIX

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 § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) 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.

Dated this 19th day of June, 2018.

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