

RECEIVED

09-11-2018

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2018AP766-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CALVIN LEE BROWN,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND
ORDER DENYING POSTCONVICTION RELIEF,
ENTERED IN THE MILWAUKEE COUNTY CIRCUIT
COURT, THE HONORABLE JEFFEREY A. WAGNER,
PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

BRAD D. SCHIMEL
Attorney General of Wisconsin

DONALD V. LATORRACA
Assistant Attorney General
State Bar #1011251

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2797
(608) 266-9594 (Fax)
latorracadv@doj.state.wi.us

TABLE OF CONTENTS

	Page
ISSUE PRESENTED	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	1
INTRODUCTION	1
SUPPLEMENTAL STATEMENT OF THE CASE	2
I. Factual statement.....	2
II. Procedural history	5
STANDARD OF REVIEW	6
ARGUMENT	7
 Brown was not entitled to a <i>Franks/Mann</i> hearing because he did not make a substantial preliminary showing that Detective Stachula intentionally or recklessly omitted material facts from the affidavit.....	
A. General legal principles.....	7
1. Probable cause determinations	7
2. A <i>Franks/Mann</i> challenge to a search warrant	9
B. Brown was not entitled to a <i>Franks/Mann</i> hearing because the search warrant affidavit established probable cause and did not omit material facts that would have undermined the probable cause determination.....	10
1. The officers' corroboration of JRR's statements demonstrated that she was reliable and established probable cause.	10

	Page
2. Brown did not make a substantial preliminary showing that the omission of information about JRR's recent legal difficulties, if disclosed, would have undermined the magistrate's probable cause determination.....	13
3. Brown's arguments notwithstanding, he was not entitled to a <i>Franks/Mann</i> hearing.....	15
CONCLUSION.....	17

TABLE OF AUTHORITIES

Cases

<i>Franks v. Delaware</i> , 438 U.S. 154 (1978)	1, 9, 10
<i>Illinois v. Gates</i> , 462 U.S. 213 (1983)	8
<i>State v. Anderson</i> , 138 Wis. 2d 451, 406 N.W.2d 398 (1987)	10, 12
<i>State v. Boggess</i> , 115 Wis. 2d 443, 340 N.W.2d 516 (1983)	8
<i>State v. Delgado</i> , 194 Wis. 2d 737, 535 N.W.2d 450 (Ct. App. 1995).....	15
<i>State v. DeSmidt</i> , 155 Wis. 2d 119, 454 N.W.2d 780 (1990)	6
<i>State v. Fischer</i> , 147 Wis. 2d 694, 433 N.W.2d 647 (Ct. App. 1988).....	10
<i>State v. Goss</i> , 2011 WI 104, 338 Wis. 2d 72, 806 N.W.2d 918.....	12
<i>State v. Jones</i> , 2002 WI App 196, 257 Wis. 2d 319, 651 N.W.2d 305	9

	Page
<i>State v. Mann</i> , 123 Wis. 2d 375, 367 N.W.2d 209 (1985)	1, <i>passim</i>
<i>State v. Manuel</i> , 213 Wis. 2d 308, 570 N.W.2d 601 (Ct. App. 1997)....	7, 9, 14
<i>State v. Petrone</i> , 161 Wis. 2d 530, 468 N.W.2d 676 (1991), <i>overruled on other grounds</i> , <i>State v. Greve</i> , 2004 WI 69, 272 Wis. 2d 444, 681 N.W.2d 479.....	7
<i>State v. Romero</i> , 2009 WI 32, 317 Wis. 2d 12, 765 N.W.2d 756.....	8
<i>State v. Schaefer</i> , 2003 WI App 164, 266 Wis. 2d 719, 668 N.W.2d 760	12
<i>State v. Silverstein</i> , 2017 WI App 64, 378 Wis. 2d 42, 902 N.W.2d 550	8, 9
<i>State v. Tate</i> , 2014 WI 89, 357 Wis. 2d 172, 849 N.W.2d 798.....	7
<i>State v. Ward</i> , 2000 WI 3, 231 Wis. 2d 723, 604 N.W.2d 517.....	7
<i>State ex rel. Evanow v. Seraphim</i> , 40 Wis. 2d 223, 161 N.W.2d 369 (1968)	15, 16
 Constitutional Provisions	
U.S. Cons. amend. IV.....	7
Wis. Const. art. I, § 11	7

ISSUE PRESENTED

Did Calvin Lee Brown make a substantial preliminary showing that he was entitled to a *Franks/Mann*¹ hearing because the affiant intentionally or recklessly omitted facts from the search warrant?

The circuit court answered: No.

This Court should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The parties have fully developed the arguments in their briefs and the issues presented involve the application of well-settled legal principles to the facts.

INTRODUCTION

After the circuit court denied Brown's motion to suppress evidence seized from his home with a search warrant, he pled guilty and was sentenced to prison on one count of possession of heroin with intent to deliver and one count of human trafficking.

On appeal, Brown cannot obtain relief based on his challenge to the search warrant. The circuit court soundly upheld the issuing court commissioner's probable cause determination. It correctly determined that even if the omitted information had been included in the search warrant affidavit, the affidavit still established probable cause to search Brown's residence. Because Brown did not make a substantial preliminary showing that the affiant omitted material facts from the affidavit with an intentional or

¹ *Franks v. Delaware*, 438 U.S. 154 (1978); *State v. Mann*, 123 Wis. 2d 375, 367 N.W.2d 209 (1985).

reckless disregard for the truth, he was not entitled to a *Franks/Mann* hearing.

SUPPLEMENTAL STATEMENT OF THE CASE

I. Factual statement

On September 20, 2016, City of West Allis police detective Nick Stachula applied to Milwaukee County Court Commissioner Rosa M. Barillas for a search warrant for Brown's Burnham Street residence for evidence related to the crimes of prostitution, possession of controlled substances with intent to deliver, and false imprisonment. (R. 12:3–4.)

The search warrant affidavit. Stachula provided information about his training and experience investigating drug cases and prostitution cases. (R. 12:5.) He gave a detailed description of the residence that he wanted to search and identified the evidence associated with drug distribution and prostitution that he wanted to search for. (R. 12:11–14.)

Stachula explained that on September 20, 2016, JRR,² an “adult victim,” told Stachula that Calvin Brown held JRR against her will at the Burnham residence between September 10 and September 16, 2016. (R. 12:6.) JRR said that she went to the residence to visit a friend, Valarie Miller. JRR was aware that Miller and other women, “T” and “A,”³ were involved in prostitution at this residence. (R. 12:6–7.) JRR said that “A” performed sex acts on Brown for crack cocaine. (R. 12:7.) JRR also gave Stachula the phone number used to facilitate prostitution at the residence. (R. 12:6.)

² In his affidavit, Stachula identified JRR in a gender neutral manner, i.e., “he/she.” (R. 12:6.) The complaint describes her as a female. (R. 1:3.) The State will use “she/her” to refer to JRR in its brief.

³ While JRR provided first names for “T” and “A,” the State uses their initials to protect their privacy.

According to JRR, Brown took her cellphone and purse and did not allow her to access them without his permission. (R. 12:6.) JRR said that Brown gave her and Miller a gram of heroin each day and also provided them with several grams of crack cocaine. (R. 12:7.) JRR told Stachula that she was a recovering heroin and cocaine addict. (R. 12:6.) While at the Burnham residence, JRR saw Brown “cooking up several ounces of cocaine and making crack cocaine.” (R. 12:7.) JRR said that Brown kept his cocaine, heroin, and the proceeds in a “Tupperware with a red lid” that he kept under the couch or on the side compartment of the refrigerator that he locked. (R. 12:7.)

JRR said that she overdosed on September 11, 2016, after Brown gave her heroin and cocaine. While she was passed out, Miller took pictures of JRR, who was in her undergarments, and posted the pictures on backpage.com. (R. 12:6.) Stachula explained backpage.com is a website used to advertise prostitution activity. (R. 12:5.) According to JRR, after Brown and Miller posted her photos on backpage.com, they asked her to engage in prostitution, and JRR refused. (R. 12:6.) JRR reported that she had to clean the house and rode with Brown when he sold heroin and cocaine in West Allis. (R. 12:6.)

JRR later identified Brown and Miller from photographs as the persons who resided at the Burnham residence, gave her heroin and cocaine, and held her against her will. (R. 12:7).

Officer Steven Kuehnmuensch saw a Jeep that was registered to Brown parked outside the Burnham Street residence. (R. 12:7.) After he saw three people exit the residence and enter the Jeep, Kuehnmuensch stopped the Jeep and arrested the driver, who was Brown, and front passenger, who was Miller. (R. 12:8.) Kuehnmuensch learned that the third occupant, “TB,” had an arrest warrant. (R. 12:8.) “TB” shares the same first name as one of the women whom JRR

had identified as being involved in prostitution at the residence. (R. 12:7–8.)

Detective Allison Cerqua checked backpage.com advertisements associated with the phone number JRR provided. (R. 12:8.) Cerqua identified advertisements dated September 20, 2016, that included photographs of Miller and TB, including photographs that showed intimate parts. (R. 12:8.) An advertisement dated September 17, 2016, showed a close-up image of a female's breasts in a bra and facial photographs of TB. (R. 12:8.) An advertisement dated September 11, 2016, included photographs of a woman lying on a bed in undergarments. JRR said that she is the person in these photographs and that they were taken when she had passed out at the residence. (R. 12:8.)

Stachula explained why he believed that JRR's information was "reliable and accurate." (R. 12:9.) JRR was not providing this information for "financial gain or to receive credit on pending criminal matters." (R. 12:9.) In addition, Stachula also described how officers had corroborated JRR's statements:

Specifically, JRR reported that JRR was photographed at the residence in a state of undress and that images of JRR were posted on backpage.com. Affiant's review of backpage.com corroborated this information. JRR also reported that other females including "[T]" were also present in the target residence engaged in acts of prostitution. Affiant's review of backpage.com corroborated this information. JRR identified Valarie Miller and Calvin Brown as the persons involved in the acts at the target residence. PTO Kuehnmuensch observed a vehicle listing to Brown outside of the target residence and later identified Brown, Miller, and "[T]" as occupants of the vehicle. Brown later confirmed that he resided at the target residence, consistent with the information provided by JRR. JRR provided the telephone number of [###-###-####] as the number used in the prostitution activities at the

target residence. Affiant's review of backpage.com corroborated this information insofar as affiant located adult ads for Miller, JRR, and ["T"] tied to that phone number.

(R. 12:9.)

The search warrant's execution. Officers executed the search warrant at Brown's residence. They found ledgers containing service prices and backpage.com ads as well as a plastic container containing unused condoms, lubricants, and lotion. (R. 1:4.) Inside a locked refrigerator, they found two Tupperware containers. One contained \$2500 in currency. The other contained plastic bags with heroin and cocaine. (R. 1:4–5.) In addition, officers found syringes, cotton balls, tourniquets, and a burnt spoon, baking soda, sandwich bags, a scale, and other paperwork connecting Brown to the residence. (R. 1:5.)

II. Procedural history

The State charged Brown with possession with intent to deliver three grams or less of heroin, possession with intent to deliver more than 40 grams of cocaine, keeping a place of prostitution, and two counts of human trafficking. (R. 1:1–2.)

Brown moved to suppress the evidence seized through the search warrant. (R. 12.) He raised several challenges to the warrant's supporting affidavit. He alleged that the affidavit (1) did not establish the citizen's reliability and credibility, (2) contained stale information, (3) lacked sufficient information to support the issuance of the warrant based on possible prostitution activity, and (4) "contained intentional or reckless omissions of fact, the inclusion of which would have negated probable cause." (R. 12:1–2.) Brown requested an evidentiary hearing. (R. 12:2.)

In a supporting memorandum, Brown alleged that the affidavit omitted facts related to JRR's credibility. Specifically, he asserted that the circuit court had issued a

bench warrant for JRR's arrest on September 9, 2016, based on JRR's violation of a deferred prosecution agreement in a drug case. (R. 13:2.) Brown also claimed that JRR did not report that she had been held in captivity until after officers arrested her on September 20, 2016. (R. 13:2.)

The circuit court denied Brown's motion without an evidentiary hearing. Based on its review of the affidavit, it upheld the commissioner's probable cause determination. (R. 53:8.)

Brown entered pleas to the charges of possession with intent to deliver heroin and human trafficking. (R. 29:1.) The circuit court imposed terms of imprisonment on both counts and ordered that the terms be served concurrently with one another. (R. 29:1.)

Brown filed a postconviction motion, renewing his challenge to the search warrant. (R. 35.) Brown requested a *Franks/Mann* hearing to challenge JRR's credibility. (R. 35:1–2.) He also asserted that his trial counsel omitted information from his motion that is a prerequisite to obtaining a *Franks/Mann* hearing and that this failure constituted ineffective assistance of counsel. (R. 35:5.)

The circuit court denied Brown's postconviction motion without an evidentiary hearing. It determined that even "if the omitted information had been included, the affidavit . . . would have still established probable cause to issue a search warrant." (R. 43:2.)

Brown appeals.

STANDARD OF REVIEW

This Court's duty on review is to ensure that the issuing magistrate had "a substantial basis" for concluding that probable cause existed. *See State v. DeSmidt*, 155 Wis. 2d 119, 133, 454 N.W.2d 780 (1990) (citation omitted). Therefore, this Court accords "great deference" to a search warrant-issuing

magistrate's probable cause determination. It will uphold the magistrate's probable cause determination unless the defendant establishes that the facts asserted in support of the warrant are "clearly insufficient" to support probable cause. *State v. Ward*, 2000 WI 3, ¶ 21, 231 Wis. 2d 723, 604 N.W.2d 517.

This Court reviews de novo the circuit court's decision to deny a *Franks/Mann* motion without a hearing. *State v. Manuel*, 213 Wis. 2d 308, 315, 570 N.W.2d 601 (Ct. App. 1997).

ARGUMENT

Brown was not entitled to a *Franks/Mann* hearing because he did not make a substantial preliminary showing that Detective Stachula intentionally or recklessly omitted material facts from the affidavit.

A. General legal principles

The Fourth Amendment to the United States Constitution, and article I, section 11 of the Wisconsin Constitution protect people from unreasonable searches and establish the requirements for the issuance of a search warrant. *State v. Tate*, 2014 WI 89, ¶ 27, 357 Wis. 2d 172, 849 N.W.2d 798.

1. Probable cause determinations

Courts determine whether probable cause exists based on the totality of the circumstances. *Ward*, 231 Wis. 2d 723, ¶ 26. "Probable cause [for a search warrant] is not a technical, legalistic concept[,] but a flexible, common-sense measure of the plausibility of particular conclusions about human behavior." *State v. Petrone*, 161 Wis. 2d 530, 547–548, 468 N.W.2d 676 (1991), *overruled on other grounds*, *State v. Greve*, 2004 WI 69, 272 Wis. 2d 444, 681 N.W.2d 479. A magistrate's

task is “simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the ‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *Illinois v. Gates*, 462 U.S. 213, 238 (1983). The test is not whether the inference that the issuing magistrate drew is the only reasonable inference, but whether the inference drawn is a reasonable one. *State v. Romero*, 2009 WI 32, ¶ 41, 317 Wis. 2d 12, 765 N.W.2d 756.

Assessing the reliability of a declarant’s information is part of the totality of the circumstances. *Gates*, 462 U.S. 213 at 241. When deciding whether probable cause exists, a magistrate will consider both the declarant’s credibility and the basis of the declarant’s knowledge. *Romero*, 317 Wis. 2d 12, ¶ 20. A deficiency in one area of reliability may be compensated for by a strong showing of some other indicia of reliability. *State v. Boggess*, 115 Wis. 2d 443, 454, 340 N.W.2d 516 (1983). As part of assessing the quality of the declarant’s information, the magistrate may consider the basis of the declarant’s information, the specificity of the information, and law enforcement’s independent corroboration of the information. *Id.* at 454–55. Thus, even if a declarant’s credibility cannot be established based on the declarant’s past performance of supplying reliable information to law enforcement, the facts may still permit the magistrate to conclude that the declarant has provided sufficiently reliable information to support the search warrant. *Romero*, 317 Wis. 2d 12, ¶ 21.

When this Court reviews the reliability of a citizen witness, this Court has applied a “relaxed test of reliability that shifts from a question of ‘personal reliability’ to one of ‘observational reliability.’” *State v. Silverstein*, 2017 WI App 64, ¶ 15, 378 Wis. 2d 42, 902 N.W.2d 550 (citation omitted). A court assesses observational reliability “from the nature of

[the citizen’s] report, his opportunity to hear and see the matters reported, and the extent to which it can be verified by independent police investigation.” *Id.*

2. A *Franks/Mann* challenge to a search warrant

In *Franks v. Delaware*, 438 U.S. 154 (1978), the Supreme Court held that a trial court is required to conduct a hearing when a “defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included . . . in the warrant affidavit, and if the allegedly false statement [was] necessary to a finding of probable cause.” *Id.* at 155–56. In *State v. Mann*, 123 Wis 2d 375, 367 N.W.2d 209 (1985), the Wisconsin Supreme Court extended the *Franks* rule “to include omissions from a warrant affidavit if the omissions are the equivalent of deliberate falsehoods or reckless disregard for the truth.” *State v. Jones*, 2002 WI App 196, ¶ 25, 257 Wis. 2d 319, 651 N.W.2d 305 (citation omitted).

“For an omitted fact to be the equivalent of ‘a deliberate falsehood or a reckless disregard for the truth,’ it must be an undisputed fact that is critical to an impartial judge’s fair determination of probable cause.” *Mann*, 123 Wis. 2d at 388 (footnote omitted). On the other hand, mere credibility determinations, the weighing of evidence, or the drawing of one of several inferences from a given fact, are not the sort of material omissions or misstatements of fact governed by the *Franks* rule. *Id.* at 389; *Manuel*, 213 Wis. 2d at 316.

A defendant is not entitled to a *Franks/Mann* hearing unless the defendant shows that the omitted facts, if included, would prevent a probable cause finding. *Mann*, 123 Wis. 2d at 388. Thus, a circuit court may deny a *Franks/Mann* hearing “if, when the material previously omitted is inserted into the [affidavit], there remains sufficient content in the [affidavit] to support a finding of probable cause[.]” *Id.* at 388.

If the circuit court determines that a defendant has made a “substantial preliminary showing” that entitles him or her to a veracity hearing, the circuit court must “determine whether the material is indeed false or included with reckless disregard for the truth.” *State v. Fischer*, 147 Wis. 2d 694, 699–700, 433 N.W.2d 647 (Ct. App. 1988). “The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant.” *Franks*, 438 U.S. at 171. “Because the defendant must show either intent or reckless disregard, a *Franks* hearing, by necessity, focuses on the state of mind of the affiant.” *State v. Anderson*, 138 Wis. 2d 451, 464, 406 N.W.2d 398 (1987). Said another way, “the focus is on the integrity of the challenged statement.” *Id.* at 464 n.6.

B. Brown was not entitled to a *Franks/Mann* hearing because the search warrant affidavit established probable cause and did not omit material facts that would have undermined the probable cause determination.

1. The officers’ corroboration of JRR’s statements demonstrated that she was reliable and established probable cause.

Detective Stachula and the other officers corroborated JRR’s allegations about Brown’s and Miller’s connection to the Burnham Street residence, prostitution, and drug-related activities.

Corroboration of JRR’s allegations about Brown’s and Miller’s connection to the Burnham Street residence. JRR told Stachula that she went to visit Miller at the Burnham residence on September 10, 2016. JRR also said that Brown was at the residence. (R. 12:6.) Officer Kuehnmuench saw a Jeep parked outside the residence registered to Brown.

(R. 12:7.) Kuehnmuench saw people exit the residence, enter the Jeep, and leave the area. (R. 12:7–8.) When Kuehnmuench stopped the Jeep, he saw Brown in the driver’s seat, Miller in the front passenger’s seat, and “TB,” a person whom JRR identified as being involved in prostitution at the residence, in the back seat. (R. 12:7–8.) Brown told the officers that he resided at the Burnham residence. (R. 12:14.)

Corroboration of JRR’s allegations about prostitution at the Burnham Street residence. JRR told Stachula that after she had overdosed on drugs that Brown provided, Miller took photos of JRR in undergarments and posted them on backpage.com. (R. 12:6.) JRR also identified the specific phone number associated with prostitution activity at the residence. (R. 12:6.) JRR said that she refused Brown’s and Miller’s request that JRR engage in prostitution. (R. 12:6.)

Stachula, who had experience investigating online advertising of prostitution, explained how people use backpage.com to facilitate prostitution. (R. 12:5.) Detective Cerqua located several backpage.com advertisements associated with the phone number that JRR previously provided. (R. 12:8.) Cerqua located an advertisement dated September 11, 2016 of a woman lying on a bed in undergarments. JRR confirmed that she was the person in the photographs. (R. 12:8.) The advertisement’s date and content confirms JRR’s prior statement that Miller took photographs of her after she overdosed on September 11, 2016. (R. 12:6.)

In addition, Cerqua located three other sexually suggestive advertisements on backpage.com associated with the phone number that JRR provided. An advertisement dated September 20, 2018 included a nude photo of Miller. Advertisements dated September 17 and 20, 2018 included photos of “TB.” (R. 12:7–8.) Both the traffic stop and the backpage.com advertisements associated with a common phone number that JRR provided, confirmed JRR’s assertions that Brown, Miller, and “TB” were associated with one

another and the residence, and that they had a common interest in prostitution activities.

Corroboration of the drug trafficking activity. JRR also told Stachula that Brown repeatedly gave her and Miller cocaine and heroin while she was at the Burnham residence. JRR provided details about the type of container where Brown kept his drugs and proceeds. JRR also said that she drove with Brown when he delivered cocaine and heroin. (R. 12:6.)

For several reasons, the commissioner could reasonably conclude that JRR's assertions about Brown's cocaine and heroin distribution were accurate. First, as a recovering heroin and cocaine addict (R. 12:6), JRR understood how cocaine and heroin are distributed and used in the Milwaukee area.

Second, JRR admitted that she regularly took cocaine and heroin when she was at the Burnham residence. (R. 12:6–7.) Thus, her statements about cocaine and heroin use were against her penal interest. Courts have long recognized that “the credibility of an informant, for the purpose of finding probable cause, is established by the fact that his or her statement is against his or her penal interest.” *Anderson*, 138 Wis. 2d at 470–71 (collecting cases).

Third, Stachula also determined that Brown had been convicted six years earlier of crimes associated with the distribution of heroin and cocaine, the same drugs that Brown gave to JRR. (R. 12:14.) As Wisconsin courts have long recognized, a prior conviction for similar conduct may also support a probable cause determination. *State v. Goss*, 2011 WI 104, ¶ 22, 338 Wis. 2d 72, 806 N.W.2d 918; *see also State v. Schaefer*, 2003 WI App 164, ¶ 22, 266 Wis. 2d 719, 668 N.W.2d 760 (“The prior conviction takes its place in a brick-by-brick case for probable cause, but is far from the only brick.”).

To be sure, JRR did not have a history of prior reliability that would have established her credibility. But the commissioner could still conclude that JRR provided sufficiently reliable information to support the search warrant's issuance. The officers' corroboration of JRR's statements through surveillance, a traffic stop, record checks, and an examination of the backpage.com advertisements significantly enhanced the observational reliability of JRR's detailed allegations. Based on the totality of these circumstances, the magistrate had a substantial basis for concluding that probable cause existed.

2. Brown did not make a substantial preliminary showing that the omission of information about JRR's recent legal difficulties, if disclosed, would have undermined the magistrate's probable cause determination.

The circuit court denied Brown's motion for a *Franks/Mann* hearing because it determined that even "if the omitted information had been included, the affidavit . . . would have still established probable cause to issue a search warrant." (R. 43:2.) The circuit court applied the correct legal standard and the record supports its decision to deny Brown's request for a *Franks/Mann* hearing. *See Mann*, 123 Wis. 2d at 388.

Even if Detective Stachula had included the information about JRR that Brown claims was omitted, the affidavit still stated probable cause. Brown asserts that the affidavit should have included information that the circuit court had issued an arrest warrant for JRR based on her violation of a deferred prosecution agreement on a drug case. (Brown's Br. 12.) He also contends that Stachula should have disclosed that JRR complained against Brown only after she was arrested and in custody. (Brown's Br. 12.) But this omitted information related to JRR's credibility, and *Mann*

forbids “the very kind of credibility determination and evidence weighing” that Brown now invites this Court to make. *See Manuel*, 213 Wis. 2d at 316–17, citing *Mann*, 123 Wis. 2d at 389. This Court should decline Brown’s invitation.

And even if this Court were to consider the omitted information related to JRR’s credibility, it still does not undermine the commissioner’s probable cause determination. While JRR did not make her complaint for “financial gain” or “to receive credit for pending criminal matters” (R. 12:9), Stachula disclosed information that reflected on her credibility. JRR was a recovering cocaine and heroin addict who admitted using cocaine and heroin while she was at Brown’s residence. (R. 12:6.) The omitted information—including JRR’s violation of a deferred prosecution agreement, a bench warrant, and the custodial nature of her statement—simply did not undermine the plausibility of her allegations against Brown.

Most importantly, the officers did not simply accept JRR’s assertions at face value, but independently corroborated JRR’s statements through significant investigation. This investigation included surveillance tying Brown, Miller, and TB to the residence and a review of backpage.com advertisements associated with a phone number that JRR identified and that included photographs of JRR, Miller, and TB. (R. 12:9.) Because the omitted information did not undermine the plausibility of JRR’s statement, the totality of circumstances would still have supported the commissioner’s probable cause determination. Therefore, the circuit court properly denied Brown’s *Franks/Mann* motion without an evidentiary hearing.

3. Brown's arguments notwithstanding, he was not entitled to a *Franks/Mann* hearing.

Brown does not challenge Stachula's assertions that JRR did not act for financial gain or to receive credit on a pending case. (Brown's Br. 13) But, relying on *State v. Delgado*, 194 Wis. 2d 737, 535 N.W.2d 450 (Ct. App. 1995), Brown suggests that JRR's expectation that she might receive consideration on her pending matters reflects negatively on her credibility. (Brown's Br. 13.) Brown misplaces his reliance on *Delgado*. That case appropriately recognized that in the context of a criminal trial a defendant should be allowed to explore a witness's potential bias as it relates to the potential disposition of a pending charge. *Delgado*, 194 Wis. 2d at 752–53. Had Brown gone to trial, he certainly would have been allowed to explore JRR's bias based on her belief that cooperation might benefit her. But the issue here concerned a probable cause determination. And as the supreme court has recognized, credibility determinations are generally beyond the scope of a probable cause determination. *Mann*, 123 Wis. 2d at 389 (citing *State ex rel. Evanow v. Seraphim*, 40 Wis. 2d 223, 228, 161 N.W.2d 369 (1968) (“The hearing as to probable cause [in a complaint] before the magistrate is not a preliminary trial. It is not the proper forum to debate and determine issues as to credibility and weight of evidence once essential facts as to probability have been established.”)).

Brown asserts that Stachula's characterization of JRR as an “adult victim” was misleading, asserting that Stachula withheld information that would have “suggest[ed] she was a fugitive seeking refuge.” (Brown's Br. 13–14.) The fact that JRR may have been motivated by self-interest when she reported to Stachula did not undermine the legitimacy of her claim that Brown distributed drugs to her and attempted to traffic her. The commissioner was aware that JRR had unclean hands when she reported Brown's crimes to Stachula,

who disclosed that JRR was a recovering drug addict who admitted using cocaine and heroin at Brown's residence. (R. 12:6.) "Admissions against one's interest are not inherently untrustworthy. That the self-implicators may be known criminals with long records does not destroy reasonableness of an inference of truthfulness." *Evanow*, 40 Wis. 2d at 228. And here, the officers' examination of a backpage.com advertisement dated September 11, 2016, that included provocative photos of JRR corroborated her claim that Brown attempted to traffic her. There was nothing misleading about Stachula's characterization of JRR as a "citizen victim" who was not acting "for financial gain or to receive credit for pending criminal matters." (R. 12:9.)

Brown failed to make a substantial preliminary showing that the omitted information related to JRR's credibility was relevant to the commissioner's probable cause determination. Even if the omitted information had been included in the affidavit, the magistrate would still have concluded that probable cause existed to search Brown's residence. On this record, the circuit court properly denied Brown's *Franks/Mann* claim without an evidentiary hearing. This Court should affirm.⁴

⁴ If this Court disagrees, then it should remand the matter to the circuit court for a *Franks/Mann* hearing.

CONCLUSION

The State respectfully requests that this Court affirm the circuit court's entry of a judgment of conviction and order denying postconviction relief.

Dated this 11th day of September, 2018.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General of Wisconsin

DONALD V. LATORRACA
Assistant Attorney General
State Bar #1011251

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2797
(608) 266-9594 (Fax)
latorracadv@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,368 words.

DONALD V. LATORRACA
Assistant Attorney General

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

I hereby certify that:

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

I further certify that:

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

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

Dated this 11th day of September, 2018.

DONALD V. LATORRACA
Assistant Attorney General