STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case Nos. 2019AP000467-CR & 2019AP000468-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BOBBY L. MCNEIL,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in Milwaukee County Circuit Court, the Honorable Carolina Stark, Presiding and an Order Denying a Motion for Postconviction Relief, the Honorable Frederick C. Rosa, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

CHRISTOPHER P. AUGUST
Assistant State Public Defender
State Bar No. 1087502

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
augustc@opd.wi.gov

Attorney for Defendant-Appellant

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1. Was Mr. McNeil entitled to resentencing as a result of inaccurate information presented at his sentencing hearing?

The postconviction court found the asserted inaccurate information was harmless. (R1 61:3; R2 78:3); (App. 110).[1]

2. Was Mr. McNeil entitled to sentence modification as a result of inaccurate information presented at his sentencing hearing?

The postconviction court found that modification was unwarranted as the asserted inaccurate information was harmless. (R1 61:3; R2 78:3); (App. 110).

3. Did the circuit court erroneously exercise its discretion in granting the State's request for joinder, determining that there was no risk of undue prejudice to Mr. McNeil?

4. Did the circuit court erroneously exercise its discretion in admitting other-acts evidence

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[1] This is a consolidated case involving two appellate case numbers. Confusingly, 16AP467 corresponds to the chronologically later case—16CF5467—while 16AP468 corresponds to 16CF1685. Counsel will use R1 to refer to the record in 16AP467 and R2 to refer to the record in 16AP468.

regarding Mr. McNeil's prior instances of drug-dealing?

5. Was Mr. McNeil entitled to a hearing on his claim of ineffective assistance of counsel?

The postconviction court denied Mr. McNeil's request for an evidentiary hearing, concluding that Mr. McNeil's motion failed to "demonstrate that there was a reasonable probability of a different result." (R1 61:5; R2 78:5); (App. 112).

6. Was the evidence sufficient to convict Mr. McNeil of drug possession in 16CF5467?

Mr. McNeil is raising this issue for the first time in this brief.[2]

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. McNeil takes no position on publication.

While Mr. McNeil does not request oral argument, he welcomes the opportunity to discuss the case should the Court believe that oral argument would be of assistance to its resolution of the matter.

[2] Wis. Stat. § 809.30(2)(h). ("The person shall file a motion for postconviction or postdisposition relief before a notice of appeal is filed unless the grounds for seeking relief are sufficiency of the evidence or issues previously raised.")

STATEMENT OF THE CASE

In a criminal complaint filed on April 19, 2016, the State charged Mr. McNeil with two charges in Milwaukee County Case No. 16CF1685:

- Count One: Possession of cocaine as a second and subsequent offense and as a habitual offender contrary to Wis. Stats. §§ 961.41(3g)(c) and 939.62(1)(b);
- Count Two: Possession of narcotic drugs as a habitual criminal contrary to Wis. Stats. §§ 961.41(3g)(am) and 939.62(1)(b).

(R2 1:1-2).

The State ultimately filed an amended information adding two additional charges:

- Count Three: Possession of THC as a second and subsequent offense contrary to Wis. Stat. § 961.41(3g)(e);
- Count Four: Obstructing an officer contrary to Wis. Stat. § 961.41(1).

(R2 20:2).

While out on bail for that case, Mr. McNeil was arrested on new charges in 16CF5467 and was charged in a criminal complaint dated December 8, 2016 as follows:

- Count One: Possession of cocaine contrary to Wis. Stat. § 961.41(3g)(c);
- Count Two: Obstructing an officer contrary to Wis. Stat. § 946.41(1);
- Count Three: Felony bail jumping contrary to Wis. Stat. § 946.49(1)(b);
- Count Four: Possession of narcotic drugs contrary to Wis. Stat. § 946.41(3g)(am).

(R1 1:1-2).

The State ultimately filed an amended information modifying count four to a second and subsequent offense under Wis. Stat. § 961.41(3g)(am). (R1 9:2). The State also alleged a new charge, possession of THC as a second and subsequent offense contrary to Wis. Stat. § 961.41(3)(e). (R1 9:2).

Following a trial, the jury acquitted Mr. McNeil on all charges in 16CF1685 except Count Four, obstructing an officer. (R2 49:1). Mr. McNeil was convicted on all counts in 16CF5467. (R1 26:1-5).

Mr. McNeil was then sentenced by the Honorable Carolina Stark as follows:

- On Count Four of 16CF1685, nine months in the House of Correction, consecutive to any other sentence (R2 55:1); (App. 101);

- On Count One of 16CF5467, twelve months in the House of Correction, concurrent with all other counts in 16CF5467 but consecutive to 16CF1685 (R1 34:1); (App. 106);

- On Count Two of 16CF5467, nine months in the House of Correction, concurrent with all other counts in 16CF5467 but consecutive to 16CF1685 (R1 34:1); (App. 106);

- On Count Three of 16CF5467, two years and three months of initial confinement followed by two years of extended supervision, concurrent with all other counts in 16CF5467 but consecutive to 16CF1685 (R1 33:1); (App. 103);

- On Count Four of 16CF5467, twelve months in the House of Correction, concurrent with all other counts in 16CF5467 but consecutive to 16CF1685 (R1 34:1); (App. 106);

- On Count Five of 16CF5467, six months in the House of Correction, concurrent with all other counts in 16CF5467 but consecutive to 16CF1685 (R1 34:1); (App. 106.

Mr. McNeil filed a timely notice of intent to pursue postconviction relief in both cases. (R1 32; R2 53). He ultimately filed a postconviction motion

seeking resentencing, sentence modification, and a new trial. (R1 50; R2 71). The motion was denied in a written order, without a hearing. (R1 61:6; R2 78:6); (App. 113).

This appeal follows. (R1 63; R2 79).

STATEMENT OF RELEVANT FACTS[3]

Background

According to the criminal complaint in 16CF1685, law enforcement observed a van which they "knew to be reported stolen." (R2 1:2). Mr. McNeil entered, and then exited, the van. (R2 1:2). When officers tried to make contact with him, he fled into a nearby residence. (R2 1:2). Police followed him inside. (R2 1:2). When he refused to comply with their commands, he was eventually incapacitated with a Taser and taken into custody. (R2 1:2). Police searched the residence and discovered suspected drugs. (R2 1:2).

According to the criminal complaint in 16CF5467, police received "a call related to an entry into a vacant property […]." (R1 1:2). Upon arrival, police witnessed Mr. McNeil exiting the gate of the property. (R1 1:2). Mr. McNeil then fled from the scene. (R1 1:2). After a short foot pursuit, he was

[3] The record in this case is lengthy; counsel has therefore attempted to be judicious in his statement of facts. He reserves the right to supplement the facts in his reply.

apprehended by police. (R1 1:2). Police observed drugs lying on the street near where McNeil had been apprehended. (R1 1:2). This incident occurred while Mr. McNeil was out on bail for 16CF1685. (R1 1:2).

Pretrial Proceedings

Joinder of Cases

On December 14, 2016 (and again on February 1, 2017), the State filed motions to join both cases for trial. (R1 3; 7; R2 16; 19). In response, defense counsel filed a "Motion Objecting to Joinder" asserting that the allegations were insufficiently similar and that joinder would cause substantial prejudice. (R1 8; R2 21). Following a hearing, the circuit court granted joinder, concluding that there was substantial overlap between the two cases. (R1 69:7-9; R2 90:7-9); (App. 114-116). The circuit court relied on a finding that evidence relating to these separate allegations would be properly admissible as other acts if there were separate trials. (R1 69:8-9; R2 90:8-9); (App. 115-116).

Other-Acts

Defense counsel filed motions in limine, including a motion objecting to "other misconduct evidence." (R2 26:1). Prior to trial, counsel specified that she was objecting to the testimony of Dana Marifke, who loaned Mr. McNeil a van which was later reported stolen in 16CF1685. (R1 71:57; R2 92:57). The State indicated that they would be calling

Ms. Marifke to testify that Mr. McNeil was her drug dealer and that she had loaned him the van in exchange for heroin. (R1 71:58; R2 92:58).

The circuit court denied the defense motion, asserting that Ms. Marifke's testimony was relevant in two respects. (R1 71:62; R2 92:62); (App. 120). First, it helped establish that officers were acting with lawful authority when they contacted Mr. McNeil. (R1 71:61; R2 92:61); (App. 119). Second, testimony that he dealt drugs to Ms. Marifke was relevant to the drug charges. (R1 71:62; R2 92:62); (App. 120).

Trial Testimony

April 14, 2016 Police Contact

Officer Joshua Albert testified that he was "dispatched to investigate a stolen vehicle" on April 14, 2016. (R1 74:5; R2 95:5). Upon arrival, Officer Albert observed the suspect vehicle—a Ford Windstar van—parked in front of a residence. (R1 74:5; R2 95:5). Officer Albert exited his squad car and approached the van. (R1 74:6; R2 95:6). He witnessed Mr. McNeil standing nearby. (R1 74:6; R2 95:6).

Officer Albert initially testified that Mr. McNeil began walking back towards the residence. (R1 74:6; R2 95:6). However, later in his testimony he stated that he had yelled out to Mr. McNeil from his squad car and, in response, Mr. McNeil "ran into the residence." (R1 74:8; R2 95:8). Officer Albert followed Mr. McNeil inside. (R1 74:9; R2 95:9). While inside

the residence, Mr. McNeil repeatedly refused to follow police commands and hid himself in two different rooms. (R1 74:10-17). He was ultimately subdued with a Taser and taken into custody. (R1 74:17; R2 95:17). After Mr. McNeil was in custody, Officer Albert began searching the house. (R1 74:19; R2 95:19). He found suspected narcotics in both the bathroom and the bedroom. (R1 74:20-21; R2 95:20-21).

December 6, 2016 Police Contact

Officer Kristen Ruegg testified regarding the December 6, 2016 incident. (R1 73:58; R2 94:58). She stated that she had been dispatched to a residence on West Greenfield Avenue regarding "an entry into a vacant house." (R1 73:58; R2 94:58). As she pulled into the alley, Officer Ruegg witnessed Mr. McNeil "exiting the rear gate of the vacant house." (R1 73:58; R2 94:58). She exited her squad car and asked him to stop. (R1 73:59; R2 94:59). In response, Mr. McNeil "turned to the east and ran away." (R1 73:60; R2 94:60). Officer Ruegg chased after Mr. McNeil, yelling "stop" as she did so. (R1 73:60; R2 94:60). Eventually, a bystander intervened and pushed Mr. McNeil to the ground. (R1 73:61; R2 94:61).

Officer Ruegg caught up to Mr. McNeil and attempted to handcuff him. (R1 73:61; R2 94:61). Although he initially resisted, Officer Ruegg was ultimately able to handcuff Mr. McNeil and place him in custody. (R1 73:61; R2 94:61). She observed a baggie of suspected marijuana on the ground near

Mr. McNeil's person. (R1 73:62; R2 94:62). Officer Ruegg testified that, after taking Mr. McNeil "downtown," he "made threats to the man that helped [her] and his family." (R1 73:64; R2 94:64). When asked to elaborate, Officer Ruegg told the jury that Mr. McNeil threatened to "kill him and his kids if his kids could talk." (R1 73:64; R2 94:64).

On cross-examination, Officer Ruegg admitted that—contrary to her agency's standard operating procedures—she had failed to identify or interview the citizen who helped her arrest Mr. McNeil. (R1 73:66-68; R2 94:66-68). She acknowledged that the marijuana baggie found was in both the vicinity of the bystander citizen as well as Mr. McNeil. (R1 73:68; R2 94:68). Officer Ruegg testified that she never witnessed Mr. McNeil holding, touching, or throwing the drugs. (R1 73:69; R2 94:69). She admitted it was "possible" that the drugs had been "dropped by the citizen […] who helped assist in this arrest." (R1 73:69; R2 94:69).

Expert Testimony

The State called Cullen Eberhardy, an analyst with the Wisconsin State Crime Lab. (R1 74:59; R2 95:59). He testified about his analysis of three substances on agency number 16-341-0068. (R1 74:61; R2 95:61). Item A1, weighing approximately .0280 grams, "identified the presence of heroin and cocaine and also indicated the presence of fentanyl." (R1 74:64; R2 95:64). Mr. Eberhardy was asked to explain the "indicated" finding and stated:

> In this particular instance, fentanyl was in a much smaller amount; so it showed up in all the instrumental tests, it just compared with a standard on all of those instruments. But the mass spectrum was--the signal on the mass spectrum was a little weaker than what would be preferred for identification.

(R1 74:64; R2 95:64). The exhibit contains the following disclaimer:

> Use of the term 'indicated' in this report means the examinations performed did not meet the reporting criteria for identification of that substance.

(R1 20:3; R2 43:3).

Item A2, weighing 1.3964 grams, was identified as THC or marijuana. (R1 74:65; R2 95:65). Item A3, weighing .92 grams, was identified as heroin. (R1 74:66; R2 95:66).

Evidence of Prior Drug-Dealing

The State called Dana Marifke as a witness, who identified Mr. McNeil as someone she "used to get drugs from." (R1 74:70; R2 95:70). She told the jury that she had traded the van—the one that had later been reported stolen—to Mr. McNeil in exchange for crack cocaine and heroin. (R1 74:71; R2 95:71). The State used her to introduce text messages showing she had tried, and failed, to have Mr. McNeil return the van. (R1 74:73; R2 95:73). One of the

messages referenced drug-dealing. (R1 74:73; R2 95:73).

Verdict

At the conclusion of the trial, Mr. McNeil was acquitted of all drug charges in 16CF1685. (R2 49). He was found guilty, however, of obstructing an officer. (R2 49:4). Mr. McNeil was found guilty of all counts in 16CF5467. (R1 26).

Sentencing

On May 3, 2017, Mr. McNeil appeared again before the Honorable Carolina Stark for sentencing. (R1 78; R2 99).

State's Recommendation

With respect to Count Four of 16 CF 1685, the State emphasized the seriousness of the conduct, asserting that Mr. McNeil's actions had repeatedly placed Officer Albert in harm's way. (R1 78:7; R2 99:7). The State asked for a six-month consecutive jail sentence. (R1 78:7; R2 99:7).

With respect to Count One of 16 CF 5467, the State argued that the low weight of the cocaine "really mitigates the seriousness of that count." (R1 78:9; R2 99:9). However, the State also pointed out that "not only was heroin present in that mix, there was fentanyl attached to that mix." (R1 78:9; R2 99:9). This fact cut against any mitigating influence from the low weight:

> And just -- law enforcement is so concerned with fentanyl they are no longer, if they have reason to believe that there's fentanyl in the mix, they are no longer doing a field test because they're so worried about the powder just coming into the air and exposing them to -- and they've had this case. An officer overdosed simply by opening the bag and the powder went into his nose.
>
> So even at a dose of .028 grams, any amount of fentanyl is a serious risk. I think if you mix those three drugs, that's enough to kill somebody. I really do firmly believe that when you don't know the weight and mixture of fentanyl involved, the seriousness there can't be underestimated.

(R1 78:9; R2 99:9). Accordingly, the State recommended one year of initial confinement followed by one year of extended supervision. (R1 78:10; R2 99:10). Counsel was "not opposed to that being a concurrent sentence." (R1 78:10; R2 99:10).

As to Count Two, obstructing an officer, the State argued this was "also severe." (R1 78:10; R2 99:10). There were two aggravating factors: First, this was Mr. McNeil's second obstruction charge in six months. (R1 78:10; R2 99:10). Second, this charge involved the intervention of a citizen. (R1 78:10; R2 99:10). Counsel asked for eight months of consecutive jail. (R1 78:10; R2 99:10).

Regarding Count Three, felony bail jumping, this conviction was aggravated given Mr. McNeil's prior record, which included prior bail jumping convictions. (R1 78:11; R2 99:11). Counsel asked the

court to impose one year of initial confinement followed by one year of extended supervision, concurrent. (R1 78:14; R2 99:14).

As to Count Four, relating to heroin, the State asked the court to consider the "total picture" which suggested that Mr. McNeil was a for-profit drug-dealer. (R1 78:14; R2 99:14). The State asked the court to impose one year of initial confinement followed by one year of extended supervision, consecutive. (R1 78:14; R2 99:14).

Finally, regarding Count Five—possession of THC—the State conceded that the offense was "mitigated at one gram." (R1 78:14; R2 99:14). Although the State had considered a probation disposition, it ultimately concluded that either probation or jail would be inappropriate given Mr. McNeil's record and the overall set of allegations. (R1 78:14-15; R2 99:14-15). The State therefore asked for a prison sentence on that count. (R1 78:15; R2 99:15).

Defense Recommendation

Counsel argued that the State's case for the drug charges in 16CF5467 was not particularly convincing and that the "drugs could have come from the quote, 'good samaritan,' [sic] who pushed Mr. McNeil down." (R1 78:16; R2 99:16). Mr. McNeil was therefore maintaining his innocence. (R1 78:16; R2 99:16).

In addition, the weights for the respective drugs were all relatively small. (R1 78:16; R2 99:16).

As to the obstructing charge in 16CF1685, counsel maintained that there was an innocent explanation. (R1 78:18; R2 99:18). Mr. McNeil claimed that he was running inside the residence to retrieve seizure medication during the police contact. (R1 78:19; R2 99:19). As to the second obstructing, counsel asked the court to consider that Mr. McNeil was a "young black male" who had lost two family members to police violence. (R1 78:20; R2 99:20).

Counsel also presented numerous pieces of mitigating evidence to the court, including Mr. McNeil's deep ties to the Milwaukee area, substantial family support and employment history. (R1 78:22-24; R2 99:22-24). Counsel also asked the court to take Mr. McNeil's pretrial confinement into consideration in determining an appropriate sentence. (R1 78:25; R2 99:25).

Sentencing Explication

With respect to 16CF1685, the court stated that it was not giving any weight to the acquitted charges. (R1 78:40; R2 99:40); (App. 128). However, it concluded that the "obstructing was a pretty aggravated obstructing." (R1 78:41; R2 99:41); (App. 129). The court did not credit Mr. McNeil's innocent explanation and faulted him for not accepting responsibility. (R1 78:42; R2 99:42); (App. 130). The court found that the offense was also aggravated as a result of the surrounding allegations regarding the stolen van. (R1 78:42 R2 99:42); (App. 130). Mr.

McNeil's conduct was "particularly dangerous." (R1 78:43; R2 99:43); (App. 131).

With respect to his flight from the police in 16CF5467, the court found that Mr. McNeil's choice to go running through an "urban center right in Milwaukee" was aggravated. (R1 78:48-49; R2 99:48-49); (App. 136-137). The offense was also aggravated because Mr. McNeil was out on bail when the offense occurred and because "it took the intervention of a citizen to catch [him]." (R1 78:49; R2 99:49); (App. 137). The court rejected Mr. McNeil's argument that it was the "Good Samaritan," and not Mr. McNeil, who had dropped the drugs on the ground. (R1 78:50; R2 99:50); (App. 138). The obstructing was also aggravated because of Mr. McNeil's threats to the "Good Samaritan's" family. (R1 78:51; R2 99:51); (App. 139).

As to the THC charge, the court found that offense not "particularly aggravated under all of the circumstances." (R1 78:52; R2 99:52); (App. 140). It was in the "lower intermediary category for the offense severity." (R1 78:52; R2 99:52); (App. 140).

With respect to the heroin charge, the court found that this too was in the "intermediate" range given evidence suggesting that Mr. McNeil was a for-profit drug-dealer, Mr. McNeil's prior drug trafficking conviction, and the fact that he was out on bail when the offense was committed. (R1 78:52-53; R2 99:52-53); (App. 140-141).

With regard to the cocaine charge, the court stated that there was not "a large quantity." (R1 78:53; R2 99:53); (App. 141). However, the court believed the offense was more aggravated because of the fentanyl result:

> When we look at the cocaine, there wasn't a large quantity. The lab analyst testified that one of the substances they tested, there was enough to identify with scientific reliability that the substance was cocaine and heroin, .028 grams, but the lab analyst Cullen Eberhardy also testified there was enough in that sample, that substance, to identify the presence of fentanyl. And fentanyl, as Attorney Wozniak has pointed out, is a very dangerous ding, more potent than heroin, and heroin is already a very dangerous drug.
>
> If fentanyl gets on someone's skin, it can be absorbed through the skin and absorbed through the skin enough to cause overdose or death. It's something that is particularly dangerous to anyone who uses it. It's something that causes a significant risk to anyone else in the community who might come in contact with it. That could be a law enforcement officer who's recovering a substance that they don't know has fentanyl in it. It could be a medical professional.
>
> For example, if someone has this substance on them and something happens to them and an ambulance or fire department is called to treat them and they don't know what the substance is and they come into contact with it, it can cause significant harm to that person. If someone comes into contact with it, be it someone in close

> proximity to the person carrying it has contact with it, there is a significant risk for harm because of how fentanyl is so potent and how it can be ingested in different ways, including through the skin.
>
> So the presence of fentanyl in a substance that has a very small weight, 0.02 grams I think is an aggravating factor because of how risky and dangerous that drug can be in the presence of a mixture of heroin and cocaine. And so I think the possession of cocaine under all of the circumstances, the circumstances with fentanyl but all of the circumstances of December 6, 2017, and that you were on bail for the lower pending charge, also makes that an intermediate level felony offense.

(R1 78:53-54; R2 99:53-54); (App. 141-143).

Finally, the court found the bail jumping to be aggravated due to "all of the circumstances of what happened on December 6, 2016" as well as the other charges which were the "basis of the bail jumping." (R1 78:55; R2 99:55); (App. 143). Those predicate offenses "were aggravated for all of the reasons that I've already stated." (R1 78:55; R2 99:55); (App. 143).

The court also considered Mr. McNeil's character, which included a discussion of his prior offenses. (R1 78:56; R2 99:56); (App. 144). His lack of acceptance of responsibility was also a poor sign of character. (R1 78:58; R2 99:58); (App. 146). The court did give Mr. McNeil credit, however, for the

mitigating considerations discussed by defense counsel. (R1 78:58; R2 99:58); (App. 146).

The court concluded there was a "high need to protect the community." (R1 78:59; R2 99:59); (App. 147). The court therefore imposed a global sentence of two years and three months of initial confinement followed by two years of extended supervision. (R1 78:63-65; R2 99:63-65); (App. 151-153).

Postconviction Proceedings

Mr. McNeil ultimately filed a postconviction motion. (R1 50; R2 71). The motion raised three claims. As a predicate to his first two claims—for sentence modification or resentencing—he submitted the report of an expert witness who reviewed the drug evidence in this case. (R1 50:69; R2 71:69). That expert identified serious flaws with the "fentanyl" information which was discussed at sentencing. (R1 50:69; R2 71:69).

The motion also requested a new trial based on ineffective assistance of counsel. (R1 50:14; R2 71:14). It asserted that counsel performed deficiently by not objecting to testimony about Mr. McNeil threatening the life of the "Good Samaritan" and his children. (R1 50:16; R2 71:16). Mr. McNeil argued that this character evidence prejudiced him by showing him to be a "violent, evil person." (R1 50:16; R2 71:16). Because it invited the jury to convict based on negative character judgments, this evidence tainted the reliability of the ensuing jury verdict. (R1 50:17; R2 71:17). Mr. McNeil specifically asked the court to

schedule an evidentiary hearing on the motion. (R1 50:17; R2 71:17).

The postconviction court, the Honorable Frederick Rosa, denied the motion without a hearing. (R1 61:6; R2 78:6); (App. 113). With respect to the inaccurate information claim, the court concluded that any alleged error was harmless. (R1 61:3; R2 78:3); (App. 110). While the sentencing court arguably relied on the information in sentencing Mr. McNeil to a concurrent jail sentence on one of the drug charges, the postconviction court concluded that this had no overall impact on Mr. McNeil's global sentence. (R1 61:3; R2 78:3); (App. 110). For the same reasons, the court rejected Mr. McNeil's sentence modification claim. (R1 61:3; R2 78:3); (App. 110).

With respect to the ineffective assistance of counsel claim, the court also denied that claim, concluding that Mr. McNeil failed to establish "that there was a reasonable probability of a different result." (R1 61:4-5; R2 78:4-5); (App. 111-112).

ARGUMENT

I. Mr. McNeil is entitled to resentencing because the circuit court relied on inaccurate information about fentanyl in sentencing him.

A. Legal principles and standard of review.

It is well-established that a criminal defendant "has a constitutionally protected due process right to be sentenced upon accurate information." *State v. Travis*, 2013 WI 38, ¶ 17, 347 Wis. 2d 142, 832 N.W.2d 491. In order to obtain a new sentencing, the defendant must satisfy a two-pronged test: (1) He must prove that "the information at the original sentencing was inaccurate" and (2) that "the court actually relied on the inaccurate information." *Id.*, ¶ 21. The defendant's burden is clear and convincing evidence. *Id.*, ¶ 22. "Once the defendant shows actual reliance on inaccurate information, the burden then shifts to the State to prove the error was harmless." *Id.*, ¶ 23.

This Court reviews Mr. McNeil's inaccurate information claim independently and without deference to the postconviction court's decision. *Id.*, ¶ 20.

B. The information discussed at sentencing regarding fentanyl was inaccurate.

As the statement of facts shows, there were repeated references at Mr. McNeil's sentencing to: (a)

the existence of fentanyl in the drugs and (b) the allegedly severe risk created by fentanyl to others. However, as the report of Dr. James Thomas O'Donnell establishes, these claims are devoid of scientific support. His report, which was attached to the postconviction motion, offers several relevant insights.

First, the Wisconsin Crime Laboratory's finding of "indicated" should not be construed as a "conclusive" result. (R1 50:70; R2 71:70); (App. 164). More importantly, Dr. O'Donnell opines that it cannot be said "with reasonable scientific certainty" that there is *any* fentanyl present in the sample. (R1 50:70; R2 71:70); (App. 164). The amount found in the small sample is below the Crime Laboratory's own level of detection and the identification "is questionable; not all chromatographic peaks match the standard, peaks are extremely small." (R1 50:70; R2 71:70); (App. 164). Accordingly, "A reasonable scientist would not report this 'indicated' finding of fentanyl as confirmed, with any reasonable certainty." (R1 50:70; R2 71:70); (App. 164).

Thus, there are reasonable grounds to discount any inferences about the existence of fentanyl in the substances of which Mr. McNeil was convicted of possessing. The science is simply not present—a questionable identification, outside the laboratory's level of detection, based on a very small sample size. Considering Dr. O'Donnell's report, the most reasonable, scientifically-grounded, position is that

there is simply no evidence of fentanyl being present in these drugs.

However, even if it could be assumed that the Crime Lab analysis establishes the presence of some small amount of fentanyl—that the diminishingly small result is at all meaningful—the assumed consequences of the fentanyl referenced at sentencing still do not follow. As Dr. O'Donnell opines, the weak signal is "most likely a TRACE finding, most likely due to miniscule residual fentanyl previously weighed on a common scale, handled with a spoon or spatula, or placed in a work area." (R1 50:70; R2 71:70); (App. 164). It could very well have been a trace contaminant left behind by an upstream processor—and not attributable to Mr. McNeil.

Most importantly, Dr. O'Donnell notes that, "It cannot be reasonably concluded that the trace amount of fentanyl identified would have any physiological, pharmacological, or toxicological effects on a person." (R1 50:70; R2 71:70); (App. 164). Thus, Dr. O'Donnell's report therefore directly contradicts the prosecutor's sentencing claim about the potential danger of fentanyl in this case in at least three ways: (1) it is not scientifically certain there is any fentanyl in this mixture; (2) assuming, arguendo, that there is, the amount is a miniscule trace likely attributable to upstream processing; and (3) this amount of fentanyl would not have any effects on a person.

In sum, the "worse-case scenarios" imagined by the prosecutor and court at sentencing in this case

are simply unsupported by the evidence. In particular, the sentencing court's assumption that if this substance was to get on the skin of an officer, a fatal reaction could occur is conclusively disproven by Dr. O'Donnell's report. (R1 78:53; R2 99:53); (App. 141). Accordingly, Mr. McNeil has proven that the information about fentanyl discussed at sentencing was inaccurate.

C. The sentencing court relied on this information in sentencing Mr. McNeil.

The Wisconsin Supreme Court most recently addressed the issue of "reliance" at sentencing in *State v. Alexander*, 2015 WI 6, 360 Wis. 2d 292, 858 N.W.2d 662, focusing in that case on reliance with respect to an improper sentencing factor. This inquiry focuses on the sentencing court's mandated articulation of the "basis for the sentence imposed." *Alexander*, 2015 WI 6, ¶ 25. Thus, this Court reviews "the circuit court's articulation of its basis for sentencing in the context of the entire sentencing transcript to determine whether the court gave 'explicit attention' to an improper factor, and whether the improper factor 'formed part of the basis for the sentence.'" *Id*. This Court uses an identical analytical framework in determining reliance for the purposes of an inaccurate information claim. *See Id*., ¶ 18-19.

Here, it is indisputable that the court relied on the fentanyl in sentencing Mr. McNeil on the corresponding drug charge. That conclusion is borne out by a review of the circuit court's multi-paragraph

remarks, in context of the sentencing on that count. (R1 78:53-54; R2 99:53-54). The circuit court plainly stated that the presence of fentanyl was an "aggravating factor." (R1 78:53-54; R2 99:53-54); (App. 141-142).

At the same time, the fentanyl information also influenced the sentence for felony bail jumping—the governing sentence in this case. Here, the underlying drug charge was factually linked to that bail jumping, as it was one of the predicate violations of the law underlying the conviction. Moreover, the circuit court also stated that its sentence on the bail jumping charge was intended to reflect "all of the circumstances" surrounding Mr. McNeil's conduct on December 6, 2016. (R1 78:55; R2 99:55); (App. 143). This would logically include the fentanyl information, which the court found to be highly relevant and highly aggravating, given its extensive remarks on that topic—remarks which directly preceded its discussion of the bail jumping conviction. Finally, the circuit court straightforwardly stated that the longer prison sentence on the felony bail jumping reflected the aggravated nature of the other predicate crimes—crimes the court believed to be aggravated for reasons already placed on the record. (R1 78:55; R2 99:55); (App. 143). This would again presumably include—and is obviously a reference to—the court's lengthy comments on fentanyl which occurred directly before its shorter comments about the bail jumping conviction.

Finally, the court was explicit that a primary goal of the sentence was protection of the public. (R1 78:59; R2 99:59); (App. 147). In this case, the court was under the impression that the drugs in Mr. McNeil's possession—by virtue of the alleged fentanyl—were highly dangerous to the public, as they created not only a risk of fatal overdose to users but also a risk to literally anyone who so much as touched the substances. (R1 78:53-54; R2 99:53-54); (App. 141-142). That conduct "causes a significant risk to anyone else in the community who might come in contact with [the allegedly tainted drugs.]" (R1 78:53; R2 99:53); (App. 142). Having made a determination that Mr. McNeil was dealing lethally tainted drugs, it strains credulity to assert that this finding was unrelated to its conclusion that protection of the public was the overriding goal of the sentence.

D. The inaccurate information was not harmless.

In *Travis*, the Wisconsin Supreme Court noted three variations of the harmless error test for sentencing:

1. "Errors that do not affect the substantial rights of the adverse party are harmless. *Travis*, 2013 WI 38, ¶ 68 (citing Wis. Stat. § 805.18(1)).

2. "[A] remand [for resentencing] is appropriate unless the reviewing court concludes, on the record as a whole, that

the error was harmless, i.e., that the error did not affect the [sentencing] court's selection of the sentence imposed." *Id*., ¶ 69 (citing Fed. R. Crim. P. 52(a)).

3. "[A]n error is harmless if it did not contribute to the sentence, that is, if there is no reasonable probability that the error contributed to the outcome." *Id*., ¶70.

The Court ultimately rejected the State's harmlessness arguments in *Travis*, holding that the error there "permeated" the entire sentencing, depriving the State of its ability to convincingly argue "that the error did not affect the circuit court's selection of sentence; that there is no reasonable probability that the error contributed to the sentence; or that it is clear beyond a reasonable doubt that the same sentence would have been imposed absent the error." *Id*., ¶ 85-86.

A similar outcome should obtain in this case. Here, both the State and the circuit court devoted extensive time to the fentanyl issue, describing several extremely prejudicial inferences that could be drawn from Mr. McNeil's conduct. Most pertinently, there was a suggestion that he directly placed law enforcement lives at stake by possessing fentanyl-laced drugs that they were obliged to process as a result of his criminality.

As argued above, the impact of the fentanyl information is not confined to the cocaine charge.

Because of the interrelationship with the controlling sentence—the bail jumping—as well as the court's explicit references to community protection, this highly damaging information permeated Mr. McNeil's sentencing, thereby depriving him of a constitutionally adequate proceeding.

Accordingly, this Court should reverse and remand for resentencing.

II. Mr. McNeil is entitled to sentence modification in light of his expert's report about the fentanyl evidence in this case.

A. Legal standard and standard of review.

A circuit court has the inherent power to modify a defendant's sentence upon the showing of a "new factor." *State v. Harbor*, 2011 WI 28, ¶ 35, 333 Wis. 2d 53, 797 N.W.2d 828. In assessing a claim for sentence modification, a circuit court applies a two-part analysis: First, the defendant bears the burden of demonstrating the existence of a new factor by clear and convincing evidence. *Id.*, ¶ 36. A "new factor" is defined as "a fact or set of facts highly relevant to the imposition of the sentence, but not known to the trial judge at the time of the original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." *Id.*, ¶ 40 (citing *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)). "Whether the fact or set of facts put forth by the defendant constitutes a 'new factor' is a question of law." *Id.*, ¶ 33.

Once a defendant has satisfactorily demonstrated the existence of a new factor, the circuit court moves to step two of the analysis. It exercises its discretion and determines "whether that new factor justifies modification of the sentence." Id., ¶ 37. It is not necessary, however, that the new factor "frustrate" the purpose of the original sentence. *Id.*, ¶ 48.

The postconviction court's determination that a new factor does not warrant sentence modification is reviewed for an erroneous exercise of discretion. *Harbor*, 2011 WI 28, ¶ 33. As with any discretionary determination, this Court should reverse if the lower court either fails to sufficiently justify its determination or if that outcome is otherwise unsupported by the record. *State v. Sullivan*, 216 Wis. 2d 768, 781, 576 N.W.2d 30 (1998).

B. Dr. O'Donnell's report corrects inaccurate information regarding fentanyl in the substance Mr. McNeil was convicted of possessing and constitutes a new factor.

As this Court has already established, the correction of inaccurate information relied on at sentencing can be a new factor. *State v. Norton*, 2001 WI App 245, ¶ 9, 248 Wis. 2d 162, 635 N.W.2d 656.

As Mr. McNeil has already established in section I, B, *supra*, the information presented at sentencing—and discussed by the circuit court—was inaccurate. As Dr. O'Donnell's report establishes, the fentanyl information was not scientifically supported

and, even if it could be assumed that there was *some* scant amount of fentanyl in the drugs Mr. McNeil possessed, it was not possible for that fentanyl to have any effect on either a consumer or a member of law enforcement who may have been inadvertently exposed.

Accordingly, this Court should conclude that Mr. McNeil has satisfied the first prong of the new factor test.

C. This Court should therefore remand so that the lower court can exercise its discretion under the second prong of the new factor test.

In assessing the new factor claim, the postconviction court relied on its earlier finding of harmlessness to find that modification was not warranted under the second prong of the analysis. (R1 61:3; R2 78:3); (App. 110). As argued above, that conclusion is simply unreasonable given a careful review of the available record. Because the postconviction court did not otherwise address whether the new factor justified sentence modification, the postconviction court's reasoning is incomplete.

Accordingly, should this Court conclude that Mr. McNeil has satisfactorily proved the existence of a new factor, it should remand for an adequate consideration of this discretionary determination.

III. The circuit court erroneously exercised its discretion in determining that joinder of these two cases was not prejudicial to Mr. McNeil.

A. Legal standard.

Joinder of separate crimes is governed the criminal procedure statutes:

> Two or more crimes may be charged in the same complaint, information or indictment in a separate count for each crime if the crimes charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan. When a misdemeanor is joined with a felony, the trial shall be in the court with jurisdiction to try the felony.

Wis. Stat. § 971.12(1).

A defendant is entitled to "relief from prejudicial joinder" under the following circumstances:

> If it appears that a defendant or the state is prejudiced by a joinder of crimes or of defendants in a complaint, information or indictment or by such joinder for trial together, the court may order separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. The district attorney shall advise the court prior to trial if the district

> attorney intends to use the statement of a codefendant which implicates another defendant in the crime charged. Thereupon, the judge shall grant a severance as to any such defendant.

Wis. Stat. § 971.12(3).

Here, Mr. McNeil opposed the State's motion for joinder by alleging that joinder would be unduly prejudicial.[4] In determining whether there is unacceptable prejudice to the defendant, this Court looks to whether the otherwise unrelated allegations would be admissible as other-acts evidence at separate trials. *State v. Hall*, 103 Wis. 2d 125, 142-143, 307 N.W.2d 289. As this Court well knows, other-acts evidence is not admissible to prove propensity. *Sullivan*, 216 Wis. 2d at 782. Courts must use a familiar three-step test for the admissibility of other-acts evidence:

(1) Whether the evidence is "offered for a permissible purpose […] such as to establish motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* at 783. In assessing the first prong of the analysis, "it's not enough for the proponent of the other-act evidence simply to point to a purpose in 'permitted' list and assert that the other-act evidence is relevant to it."

[4] Mr. McNeil also challenged whether joinder was legally warranted under sub. 1. (R1 8; R2 21). Mr. McNeil does not renew that argument on appeal.

United States v. Gomez, 763 F. 3d 845, 856 (7th Cir. 2014). "In other words, the rule allows the use of other-act evidence only when its admission is supported by some propensity-free chain of reasoning." *Id.*

(2) Whether the other-acts evidence is relevant. *Id.* at 786. There are two layers of analysis: First, "whether the evidence relates to a fact or proposition that is of consequence to the determination of the action." *Id.* Second, "whether the evidence has a tendency to make a consequential fact more probable or less probable than it would be without the evidence." *Id.* This second layer of analysis—focusing on the probative value of the evidence—"depends on the other incident's nearness in time, place and circumstances to the alleged crime or to the fact or proposition sought to be proved." *Id.* This similarity condition is intentionally stringent. *See State v. Muckerheide*, 2007 WI 5, ¶ 5, 298 Wis. 2d 553, 725 N.W.2d 930.

(3) Finally, the Court must weigh "the probative value of the other acts evidence against the danger of unfair prejudice, confusion of the issues, or misleading the jury, or considerations of undue delay, waste of time or needless presentation of cumulative evidence." *Sullivan*, 216 Wis. 2d at 789.

The circuit court's ruling that no undue prejudice would result from joinder is reviewed for an erroneous exercise of discretion. *Hall*, 103 Wis. 2d at 140.

B. Mr. McNeil was unfairly prejudiced by joinder of these two cases.

Had Mr. McNeil been tried separately on each case, it would have been improper to admit the allegations in the other case as other acts:

Obstructing an Officer

In this case, Mr. McNeil faced charges in both cases of obstructing an officer. (R1 1:1-2; R2 20:1-2). The circuit court did not address these charges in its oral decision. This omission, in and of itself, is strong evidence of an erroneous exercise of discretion as it shows that the court failed to consider all factors relevant to that decision.

When the obstructing charges are considered, it is clear that the separate instances of obstructing would not be properly admissible in separate trials. First, evidence that Mr. McNeil committed another obstructing—under different circumstances—appears to be pure propensity evidence and thus presumptively inadmissible. Wis. Stat. § 904.04(2)(a). This propensity inference is strong and, under these facts and circumstances, cannot be reasonably separated from any asserted "permissible purpose" that the evidence might otherwise serve. *Gomez,* 763 F. 3d at 856.

Moreover, the prejudicial impact of this evidence is obvious, as it is yet more "bad behavior" involving law enforcement—another interaction where Mr. McNeil disobeyed their authority and, in so doing, put others at risk. Admission of a separate allegation of obstructing would therefore naturally invite the laundry list of concerns which are normally cited to bar the admission of other acts evidence:

> 1) The overstrong tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts; (2) the tendency to condemn not because he is believed guilty of the present charge but because he has escaped punishment from other offenses; (3) the injustice of attacking one who is not prepared to demonstrate the attacking evidence is fabricated; and (4) the confusion of issues which might result from bringing in evidence of other crimes.

Whitty v. State, 34 Wis. 2d 278, 292, 149 N.W.2d 557 (1967).

Accordingly, it was error to allow these allegations to be joined for a single trial.

The Drug Charges

In this case, the circuit court focused extensively on the drug charges in finding that joinder would not prejudice Mr. McNeil:

> I also note that some of the other charges, in each of the cases there is a charge of possessing cocaine, in each of the cases there is a charge of possessing heroin. So information from one case

> or evidence about possessing cocaine in one case, possessing heroin in another, I think could be admitted in the charges of possessing cocaine and possessing heroin in the other case for the admissible purpose of showing knowledge that the substances were controlled substances, not a mistake or lack of knowledge.
>
> And one of the elements is knowingly possessing a controlled substance. And so given that information or evidence about one crime would have an admissible, permitted purpose for the other crime charged, again, that tends to show there would not be substantially unfair prejudice to the defendant by joining the two cases.

(R1 69:8-9; R2 90:8-9); (App. 115-116).

Again, the propensity inference is plain—that Mr. McNeil probably possessed drugs during the second law enforcement contact because he (allegedly) possessed drugs during the first police contact. Thus, while the circuit court tried to identify a permissible purpose—relating to the knowledge element—it failed to identify a truly propensity-free chain of reasoning that would support the admissibility of this evidence. In essence, the court asserted that proof of prior possession could be used to prove possession at some other place and time. This is not an appropriate exercise of discretion.

Moreover, the circuit court totally failed to consider the other prongs of the other acts analysis. As to relevance, that prong needed to be scrupulously analyzed and cannot be satisfied with reference to

mere generalities, as the circuit court did here. As Professor David Blinka writes, "If articulating a permissible proposition (step #1) is relatively straightforward, explaining its relevancy is infinitely more demanding." § 404.604 The Sullivan Standard of Admissibility, 7 Wis. Prac., Wis. Evidence § 404.604 (4th ed.) Again, the court needs to carefully ensure that further propensity judgments are not being smuggled in: "The relevancy determination, then, is critical because on close inspection the other act evidence is often probative of nothing more than the subject's character." *Id*. Here, the circuit court merely relied on the fact that both cases involved drug allegations without meaningfully assessing their similarity or dissimilarity. That is an erroneous exercise of discretion.

Finally, admission of separate drug charges clearly creates undue prejudice to the defendant. Here, Mr. McNeil's ability to defend himself against these separate drug charges was substantially handicapped. The submission of multiple allegations to the jury likely watered down the strength of his defense on the second charge, where drugs were found near an anonymous bystander who has never been satisfactorily identified. It is reasonably likely that the split verdict in this case is a direct result of the propensity evidence at issue, as it invited the jury to compare the likelihood of Mr. McNeil being innocent on two separate occasions involving similar incidents, rather than faithfully considering the merits of each allegation independently.

Of course, this is exactly what the State asked the jury to do, arguing in closing that Mr. McNeil's guilt was inferable from the fact that he had twice been charged with similar conduct: "Either the defendant committed these crimes, or he just walks around, horrible things happen to him, and drugs keep falling all over him. The only logical outcome here is that the defendant possessed those drugs on those dates in question." (R1 76:47; R2 97:47). Here, the propensity evidence—that no one could have this kind of "bad luck"—directly overrode Mr. McNeil's ability to adequately defend himself against these charges. Thus, while he was able to obtain a concession that the drugs found during the second stop could have come from the so-called "Good Samaritan," (R1 73:69; R2 94:69), the jury was apparently unwilling to give him the same break twice—proof of duplicate charges was proof against innocence.

Accordingly, it was error to allow these charges to be joined for trial.

Felony Bail Jumping

Finally, the court's comments regarding the felony bail jumping charge on 16CF5467 deserves brief attention. In its comments, this was one of two reasons it identified for granting the State's motion for joinder:

> First, in case 16 CF 5467, there is a charge of felony bail jumping. As part of that allegation, the State alleges that Mr. McNeil was released

> from custody in case 16 CF 1685 when he allegedly committed the offenses charged in case 16 CF 5467.
>
> So whenever the charge of felony bail jumping in 16 CF 5467 is presented to the jury that jury is likely to hear, there is admissible evidence, that he had been charged in case 16 CF 1685 of a felony level offense, released under Chapter 969, and then allegedly violated the terms or conditions of that release. So in terms of prejudice to the defendant on that point, I find that there is not substantially unfair prejudice to him on that point because the jury is likely to hear that information, it is admissible.

(R1 69:8-9; R2 90:8-9); (App. 115-116).

This logic does not pass muster on appeal. Just because the jury would necessarily be told that Mr. McNeil was charged with a felony offense, that does not mean that they would learn the specifics of the underlying charges, as they would in a joint trial. The court appears to have unreasonably focused on the unavoidable prejudice flowing from the felony bail jumping charge instead of looking at the specific allegations in detail. Moreover, the argument totally ignores the likelihood of a stipulation which would avoid any details of the pending felony being submitted to the jury—which is precisely what occurred in this case. (R2 21).

Accordingly, this Court should hold that the circuit court erroneously exercised its discretion in

joining the two cases for trial. It should then reverse and remand for new trial(s).[5]

IV. The circuit court erroneously exercised its discretion in admitting other misconduct evidence.

A. Legal standard and standard of review.

In assessing the admissibility of other misconduct evidence, this Court reviews the lower court's exercise of discretion with reference to the legal outline set forth in section III, A, *supra*. The circuit court's decision to admit other acts evidence is reviewed for an erroneous exercise of discretion. *Sullivan*, 216 Wis. 2d at 771.

B. The circuit court erroneously exercised its discretion in allowing evidence of drug-dealing in this drug possession case.

Here, counsel objected to the testimony of Dana Marifke, who presented evidence that Mr. McNeil had dealt drugs to her on prior occasions. (R1 71:57; R2 92:57).

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[5] Mr. McNeil observes that the State may make a harmlessness argument in their response brief. *State v. Leach*, 370 Wis. 2d 648, 672, 370 N.W.2d 240 (1985). However, because it is their burden to prove harmlessness beyond a reasonable doubt, *State v. Mayo*, 2007 WI 78, ¶ 29, 301 Wis. 2d 642, 734 N.W.2d 115, he respectfully reserves the right to respond to the State's specific arguments on that point in his reply brief.

Ms. Marifke's stated purpose in testifying was to establish a bona fide dispute over the allegedly "stolen" van, thereby establishing the lawful authority of the police when they contacted Mr. McNeil and he ultimately obstructed their investigative efforts by running inside a nearby residence. (R1 71:58-59; R2 92:58-59). The State also wanted to present her testimony in order to prove up the charges of drug possession, as "Ms. Marifke can offer testimony that she has essentially seen the defendant with those drugs and that the purpose of him being in that stolen van was to deal drugs." (R1 71:59; R2 92:59).

Defense counsel indicated that she had no objection to the State establishing the legitimacy of the law enforcement investigation with respect to the van. (R1 71:59; R2 92:59). Counsel did take issue, however, with testimony linking Mr. McNeil to drug-dealing, asserting that this was inadmissible other acts testimony. (R1 71:59; R2 92:59).

The circuit court focused on the "lawful authority" element of obstructing in its oral ruling. (R1 71:60-61; R2 92:60-61); (App. 118-119). Again, however, Mr. McNeil does not disagree that the State was permitted to establish that police were acting on a legitimate tip about a stolen vehicle when they attempted to speak with Mr. McNeil. This still does not explain why evidence of drug-dealing was at all relevant to that point—especially when there was other admissible testimony that would help to establish it. The State also had evidence that a 911

caller had reported the van as stolen and actually pointed it out to first responders when they arrived on the scene. (R1 74:48; R2 95:48).

Of course, the real reason this evidence was being presented was to paint Mr. McNeil as a drug dealer—to further obvious propensity inferences that are barely concealed by the State's discussion of its alleged permissible purpose. Evidence of this propensity inference is once again present in the State's closing argument, in which the State explicitly argued (their qualifications and disclaimers notwithstanding) that proof of prior possession could be used to establish possession with respect to the charged conduct. (R1 76:31; R2 97:31).

In addition to the barely concealed propensity inference, there are myriad other problems. First, the court failed to diligently assess relevance, openly conceding that the conduct at issue was not necessarily similar. (R1 71:60; R2 92:60); (App. 118). The court also did not adequately assess prejudice, besides asserting that there could be no prejudice because this was the type of evidence the "law permits." (R1 71:63; R2 92:63); (App. 121). That remark flatly ignores the balancing test in Wis. Stat. § 904.03.

Accordingly, this Court should find that the circuit court erroneously exercised its discretion and reverse and remand for a new trial.

V. Mr. McNeil was entitled to a hearing on his postconviction motion alleging ineffective assistance of counsel.

A. Legal standard and standard of review.

A criminal defendant has the right to the effective assistance of counsel under both the state and federal constitutions. U.S. Const. Amend. VI & XIV; Wis. Const. Art. 1, § 7 & 8. To prevail on an ineffective assistance of counsel claim, a defendant must establish that counsel's performance was deficient and that counsel's deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). An attorney's performance is deficient if it falls "below objective standards of reasonableness." *State v. Thiel*, 2003 WI 111, ¶ 33, 264 Wis. 2d 571,665 N.W.2d 305. To prove prejudice, the defendant must show that counsel's deficient performance was "sufficient to undermine confidence in the outcome." *Thiel*, 2003 WI 111, ¶ 20 (citing Strickland, 466 U.S. at 694).

Counsel's deficient performance is prejudicial when there is a reasonable probability "that, but for counsel's [deficient performance], the result of the proceeding would have been different," or when counsel's errors "were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 694. Whether confidence in the outcome has been undermined is distinct from whether or not the evidence is sufficient to convict. *State v. Pitsch*, 124 Wis. 2d 628, 645, 369

N.W.2d 711 (1985). A defendant also need not be prejudiced by "each deficient act or omission in isolation." *Thiel*, 2003 WI 111, ¶ 63. Rather, prejudice may be established by the cumulative effect of counsel's deficient performance. *Id*.

In Wisconsin, a defendant can only prevail on an ineffective assistance of counsel claim after presenting the testimony of trial counsel at a postconviction hearing. *State v. Machner*, 92 Wis.2d 797, 803, 285 N.W.2d 905 (Ct. App. 1979). In order to obtain such a hearing, the postconviction motion must allege, on its face, "sufficient material facts that, if true, would entitle the defendant to relief." *State v. Allen*, 2004 WI 106, ¶9, 274 Wis.2d 568, 682 N.W.2d 433.

In assessing whether the motion satisfied that requirement, this Court applies de novo review. *Id*. "However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." *Id*. This Court reviews the circuit court's discretionary decision "under the deferential erroneous exercise of discretion standard." *Id*.

B. Mr. McNeil was entitled to a hearing.

Mr. McNeil's postconviction motion alleged yet more erroneously admitted misconduct evidence—evidence that he had threatened to kill the "Good Samaritan" and his children. (R1 50:16; R2 71:16).

Because counsel did not object to the admission of this evidence, Mr. McNeil framed the issue through the lens of ineffective assistance of counsel. (R1 50:16; R2 71:16).

The postconviction court denied the motion without a hearing, concluding that Mr. McNeil had insufficiently alleged prejudice. (R1 61:5; R2 78:5); (App. 112). Here, Mr. McNeil made sufficient allegations which entitle him to a hearing on remand.

With respect to deficient performance, reasonably competent counsel would not allow their client's character to be attacked via evidence that they had made otherwise inadmissible and irrelevant threats to murder someone's entire family, including young children. Such evidence was not admissible at this trial, as it was not only irrelevant but also egregiously prejudicial under Wis. Stat. § 904.03. Accordingly, had counsel made a timely objection, there would have been ample basis for exclusion.

Counsel's deficient performance was prejudicial: Evidence that Mr. McNeil threatened to murder the children of the unnamed individual who assisted the police is exactly the type of character evidence which "magnifies the risk that jurors will punish the accused for being a bad person regardless of his or her guilt of the crime charged." *Sullivan*, 216 Wis. 2d at 783.

This evidence suggests that Mr. McNeil is a violent, evil person. It is nothing more than a ploy to elicit fear and moral condemnation from the jury

panel. In allowing the jury to convict based on character judgments which flow from otherwise inadmissible evidence, this evidence abetted a breakdown in the normal functioning of the adversarial process and therefore resulted in an unreliable—and constitutionally infirm—verdict. *See Pitsch*, 124 Wis. 2d at 642.

Moreover, it is not enough—as the postconviction court averred—that other sufficient evidence existed to convict Mr. McNeil. (R1 61:5; R2 78:5); (App. 112). That is simply not the law. *Id*. at 646. The correct focus for this Court should be on confidence and reliability, not on whether other evidence in the record can be marshaled to uphold the jury's verdict. *Id*. The pernicious effects of inadmissible character evidence are well-known in the law. Such evidence is "objectionable, not because it has no appreciable probative value, but because it has too much." *Whitty*, 34 Wis. 2d at 292. Allowing a jury verdict which was influenced by such testimony to stand would be to countenance an otherwise unacceptable breakdown in the traditional functioning of the adversarial process.

Accordingly, this Court should reverse and remand for a new trial.

VI. The evidence was insufficient to convict Mr. McNeil of drug possession in 16CF5467.

A. Legal principles and standard of review.

A challenge to the sufficiency of the evidence is evaluated via the "reasonable doubt standard of review." *State v. Poellinger*, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990).

This Court must evaluate the available evidence in the light most favorable to the finding of guilt and ask whether "the trier of facts could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true." *Id*. (citing *Johnson v. State*, 55 Wis. 2d 144, 148, 197 N.W.2d 760 (1972)). A conviction obtained absent sufficient evidence is a violation of Mr. McNeil's right to due process of law. U.S. Const. Amend. XIV; Wis. Cons. Art. I. § 1.

B. The State presented insufficient evidence to prove that Mr. McNeil possessed cocaine, heroin, and THC.

At trial, the State alleged that Mr. McNeil was in possession of three distinct substances on the evening of December 6, 2016—cocaine, heroin and THC. (R1 9:1-2). For each substance, they were required to prove the following three elements beyond a reasonable doubt:

1) Mr. McNeil either "had actual physical control" or otherwise "exercise[d] control over the substance. (R1 76:9; R2 97:9).

2) That the substance in Mr. McNeil's possession was a controlled substance. (R1 76:9-10; R2 97:9-10).

3) That Mr. McNeil knew or believed the substance to be a controlled substance. (R1 76:10; R2 97:10).

At trial, the State presented evidence that, following his flight from law enforcement, Officer Ruegg found a baggie of THC on the street near Mr. McNeil's person. (R1 73:62; R2 94:62). The testimony does not disclose that any other baggies of any other suspected substances were present, nor did the officer testify about an examination of the bag and its contents. Notably, the officer did testify that she never witnessed Mr. McNeil holding, touching, or throwing the drugs. (R1 73:69; R2 94:69). She also admitted it was "possible" that the drugs had been "dropped by the citizen […] who helped assist in this arrest." (R1 73:69; R2 94:69). That citizen was never identified during the course of this trial. Mr. McNeil never made any statements admitting that the baggie belonged to him and the State failed to present any touch DNA or fingerprint evidence that would forensically link him to the baggie.

While these facts alone indicate that there are grave problems establishing either actual or constructive possession; there are other problems as

well. For example, the evidence presented failed to establish how the baggie of suspected THC found by Officer Ruegg led to a conclusion that Mr. McNeil also possessed two other controlled substances – cocaine and heroin. At the same time, there are also significant issues in establishing element two—that the substances allegedly possessed by Mr. McNeil were controlled substances. While the State did present the testimony of an analyst who tested *some* drugs, the State failed to present sufficient chain of custody evidence establishing that the drugs tested and identified as such by Mr. Eberhardy were in fact the same substances recovered at the scene by Officer Ruegg. *See State v. McCoy*, 2007 WI App 15, ¶ 9, 298 Wis. 2d 523, 728 N.W.2d 54 (Break in chain of custody impacts weight, not admissibility, of evidence).

Here, Officer Ruegg testified that she took the suspected baggie of THC and inventoried it under incident number 163410068. (R1 73:62; R2 94:62). Her testimony does not reflect what it means to "inventory" a substance, nor does it enlighten the jury as to what actually happened to the substance once it was seized from the ground. More problematically, Officer Ruegg did not have a stellar recollection of inventorying the THC baggie. (R1 73:69; R2 94:69). The record also demonstrates that she failed to respect her department's standard operating procedures in other respects during this investigation, as when she failed to identify or interview the "Good Samaritan." (R1 73:68; R2 94:68).

There was no testimony presented as to how the baggie of suspected THC was transmitted from the scene to the lab and ultimately to the possession of the analyst who tested it. Instead, Mr. Eberhardy merely described testing substances listed under the inventory number identified by Officer Ruegg. (R1 74:61; R2 95:61).

Perhaps sensing the infirmity of the chain of custody evidence, the State called Officer Krug to testify about how chain of custody generally works, and identifying markings on the drug baggie in court. (R1 74:89; R2 95:89). Once again, however, there was no concrete linkage between the suspected THC baggie recovered from the ground on April 14, 2016, and the lab testing of three different controlled substances.

In light of these evidentiary shortcomings, the testimony was therefore insufficient to convict Mr. McNeil of drug possession. Accordingly, this Court should vacate those convictions.

CONCLUSION

Mr. McNeil therefore respectfully requests that this Court reverse and remand for the reasons set forth herein.

Dated this 29th day of July, 2019.

Respectfully submitted,

CHRISTOPHER P. AUGUST
Assistant State Public Defender
State Bar No. 1087502

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
augustc@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,321 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 29th day of July, 2019.

Signed:

CHRISTOPHER P. AUGUST
Assistant State Public Defender

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; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically 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 29th day of July, 2019.

Signed:

CHRISTOPHER P. AUGUST
Assistant State Public Defender

APPENDIX

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TO
APPENDIX