STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case Nos. 2019AP467-CR & 2019AP468-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BOBBY L. MCNEIL,

Defendant-Appellant.

ON APPEAL FROM JUDGMENTS OF CONVICTION, THE HONORABLE CAROLINA STARK, PRESIDING, AND A DECISION AND ORDER DENYING POSTCONVICTION RELIEF, THE HONORABLE FREDERICK C. ROSA, PRESIDING, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

This consolidated appeal involves two cases. The first case is based on an incident in April 2016 in which McNeil was charged with three drug possession counts (heroin, cocaine, and THC) and obstruction of an officer. The second case is based on an incident in December 2016 in which McNeil was charged with three drug possession counts (heroin, cocaine, and THC), obstruction of an officer, and felony bail jumping. A jury convicted him of obstruction in the first case and all of the counts in the second case.

1. In sentencing McNeil for possession of cocaine, the court deemed the presence of fentanyl in the cocaine to be an aggravating factor. It sentenced him on that count to 12 months in jail to be served concurrently with a nearly five-year controlling sentence on a different count. Did the postconviction court correctly hold that resentencing was not warranted based on harmless error?

2. Under the same facts, did the court correctly reject McNeil's new-factor claim based on harmless error?

3. Did the circuit court soundly exercise its discretion in joining these two cases for trial?

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

5. Did the postconviction court soundly deny McNeil's ineffective assistance of counsel claim without a hearing?

6. In the second case, was the evidence sufficient to support the jury's finding that McNeil possessed drugs?

This Court should say yes to all of these questions and affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither is warranted. The parties' briefs should set forth the relevant facts, and the issues presented can be resolved by applying well-established law.

STATEMENT OF THE CASE

Underlying crimes and initial charges. In 2016, McNeil committed a series of crimes that resulted in multiple criminal charges across two cases. In April 2016, Milwaukee police saw McNeil accessing a van that had been reported stolen. (R. 1:2.)[1] After an officer ordered McNeil to come toward him, McNeil fled into a residence, where he continued to disobey the officer's commands. (R. 1:2.) The officer was eventually able to arrest McNeil, after which he discovered a bag containing suspected drugs. (R. 1:2.)

Based on that incident, in case number 16CF1685 (the first case), the State charged McNeil with two counts, possession of cocaine and possession of heroin. Both were charged with a habitual criminality repeater enhancer, and the cocaine count was charged as a second and subsequent offense. (R. 1:1.) Later, after McNeil rejected a plea offer, the State filed an Amended Information adding counts of possession of THC, second and subsequent offense, and obstructing an officer. (R. 20:1–2.)

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[1] There are two appellate records in this case. Record 19AP468 corresponds with the first-filed case (16CF1685) and record 19AP467 corresponds with the second-filed case (16CF5467). The cases were joined in February 2017. Most documents filed in those cases after February 2017 appear in both appellate records. Accordingly, the State generally cites to the appellate record in 19AP468. The State will use the prefix [467] when it is necessary to cite to documents unique to the record in 19AP467.

While the first case was pending in December 2016, McNeil committed new drug possession and obstruction crimes and felony bail jumping (based on his status from the first case) in December 2016. (R. [467] 1.) In that incident, Officer Kristen Ruegg and her partner responded to reports that someone was entering vacated property. (R. [467] 1:2.) Ruegg saw McNeil leaving the property; McNeil, upon seeing Ruegg, "fled on foot." (R. [467] 1:2.) Ruegg arrested McNeil after a short pursuit—during which McNeil "disregarded the numerous commands to stop" and a bystander assisted by knocking down McNeil. (R. [467] 1:2.) Ruegg seized a baggie on the ground next to McNeil; the baggie contained substances later identified as heroin, cocaine, and THC. (R. [467] 1:2.)

In case number 16CF5467 (the second case), the State charged McNeil with four counts: one each of possession of cocaine,[2] possession of heroin, obstructing an officer, and felony bail jumping. (R. [467] 1:1–2.) In an Amended Information, the State added second-and-subsequent enhancers to the possession counts, and added a fifth count of possession of THC, second or subsequent. (R. [467] 9:1–2.)

Joinder motion and pretrial evidentiary ruling. After the State filed the charges in the second case, it moved to join it with the first case for trial "[b]ased upon the similarities in alleged offenses, location, time between offenses and lack of prejudice." (R. 16; 19.)

The court allowed the joinder, explaining that the second case had a felony bail jumping count connected with the first case; the drug charges in either case would be admissible other acts in the other case; and jury instructions

[2] While the cocaine seized in the second case that is the basis of the possession count contained both cocaine and heroin. (R. 95:64), for simplicity, the State refers to the substance seized as cocaine in this brief.

could mitigate any prejudice in trying the cases together. (R. 90:8–9.)

McNeil also filed a motion in limine seeking to prevent the State from introducing other-acts testimony from Dana Marifke, who owned the van that had been reported stolen in the first case, and who would be testifying that McNeil was her drug dealer and that she loaned him the van in exchange for heroin. (R. 92:57–58.) The court denied McNeil's motion, finding that Marifke's testimony was relevant for the obstruction count to help establish that the officers acted within their lawful authority when they approached McNeil in April 2016, and McNeil's history of dealing drugs was relevant to the knowledge element of the drug charges. (R. 92:61–62.)

Trial, sentencing, and postconviction proceedings. After trial, the jury returned a mixed verdict. In the first case, it found McNeil guilty of obstruction, but acquitted him on the drug counts. (R. 49.) In the second case, the jury found McNeil guilty of all five counts, i.e., three drug counts, obstruction, and felony bail jumping. (R. [467] 26.)

Accordingly, McNeil proceeded to sentencing in the joined cases on the six counts for which he was convicted. As for the convictions in the second case, the court sentenced McNeil to a series of concurrent sentences. (R. 99:63–66.) The longest—and therefore controlling—sentence was tied to the felony bail jumping charge and totaled 27 months' initial confinement and 24 months' extended supervision, whereas the remaining counts received concurrent sentences of six to 12 months' each. (R. 99:63–66.) In the first case, the court sentenced McNeil to nine months' time in the House of Corrections, consecutive to the sentences in the companion case. (R. 99:63.) Taking all of those sentences together, the court required McNeil to serve five years' time, with three years (27 months from the second case plus 9 months from the

first case) in initial confinement and two years (24 months from the second case) on extended supervision. (R. 99:71.)

McNeil sought postconviction relief on three grounds. (R. 71; 76.) First, he moved for resentencing based on inaccurate information. Second, he moved for new-factor sentence modification. Both claims were based on comments the State and the court made noting that the crime lab "identified" the presence of fentanyl in the cocaine seized in the second case. (R. 71:8–14.) McNeil offered an expert to testify that the identification of fentanyl in that manner was not reliable or correct. (R. 71:14–17.) Third, McNeil claimed that his trial counsel was ineffective for failing to object to alleged character evidence of McNeil, i.e., testimony that after McNeil's arrest in the second case, McNeil made statements threatening the bystander who had knocked him down. (R. 71:14–17.)

By written order, the court denied the motion without a hearing. On the sentencing claims, the court held that the State satisfied its burden of proving harmless error, and rejected both the inaccurate information and sentence modification claims on that basis. (R. 78:3.) It also rejected McNeil's ineffective assistance claim because McNeil failed to demonstrate prejudice, i.e., that there was a reasonable probability of a different result even if the evidence had been excluded. (R. 78:6.)

McNeil appeals. In addition to appealing his three postconviction claims, he challenges the circuit court's joinder decision, that court's decision admitting other-acts evidence, and the sufficiency of the evidence to convict him of drug possession in the second case.

ARGUMENT

I. McNeil is not entitled to resentencing because any error in the court's reliance on the fentanyl was harmless.

In his first two claims, McNeil focuses on comments that the prosecutor and the sentencing court made noting crime lab results indicating the presence of fentanyl in the cocaine McNeil possessed in the second case. In its sentencing remarks, the court viewed the presence of fentanyl as an aggravating factor in its assessment of the gravity of the cocaine possession count.

Though McNeil satisfied his burden of showing that the court relied on inaccurate information, the error was harmless. Thus, he is not entitled to resentencing or, as discussed in Part II, sentence modification.

A. Sentences imposed with reliance on inaccurate information are subject to harmless error analysis.

Whether a court has denied a defendant his due process right to be sentenced based on accurate information is a constitutional question that this Court reviews de novo. *State v. Tiepelman*, 2006 WI 66, ¶ 9, 291 Wis. 2d 179, 717 N.W.2d 1.

A defendant who requests resentencing based on the sentencing court's use of inaccurate information must demonstrate that (1) the information was inaccurate, and (2) the sentencing court actually relied on the information. *Id.* ¶ 26 (citing *State v. Lechner*, 217 Wis. 2d 392, 419, 576 N.W.2d 912 (1998)). "Whether the court 'actually relied' on the incorrect information at sentencing was based upon whether the court gave 'explicit attention' or 'specific consideration' to it, so that the misinformation 'formed part of the basis for the sentence.'" *Id.* ¶ 14 (quoting *Welch v. Lane*, 738 F.2d 863, 866 (7th Cir. 1984)).

If a defendant shows actual reliance on inaccurate information, the burden shifts to the State to prove harmless error. *Id.* ¶¶ 2, 26. "The State can meet its burden to prove harmless error by demonstrating that the sentencing court would have imposed the same sentence absent the error." *State v. Travis*, 2013 WI 38, ¶ 73, 347 Wis. 2d 142, 832 N.W.2d 491. Accordingly, it is appropriate for the State to rely "on the transcript of the sentencing proceeding in making its argument" and refrain from "speculation about what a circuit court would do in the future upon resentencing." *Id.*

B. Any error was harmless to the extent that the court relied on the alleged "presence of fentanyl" in the cocaine.

As it did below (R. 75:4), the State concedes that the information regarding the fentanyl was inaccurate and that the circuit court relied on it at sentencing. Specifically, the sentencing court referred back to trial testimony from a lab analyst, Cullen Eberhardy, stating that Eberhardy testified that "there was enough in that sample, that substance, to identify the presence of fentanyl" in the cocaine McNeil possessed. (R. 99:53.)

That statement inaccurately reflects Eberhardy's testimony. Eberhardy testified that the sample "indicated" the presence of fentanyl, which, as he clarified, did not meet the level required for identification. (R. 95:64). Counsel for the State in the postconviction proceedings also later confirmed with Eberhardy "that stating there was enough in the sample to identify the presence of fentanyl is in fact inaccurate." (R. 75:4.)

And the sentencing court relied on the fentanyl information in sentencing McNeil on the cocaine count. After noting the presence of fentanyl in the cocaine, the court detailed the many dangers of fentanyl consumption and exposure. (R. 99:53–54.) The court further stated that the

presence of fentanyl in the cocaine was an aggravating factor enhancing the gravity of the cocaine count. (R. 99:54–55.) Given the court's explicit reference to fentanyl in listing the factors that made the cocaine count an intermediate-level offense, McNeil has satisfied his burden of demonstrating that the court actually relied on the fentanyl information.[3]

But the error was harmless. To start, the court's mention of the fentanyl was a minor part of its decision: two pages of its 39-page long sentencing remarks. (R. 99:35–74.) Further, the court only discussed fentanyl when weighing the gravity of the cocaine count. (R. 99:53–54.) It stated that while McNeil possessed a small amount of cocaine, the presence of fentanyl in it, "all of the circumstances of December 6, 2016," and McNeil's bail status at the time made the cocaine count "an intermediate level felony offense." (R. 99:54–55.)

Ultimately, on the cocaine count, the court imposed 12 months in the House of Corrections concurrent to the controlling four-year felony bail jumping count. So even though the court relied, in part, on the fentanyl in imposing its sentence on the cocaine count, its reliance was harmless because the only sentence it affected was a concurrent count that McNeil was to serve within a longer controlling sentence.

Recognizing that, McNeil insists that the fentanyl information also influenced the felony bail jumping sentence. (McNeil's Br. 25–26.) He notes the court's references to "all of the circumstances" surrounding McNeil's conduct on December 6, 2016, and its goal to protect the public. (*Id.*) But a fair reading of the sentencing transcript demonstrates that

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[3] The State disagrees with McNeil's position that the court actually relied on the fentanyl information to craft the felony bail jumping sentence. (McNeil's Br. 25–26.) The court made no specific or explicit references to the fentanyl in imposing the controlling sentence. That said, the State understands those arguments to go to harmless error, and addresses them in that context.

the court would have imposed the same controlling sentence absent the information regarding fentanyl.

The court's primary concern was McNeil's lengthy pattern of noncompliance with the law and his failure to take responsibility for his crimes. In discussing the seriousness of the felony bail jumping charge, the court found that it was aggravated because McNeil engaged in lawless conduct while on bail for obstruction and other charges, with a significant past criminal record. (R. 99:55.) McNeil's lawless conduct had been a troubling pattern: his long criminal record included convictions for obstruction of an officer (in 2002), bail jumping (in 2004, 2005, and 2006), delivery of cocaine (in 2006), and robbery (in 1997 and 2012). (R. 99:55–56.) While serving probation, supervision, and on bond, McNeil violated the rules and was revoked. (R. 99:55–56.) McNeil's crimes here further showed his contempt for rules, given that he continued to possess drugs in December 2016 despite having been convicted in 2006 of delivery, facing other drug counts based on his April 2016 conduct, and being on bond for those other counts. (R. 99:57.)

It also noted that McNeil, in his conduct underlying both obstruction charges, endangered himself and the community by disobeying law enforcement's lawful orders. (R. 99:59–60.) In April, the court noted, McNeil escalated the encounter into a dangerous situation when he ran into a residence, failed to come out of a bedroom, and forced the officer to make a number of quick decisions and use a taser to subdue McNeil. (R. 99:41–46.) In December, similarly, McNeil ran from police through a busy urban area, which ended only after a bystander intervened. (R. 99:48–50.) The court also found significant McNeil's shunning responsibility for his acts and his incredible claim that during the April encounter, he was simply going into the house for a glass of water and did not realize police were chasing him. (R. 99:40–41.)

In all, the court made clear that its sentencing goals were to protect the community, to deter McNeil from engaging in future crimes, and to punish him for his crimes here. (R. 99:59–60.) In referencing "all the circumstances" tied to his crimes, the court was most concerned with McNeil's behavior underlying the obstruction and the felony bail jumping convictions and his general refusal to follow rules:

> Given the very aggravated nature of the obstructing, the danger it caused on April 14th of 2016, given the very significant danger that you posed to officers in the community and yourself on December 6, 2016, with that aggravated obstructing, your history is simply not following the rules, whether those be our community's laws in general, the rules of release on bail, the rules of probation or extended supervision.
>
> I think that it's very clear that there's a high need to protect the community from you because you have not demonstrated [outside some good behavior while in custody for these cases] that you're going to follow rules. You've demonstrated a pretty clear pattern in history of violating rules or laws in ways that pose a lot of danger to yourself and others in our community. So I think the need to protect the community is very high.

(R. 99:59–60.)

Because of McNeil's history of failing to follow rules, in the court's view, a prison sentence was required. (R. 99:60–62.) "[U]nder all of these circumstances," the court told McNeil, "there is just no way that I can have confidence that you will follow the rules of probation for the community to be safe." (R. 99:62.) As the court further explained:

> When I look at the severity of his criminal record, when I look at the multiple convictions now for bail jumping, revocations of probation and extended supervision, the types of crimes he's been convicted for, all of the factors that I've noted as aggravated in all of the different categories today, and looking at the

> amount of time he has already spent in custody when sentenced on other cases, . . . I think it has to be more than four years of initial confinement or custody to really accomplish the sentencing goals because in the past, the things that have been done haven't worked to deter him from committing other crimes to keep our community safe.

(R. 99:62–63.)

Given the court's repeated emphasis of McNeil's continued failure to follow rules, based on his record and his conduct underlying the obstruction and bail jumping charges, the fentanyl information did not influence the controlling prison sentence.

McNeil tries to align his case with *Travis*, 347 Wis. 2d 142, in which the State failed its burden of proving harmless error based on inaccurate information. (McNeil's Br. 26–27.) There, the court held that the error was not harmless when the circuit court stated at sentencing its erroneous view that Travis was subject to a five-year mandatory minimum when there was none. *Travis*, 347 Wis. 2d 142, ¶ 79. That was so because the nature of the error permeated the entire hearing in two respects: first the mistaken understanding that a mandatory minimum applied caused the court's "framework for sentencing [to be] thrown off, and the sentencing court cannot properly exercise its discretion based on correct facts and law." *Id.* ¶ 80. Second, the prosecutor, defendant, defense counsel, defendant's mother, the PSI writer, and the court were under the same mistaken understanding, which may "significantly hinder[]" the court's ability to exercise its discretion. *Id.* ¶ 83.

Travis is distinguishable. To start, here, the mistake regarding fentanyl on one of six counts was a much less significant mistake than misinformation regarding the mandatory minimum that Travis faced. To that end, the fentanyl information did not permeate the entire proceedings. Again, the court discussed it in two of its 39 pages of

sentencing remarks. (R. 99:53–54.) The prosecutor discussed it just as briefly. (R. 99:9.) It was not discussed at a level that would have thrown off the court's entire compass in crafting its sentence. Again, the transcript makes clear that the court was most driven by McNeil's failure to follow rules and the resulting danger he posed to the community, not the harm from possessing tainted drugs.

In sum, McNeil is not entitled to resentencing.

II. Sentence modification is unwarranted for the same reasons.

McNeil correctly states the law and standard of review with regard to a claim for new-factor sentence modification. (McNeil's Br. 28–29.) In a nutshell, a defendant has the burden to demonstrate the existence of a new factor; if he meets that burden, the court makes a discretionary call whether the new factor justifies sentence modification. *See State v. Harbor*, 2011 WI 28, ¶¶ 33–37, 333 Wis. 2d 53, 797 N.W.2d 828.

Here, the postconviction court assumed for the sake of argument that McNeil established that the clarification regarding the fentanyl was a new factor and determined that sentence modification was not warranted for the same reasons that McNeil was not entitled to resentencing. (R. 78:4.) Based on its harmless-error assessment on the resentencing claim, the postconviction court soundly found that new-factor sentence modification was not warranted. This Court may affirm on that ground.

Moreover, McNeil cannot establish that the fentanyl information was a "new" factor. At trial, as noted, Eberhardy testified that the cocaine sample "indicated" the presence of fentanyl but clarified that that did not meet the level required for identification. (R. 95:64). Accordingly, the accurate information was available to McNeil and his counsel at the sentencing hearing; counsel should have recognized the error

at sentencing and corrected it then. Further, the court's discussion of fentanyl was not "highly relevant" to the sentence, for the same reasons the court's reliance on it was harmless error under the circumstances. *See Harbor*, 333 Wis. 2d 53, ¶ 40.

McNeil suggests that the postconviction court could not adequately exercise its discretion in declining his request for sentence modification based on its harmlessness assessment. (McNeil's Br. 30–31.) He doesn't explain why that is so, or why the court's express finding "that sentence modification is not warranted even assuming the inaccurate information regarding the presence of fentanyl qualifies as a new factor" (R. 78:4) is "incomplete" reasoning. (McNeil's Br. 30.) Nor can he persuasively so argue. The State is not aware of any circumstances where inaccurate information constituted harmless error, but was not harmless when framed as a new factor. Even if that outcome is possible, the record in this case does not support it.

Accordingly, this Court should affirm.

III. The circuit court soundly exercised its discretion in finding that joinder did not substantially prejudice McNeil.

McNeil next challenges the circuit court's findings that joining the two cases for trial did not substantially prejudice him. As discussed below, McNeil cannot prevail.

A. Courts construe the joinder statute broadly in favor of joinder and review decisions on severance requests for an erroneous exercise of discretion.

Questions of joinder on appeal involve two distinct inquiries: first, whether the initial joinder was appropriate, and second, whether severance of the initial joinder is warranted based on prejudice to the defendant. *State v.*

Hoffman, 106 Wis. 2d 185, 208, 316 N.W.2d 143 (Ct. App. 1982). Though McNeil does not challenge the initial joinder decision, a summary of the controlling legal standard is helpful.

Wisconsin Stat. § 971.12(4) governs a court's initial joinder of cases: "The court may order 2 or more complaints, informations or indictments to be tried together if the crimes . . . could have been joined in a single complaint, information or indictment. The procedure shall be the same as if the prosecution were under such single complaint, information or indictment."

In turn, Wis. Stat. § 971.12(1) allows the State to charge multiple crimes together "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."

"The joinder statute is to be construed broadly in favor of initial joinder." *Hoffman*, 106 Wis. 2d at 208. Courts particularly favor joinder when the charged offenses involve the same defendant. *State v. Salinas*, 2016 WI 44, ¶ 36, 369 Wis. 2d 9, 879 N.W.2d 609. Reviewing courts interpret initial joinder decisions broadly to foster "the goals and purposes of the joinder statute," including economy, efficiency, convenience, and fiscal responsibility. *Id.*

The second inquiry, which forms the basis of McNeil's appeal, looks at prejudice. A defendant may seek relief from prejudicial joinder by seeking a severance of joined claims. *See* Wis. Stat. § 971.12(3).

To succeed on a severance request, a defendant must show substantial prejudice resulting from the joinder. *State v. Linton*, 2010 WI App 129, ¶ 21, 329 Wis. 2d 687, 791 N.W.2d 222 (citing *Hoffman*, 106 Wis. 2d at 209). A defendant must show more than some prejudice because "[a]ny joinder of

offenses is apt to involve some element of prejudice to the defendant, since a jury is likely to feel that a (defendant) charged with several crimes to be a bad individual who has done something wrong." *Id.* (quoting *Hoffman*, 106 Wis. 2d at 209). Accordingly, a defendant must show "a higher degree of prejudice, or certainty of prejudice" to warrant severance of charges or other relief. *Id.* (quoting *Hoffman*, 106 Wis. 2d at 210).

To that end, "when evidence of the counts sought to be severed is admissible in separate trials, 'the risk of prejudice arising due to a joinder of offenses is generally not significant.'" *State v. Hall*, 103 Wis. 2d 125, 141, 307 N.W.2d 289 (1981). Other-acts evidence is admissible if it is offered for a permissible purpose under Wis. Stat. § 904.04(2), if it is relevant, and if its probative value is not substantially outweighed "by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." *State v. Sullivan*, 216 Wis. 2d 768, 772–73, 576 N.W.2d 30 (1998).

A court's decision on the admissibility of other-acts evidence is discretionary and hence reviewed under the erroneous-exercise standard. *Id.* at 771. Likewise, while the initial joinder decision is reviewed de novo, a court's denial of a defendant's severance request is subject to the erroneous-exercise standard of review. *Salinas*, 369 Wis. 2d 9, ¶ 30.

B. Because the evidence from the joined cases would have been admissible at separate trials, McNeil cannot demonstrate prejudice.

Here, the State moved the circuit court to join the two cases, arguing that the cases were similar in time and location and involved similar charges and conduct. (R. 19:9–11.) It further argued that McNeil could not demonstrate

substantial prejudice resulting from joinder. (R. 19:11.) McNeil filed an objection, arguing that joinder was inappropriate and that severance was necessary under Wis. Stat. § 971.12(3) to avoid "unfair prejudice." (R. 21:4.)

The circuit court soundly exercised its discretion denying McNeil's severance request for three reasons.

First, it explained, the evidence in the first case would be admissible in the second case because McNeil was charged with felony bail jumping based on his release from custody in the first case. (R. 90:8.) Accordingly, the court explained, the jury would likely hear "that [McNeil] had been charged [in the first case] of a felony level offense, released under Chapter 969, and then allegedly violated the terms or conditions of that release." (R. 90:8.) Hence, the court found "that there is not substantially unfair prejudice to [McNeil] on that point because the jury is likely to hear that information, it is admissible." (R. 90:8.)

Second, the court explained, in both cases McNeil was charged with counts of possession of heroin and possession of cocaine; evidence from those corresponding counts could be admitted in both cases "for the admissible purpose of showing knowledge that the substances were controlled substances, not a mistake or lack of knowledge." (R. 90:8.) The court also noted that evidence that McNeil possessed drugs in one case would have been admissible to prove that he knowingly possessing drugs in the other case. (R. 90:8–9.)

Third, the court found that it could minimize prejudice to McNeil by instructing the jury "that each crime alleged is a separate charge, that they have to consider the elements for each of the offenses separately in reaching their verdicts of guilty or not guilty, and that their verdict as to one count should not affect their verdict as to another count." (R. 90:9.) It also proposed instructing the jury that it could not "consider any of the evidence as propensity evidence." (R. 90:9.)

That decision was sound, and McNeil's arguments to the contrary are not persuasive. As for the felony bail jumping claim, McNeil argues that the jury would not have learned of the specifics of the first case's crimes and that the parties might have entered a stipulation as to the charges underlying the bail jumping charge. (McNeil's Br. 38–39.) As for the drug counts, McNeil insists that the court "tried to identify a permissible purpose—relating to the knowledge element—[but] failed to identify a truly propensity-free chain of reasoning that would support the admissibility of this evidence." (McNeil's Br. 36.) He further faults the circuit court for not addressing the obstruction charges or engaging in a full other-acts analysis. (McNeil's Br. 34–37.)

As for the last point, McNeil is in no position to fault the circuit court's lack of analysis, given that he did not request a full other-acts assessment from the court. Indeed, his argument in support of his request for severance amounted to two paragraphs with no citations or analysis of other-acts law. (R. 21:3–4.) Moreover, "a truly propensity-free chain of reasoning" is not the standard for admission of other-acts evidence. Rather, the risk of unfair prejudice based on the propensity cannot substantially outweigh the evidence's probative value. *See Sullivan*, 216 Wis. 2d at 772.

As for McNeil's other arguments, he disregards that the circuit court held that the evidence from the first case was admissible to prove elements of the counts in the second case. To that end, if the State "must prove an element of a crime, then evidence relevant to that element is admissible, even if a defendant does not dispute that element." *State v. Hammer*, 2000 WI 92, ¶ 25, 236 Wis. 2d 686, 613 N.W.2d 686. To prove felony bail jumping, the State had to establish that McNeil was on bail for prior felony counts. Thus, the facts of the counts from the first case were admissible in the second case. Likewise, for the drug possession counts, the State had to prove knowledge. Evidence that McNeil possessed the same

drugs eight months earlier was relevant to proving he knowingly possessed controlled substances in the second case.

Moreover, as for the obstruction charges, McNeil's reaction to police in the first case—running away and failing to respond to commands—would have been admissible and relevant to the obstruction charges in the second case, because his conduct demonstrated absence of mistake or accident with regard to his reaction to law enforcement's lawful commands eight months later.

Finally, McNeil offers no explanation why the evidence would fail *Sullivan*'s unfair-prejudice prong and fails to challenge the court's finding and recognition that jury instructions would minimize any prejudice to him. *See Hammer*, 236 Wis. 2d 686, ¶ 36 ("Cautionary instructions eliminate or minimize the potential for unfair prejudice.").

In all, McNeil does not persuade that the circuit court erroneously exercised its discretion in finding that McNeil failed to demonstrate substantial prejudice from the joinder of the two cases. This Court should affirm.

C. Any error by the court in denying McNeil's severance request was harmless.

Harmless error analysis applies to improper initial joinder. *State v. Leach*, 124 Wis. 2d 648, 671, 370 N.W.2d 240 (1985). Because the initial joinder in this case was appropriate and McNeil does not challenge it, this court need not reach harmless error. In all events, McNeil is not entitled to relief because any error was harmless.

An error is harmless when the State demonstrates that there is no reasonable probability that the error contributed to the conviction. *Id.* at 674 (citing *Strickland v. Washington*, 466 U.S. 668 (1974), and *State v. Dyess*, 124 Wis. 2d 525, 370 N.W.2d 222 (1985)).

"The potential problem as a result of a trial on joint charges is that a defendant may suffer prejudice since a jury may be incapable of separating the evidence relevant to each offense or because the jury may perceive a defendant accused of several crimes is predisposed to committing criminal acts." *Id.* at 672. But the risk of prejudice is low "when the several counts are logically, factually and legally distinct, so that the jury does not become confused about which evidence relates to which crime and considers each of them separately." *Id.* (citations omitted).

In *Leach*, there was no harmless error based on misjoinder of charges because "each criminally charged episode was factually distinct from all the others. Each occurred on a different date, in a different locality, in a different manner and involved different victims. There was no possibility the jurors could confuse the proof received on each separate and distinct criminal occurrence." *Id.* at 673.

Likewise, McNeil's trial involved two similar, but factually distinct, criminal episodes. The April 2016 episode involved police responding to a reportedly stolen van on West Meinecke Avenue. (R. 95:6–8.) When police saw McNeil access the van and asked him to stop, he ran into a residence, hid in various rooms, and repeatedly refused to submit to their commands. (R. 95:10–17.) After McNeil was arrested, police found items in the bathroom and bedroom. (R. 95:20–21.) Later testing revealed those items to be heroin, cocaine, and THC. (R. 95:20–21; 96:20–26.)

The December 2016 episode involved police responding to a report that McNeil had entered a vacant house on West Greenfield Avenue. (R. 94:52, 58.) The responding officers saw McNeil and ordered him to stop; in response, McNeil led one officer on a foot chase until a bystander intervened and pushed McNeil to the ground. (R. 94:59–61.) After the officer secured his hands behind his back, she saw a baggie of suspected drugs next to him. (R. 94:61–62.) Though it was cold

outside, the bag felt like "normal room temperature . . . , like it hadn't been sitting out in the cold." (R. 94:62.) A crime lab analyst tested items in the seized baggie; his testing revealed that those items contained 0.028 grams of cocaine, 1.3964 grams of THC, and 0.92 grams of heroin. (R. 95:61–66.)

While the April and December incidents were similar in how McNeil reacted to police and the officers' recovery of heroin, cocaine, and THC, there was a low risk that the jury would confuse the facts from one incident with those from the other. The incidents occurred eight months apart, at different addresses, with different police officers, with different initial circumstances (McNeil's presence near a stolen vehicle compared to his presence in a vacant building), and different later circumstances (his running from police into a residence compared to his running from police in city streets).

And each case had its own set of evidence and witnesses that did not cross over to the companion case. To prove the April incident, the State presented testimony from Marifke, who owned the reportedly stolen van (*see* R. 95:69), the officers involved (Officers Joshua Albert and Robert Toeller, *see* R. 95:4, 47) and a crime lab analyst (Birjees Kauser, *see* R. 96:16). To prove the December incident, the State presented testimony from the different officers involved (Officers Ruegg and Melissa Krug, *see* R. 94:57, 72) and a different crime lab analyst (Eberhardy, *see* R. 95:59). Given that each incident had its own witnesses, there was little risk that the jury confused the evidence supporting the April counts with the evidence supporting the December counts.

Finally, the jury acquitted McNeil of the drug charges in the first case. Those acquittals indicate that it considered the counts separately and by weighing the evidence offered in support of each count, and that it was not prejudiced into believing that McNeil was predisposed to committing criminal acts. *Accord Leach*, 124 Wis. 2d at 672 (recognizing that misjoinder is not harmless when the jury cannot separate

"the evidence relevant to each offense" or perceives that the defendant is predisposed to committing criminal acts).

In sum, there was no misjoinder. The circuit court soundly exercised its discretion in denying McNeil's request for severance. And any error was harmless.

IV. The circuit court soundly exercised its discretion in admitting other-acts evidence regarding Marifke's testimony.

McNeil next focuses on testimony from Marifke, who owned the van that was reported stolen in April 2016 and to whom McNeil dealt heroin at the time. McNeil contends that the court erroneously exercised its discretion in admitting that testimony. McNeil is not entitled to relief on this claim.

As discussed above, other-acts evidence is admissible if it is offered for a permissible purpose, it is relevant, and if its probative value is not substantially outweighed by the risk of unfair prejudice or confusing the jury. *Sullivan*, 216 Wis. 2d at 772–73. The proponent bears the burden on the permissible-purpose and relevance prongs; the opponent bears the burden to establish unfair prejudice. *State v. Marinez,* 2011 WI 12, ¶ 19, 331 Wis. 2d 568, 797 N.W.2d 399.

This Court reviews a circuit court's admission of other-acts evidence for an erroneous exercise of discretion. *Sullivan,* 216 Wis. 2d at 780–81.

A. The court found that Marifke's testimony as relevant to knowledge, opportunity, and context, and was not unfairly prejudicial.

The admissibility of Marifke's testimony was the subject of a pretrial motion in limine and hearing. There, the State explained, Marifke was going to testify that in April 2016, McNeil was her drug dealer and that she loaned him the van in exchange for heroin. (R. 92:58.) Marifke would testify that after McNeil did not return the van at the agreed-

upon time, her father reported it stolen. (R. 92:58.) The State also offered a series of text messages between McNeil and Marifke that supported their dealer-buyer relationship. (R. 92:58.) The State explained that the evidence was relevant to the obstruction charge in the first case, to the extent that officers were acting in their lawful authority and McNeil fled. (R. 92:58–59.) The State also argued that the testimony was relevant to the drug charges in the first case to establish McNeil's knowing possession. (R. 92:59.)

The circuit court denied McNeil's motion in limine as to Marifke's testimony. (R. 92:64.) It found that Marifke's testimony was relevant to the April obstruction count to prove that the officer was acting with lawful authority when he asked McNeil to stop. (R. 92:60.) It also held that her testimony was relevant "on the drug charges," specifically that McNeil knew that he possessed controlled substances. (R. 92:62.)

To that end, it explained that Marifke's testimony was being offered for a permissible purpose, i.e., McNeil's "knowledge about whether or not a particular substance was a controlled substance" with regard to the drug counts. (R. 92:63.) It further found that Marifke's testimony was not unduly prejudicial, particularly given that the State sought to introduce it to support the knowledge element of the crimes. (R. 92:63–64.)

At trial, Marifke testified near the end of the State's case-in-chief. (R. 95:69.) Marifke explained that in April 2016, she allowed McNeil to use her van in exchange for crack and heroin. (R. 95:71.) The State also elicited her testimony that text messages between her and McNeil on April 9, 2016, showed that McNeil possessed the van on that date and that she was trying to get it back, and that she was trying to get heroin from him. (R. 95:73–74.)

After all the testimony, the court and parties discussed the jury instructions with regard to Marifke's testimony. (R. 96:45.) The State requested that the jury instruction as to Marifke's testimony reference both knowledge and opportunity as permissible purposes, arguing that evidence that Marifke and McNeil had texted about heroin a week before his arrest showed that McNeil had "an opportunity to still be in possession of drugs such as that one week later." (R. 96:47.) McNeil's counsel opposed the addition, stating that the court's ruling that the testimony was offered for knowledge. (R. 96:48.) The court granted the State's motion, but said that it would offer revised instructions to address McNeil's concerns. (R. 96:48.)

The court and parties later met off the record and agreed to instruct the jury regarding Marifke's testimony in two steps. The court first instructed the jury that it was to consider Marifke's testimony regarding the van as context to the obstruction count in the first case:

> Now during the trial, evidence has been presented regarding other conduct of the defendant for which the defendant is not on trial. Specifically, evidence has been presented regarding allegations that the defendant took Dana Marifke's automobile. If you find that this occurred, you should consider it only in regards to the charge of obstructing an officer in Count 2 in Case 16-CF-1685. You should consider it only on the issue of context or background; that is, to provide a more complete presentation of the evidence relating to the alleged events of April 14th, 2016, and on the issue of whether an officer was acting in an official capacity and with lawful authority on April 14th of 2016.

(R. 97:21.)

It also instructed the jury that it was only to consider the evidence for that purpose, not to ascribe any character traits to McNeil: "You may consider this evidence only for the purpose I have described giving it the weight you determine

it deserves." (R 97:21.) The court continued: "You may not consider this evidence to conclude that the defendant has a certain character or a certain character trait, and that the defendant acted in conformity with that trait or character with respect to the offense charged in this case." (R. 97:21–22.) The court concluded: "This evidence is not to be used to conclude that the defendant is a bad person and for that reason, guilty of the offenses charged." (R. 97:22.)

The court next instructed the jury that it could consider Marifke's testimony that McNeil either delivered or intended to deliver heroin to her with regard to the drug possession counts in both cases. (R. 97:22.) Specifically, the court told the jury that it could consider that testimony with regard to knowledge and opportunity as to the counts in the first case, and knowledge as to the counts in the second case:

> Additionally, evidence has been presented that the defendant delivered and/or intended to deliver a controlled substance to Dana Marifke. If you find that this occurred, you should consider it only in regards to the charges of possessing cocaine and possessing heroin in Counts 1 and 2 in Case 16-CF-1685, and Counts 1 and 4 in Case 16-CF-5467.
>
> In regards to Counts 1 and 2 in Case 16-CF-1685, you should consider it only on the issue of knowledge; that is, whether the defendant was aware of facts that are required to satisfy an element of either of the charged offenses and the issue of opportunity. That is, whether the defendant had the opportunity to commit either of the charged offenses.
>
> In regards to Counts 1 and 4 in Case 16-CF-5467, you should consider it only on the issue of knowledge.

(R. 97:22.) The court again reminded the jury that it was to weigh and consider Marifke's evidence only to the specified purposes, and it was not to consider it to conclude that McNeil had certain character traits that he acted in conformity with or that he was a bad person. (R. 97:22–23.)

B. The circuit court soundly exercised its discretion in admitting Marifke's testimony.

To start, the court soundly found that the State was offering Marifke's testimony for permissible purposes. As for knowledge, to prove the obstruction count in the first case, the State needed to prove that McNeil knew that police were acting with legal authority. *See* Wis. JI-Criminal 1766 (2010). Further, as for the drug counts in both cases, the State needed to prove that McNeil knew that he possessed illegal narcotics. *See* Wis. JI-Criminal 6030 (2016). Marifke's April 2016 arrangement with McNeil to loan her van in exchange for heroin, and their buyer-dealer relationship, supported the inference that McNeil knew the substances he was charged with possessing in April and December were controlled substances.

In addition, the court ably found that Marifke's testimony regarding her van was permissible context and background evidence to the events in April 2016. *See, e.g.*, *State v. Hunt*, 2003 WI 81, ¶ 58, 263 Wis. 2d 1, 666 N.W.2d 771 ("Other-acts evidence is permissible to show the context of the crime and to provide a complete explanation of the case.") It also ably found that Marifke's testimony regarding her dealer-buyer relationship with McNeil was offered for opportunity with regard to the drug charges in the first case, i.e., McNeil, based on his role as Marifke's dealer, had opportunity to possess the cocaine and heroin.

As for the second *Sullivan* step, Marifke's testimony was relevant and probative to whether McNeil knew that he was disobeying lawful orders when he ran from police and disregarded their commands in April 2016, whether he possessed drugs then, and whether he possessed drugs again during the December 2016 encounter. In other words, if the jury believed Marifke, her testimony supported reasonable inferences that McNeil committed obstruction in April 2016 and knowingly possessed drugs then and in December 2016.

And McNeil failed to demonstrate that the risk of unfair prejudice from Marifke's testimony substantially outweighed its probative value. "Prejudice is not based on simple harm to the opposing party's case, but rather 'whether the evidence tends to influence the outcome of the case by improper means.'" *State v. Hurley*, 2015 WI 35, ¶ 87, 361 Wis. 2d 529, 861 N.W.2d 174 (quoted source omitted). To avoid the risk of the jury convicting based on "improper means," circuit courts may provide limiting or cautioning instructions. *Id.* ¶ 89. This Court "presume[s] that juries comply with properly given limiting and cautionary instructions, and thus consider this an effective means to reduce the risk of unfair prejudice to the party opposing admission of other acts evidence." *Id.* ¶ 90 (citations omitted).

Here, there was little risk of unfair prejudice based on Marifke's testimony. As discussed, it had solid probative value, at least as to the April counts. While it was prejudicial to McNeil, as all other-acts evidence would be, it is not *unfairly* prejudicial such that the risk of prejudice substantially outweighs its probative value. And here, the court diminished that risk with detailed limiting instructions informing the jury on the purposes for which it was to consider Marifke's testimony and cautionary instructions that it was not to use it as propensity evidence.

McNeil asserts, without analysis, that testimony from Marifke that McNeil supplied her drugs was not relevant to drug possession charges. (McNeil's Br. 41.) He claims that "the real reason this evidence was being presented was to paint Mr. McNeil as a drug dealer." (McNeil's Br. 42.) He further complains that the circuit court failed to "diligently" assess the *Sullivan* relevance and prejudice prongs. (McNeil's Br. 42.)

But McNeil fails to explain how the evidence fails the permissible purposes prong or to offer a meaningful criticism as to relevance. And, in advancing his argument that the

evidence resulted in unfair prejudice, he fails to acknowledge the court's limiting and cautionary instructions with regard to Marifke's testimony.

The Court soundly admitted Marifke's testimony. McNeil is not entitled to relief.

C. Any error in admitting the testimony was harmless.

An erroneous decision admitting other-acts evidence is also subject to the harmless error analysis. *See Sullivan*, 216 Wis. 2d at 792. "The test for harmless error is whether there is a reasonable probability that the error contributed to the conviction." *Id.* (citation omitted). The State bears the burden of proving harmlessness. *Id.*

Here, even if the court erroneously exercised its discretion in admitting the evidence, Marifke's testimony was harmless as to the drug possession charges in the first case, given that the jury acquitted McNeil of those charges. Moreover, as to the obstruction count in the first case, McNeil acknowledges that it would have been appropriate for the jury to hear background evidence regarding the van and does not assign error to that part of Marifke's testimony.

As for the effect of Marifke's testimony on the drug possession charges based on the December 2016 encounter, it likely was minimal given the strong evidence the State presented that McNeil possessed the drugs seized. That evidence included where the drugs were found (next to him), how they were found (after he led an officer on a chase), their appearance and feel (bagged substances at room temperature despite the cold outside). It is improbable that the jury had doubts that McNeil possessed those drugs in December, but overcame those doubts only after learning from Marifke (who had no involvement in the December incident) that McNeil was her dealer in April.

In sum, the circuit court soundly found that Marifke's testimony was admissible and minimized its prejudicial effect. Even so, any error was harmless. McNeil is not entitled to a new trial.

V. The postconviction court soundly exercised its discretion in denying McNeil's ineffective assistance of counsel claim without a hearing.

In a postconviction motion, McNeil alleged that his trial counsel was ineffective for failing to object to (or seek exclusion of) testimony that McNeil, after his December 2016 arrest, made statements to police threatening to kill the bystander who knocked him down and the bystander's children. (R. 71:14–17; 76.) The postconviction court denied the motion without a hearing, holding that McNeil failed to prove prejudice, i.e., he "failed to demonstrate that there was a reasonable probability of a different result even if his threatening remarks had been excluded." (R. 78:6.)

A. A defendant is not entitled to a hearing on an ineffective assistance claim when the record conclusively demonstrates that he is not entitled to relief.

A defendant claiming ineffective assistance of counsel must prove both that his lawyer's representation was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland*, 466 U.S. at 687. If the Court concludes that the defendant has not proven one prong of this test, it need not address the other. *Id.* at 697.

To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." *Id.* at 690. The court "strongly presume[s]" that counsel has rendered adequate assistance. *Id.*

To show prejudice, the defendant must prove that the alleged defect in counsel's performance actually had an adverse effect on the defense. *Id.* at 693. More than merely showing that the error had some conceivable effect on the outcome, "the defendant must show that there is 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *State v. Pitsch*, 124 Wis. 2d 628, 642, 369 N.W.2d 711 (1985) (quoting *Strickland*, 466 U.S. at 694); *see also Harrington v. Richter*, 562 U.S. 86, 112 (2011) ("The likelihood of a different result must be substantial, not just conceivable.").

McNeil asks this Court to grant him a new trial based on his ineffective assistance claim. (McNeil's Br. 46.) But a *Machner*[4] hearing is a prerequisite to that relief. *State v. Curtis*, 218 Wis. 2d 550, 554, 582 N.W.2d 409 (Ct. App. 1998). And here, McNeil is not entitled to a *Machner* hearing.

A circuit court must conduct a *Machner* hearing on a claim of ineffective assistance only when the defendant alleges sufficient material facts that, if true, entitle him or her to relief. *State v. Bentley*, 201 Wis. 2d 303, 309–10, 548 N.W. 50 (1996); *Nelson v. State*, 54 Wis. 2d 489, 497–98, 195 N.W.2d 629 (1972). Thus, "the motion must include facts that 'allow the reviewing court to meaningfully assess [the defendant's] claim.'" *State v. Allen*, 2004 WI 106, ¶ 21, 274 Wis. 2d 568, 682 N.W.2d 433 (quoting *Bentley*, 201 Wis. 2d at 314) (brackets in *Allen*).

If the defendant fails to raise facts in the motion sufficient to entitle him 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

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[4] *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

discretion to grant or deny a hearing. *Bentley*, 201 Wis. 2d at 310–11; *Nelson*, 54 Wis. 2d at 497–98. The defendant cannot rely on conclusory allegations, hoping to supplement them at a hearing. *Bentley*, 201 Wis. 2d at 313; *see State v. Balliette*, 2011 WI 79, ¶ 68, 336 Wis. 2d 358, 805 N.W.2d 334 ("The evidentiary hearing is not a fishing expedition to discover ineffective assistance; it is a forum to prove ineffective assistance.").

Accordingly, this Court reviews whether the motion alleged sufficient facts de novo and whether the court soundly denied the motion without a hearing under the erroneous-exercise standard. *See Allen*, 274 Wis. 2d 568, ¶ 9.

B. The circuit court correctly determined that McNeil was not entitled to a *Machner* hearing.

The postconviction court denied McNeil's ineffective assistance claim without a hearing because, even assuming deficient performance, McNeil failed to meet his burden of pleading prejudice, i.e., by demonstrating "that there was a reasonable probability of a different result" had the officer's testimony been excluded. (R. 78:4–6.) That decision was both correct and a sound exercise of the court's discretion. *See Bentley*, 201 Wis. 2d at 310–11; *Nelson*, 54 Wis. 2d at 497–98 (stating that circuit court has discretion to deny a motion without a hearing if the record conclusively demonstrates he is not entitled to relief).

Here, McNeil has failed to demonstrate prejudice based on the complained-of testimony (and, to that end, the record conclusively demonstrates that McNeil could not satisfy his burden).

The complained-of statement occurred when Officer Ruegg testified to facts underlying the December 2016 encounter. (R. 94:58.) Ruegg testified that she responded to reports of a person accessing a vacant property and, when she

arrived, she saw McNeil on the property. (R. 94:58–59.) Ruegg described her commanding McNeil to stop, McNeil's leading her on a foot chase through the streets, the intervention of a bystander who knocked McNeil to the ground, and her arrest of McNeil and discovery of the baggie with apparent drugs next to McNeil. (R. 94:59–61.) After eliciting other testimony regarding the circumstances of Ruegg's encounter with McNeil, the prosecutor elicited that McNeil had later threatened the bystander and his family:

> Q. Did you—are you aware if he made any threats to anyone?
>
> A. He made threats to the man that helped me and his family.
>
> Q. You recall what he said?
>
> A. That he would kill him and his kids if his kids could talk.

(R. 94:64.)

McNeil calls that testimony improper character evidence that was "egregiously prejudicial" and suggested that McNeil "is a violent, evil person" and "is nothing more than a ploy to elicit fear and moral condemnation from the jury panel." (McNeil's Br. 45–46.)

The record belies McNeil's claim. The prosecutor, in his closing statements, made clear that he elicited McNeil's threat to show that the drugs found near McNeil were his and that he was angry at the bystander for intervening:

> Now if [McNeil] wasn't worried about the drugs that were recovered there, he wouldn't have any reason to be angry with this guy. He had taken off and run because he knew he had those drugs. Now he knew the police had recovered those drugs. That's why in that moment he's so mad. Because [the

> bystander] is the guy who really sunk him in this case.

(R. 97:36.) The State did not, as McNeil suggests, elicit the statement to suggest that McNeil was generally evil or violent or willing to kill children.

And McNeil cannot show a reasonable probability of a different outcome had the testimony been excluded. McNeil's threat was a minor part of the State's case. It appeared in two lines of testimony from a multi-day trial and a brief mention in closing argument. To that end, the threat did not impact McNeil's defense. McNeil advanced a theory that the bystander dropped the drugs, but that theory, as the sentencing court observed, was not plausible. (R. 99:50.) Regardless whether the jury heard about McNeil's threat, it was not reasonably likely to believe that the bystander was carrying a supply of drugs, decided to attract law enforcement's attention by inserting himself into a police chase, and risked getting caught planting his drugs near McNeil.

The postconviction court's denial of McNeil's motion without a hearing was sound for another reason: the record conclusively demonstrates that McNeil could not prove deficient performance. *See Vanstone v. Town of Delafield*, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995) (this Court may affirm on grounds different than those relied on by the circuit court).

Failure to raise a meritless issue is not deficient performance. *See State v. Wheat*, 2002 WI App 153, ¶ 14, 256 Wis. 2d 270, 647 N.W.2d 441. Despite McNeil's insistence that an objection to or request for exclusion of the testimony would have been successful (McNeil's Br. 45), it was admissible for the permissible purpose of showing McNeil's consciousness of guilt, it was highly probative to the issue whether he possessed the drugs found in December 2016, and it was not unfairly prejudicial, especially given the State's closing

argument that McNeil was simply angry at the bystander. *See, e.g., State v. Neuser*, 191 Wis. 2d 131, 144, 528 N.W.2d 49 (Ct. App. 1995) (holding that defendant's threat to victim was admissible because it was highly probative of the defendant's consciousness of guilt). The State did not use the testimony to suggest that McNeil was making a legitimate threat. Any efforts by counsel to exclude the evidence were unlikely to succeed.

On this record, the jury's hearing McNeil's statement to police regarding the bystander did not "undermine confidence in the outcome" or compromise the reliability of the proceedings. *See State v. Roberson*, 2006 WI 80, ¶ 29, 292 Wis. 2d 280, 717 N.W.2d 111. The postconviction court soundly exercised its discretion in denying McNeil's motion without a hearing.

VI. The evidence was sufficient to convict McNeil of drug possession in the second case.

McNeil finally argues that the evidence was insufficient to establish that he possessed the drugs found next to him in December 2016 or to establish that the drugs that the crime lab determined to be THC, heroin, and cocaine were the same drugs found next to McNeil. (McNeil's Br. 48–50.) McNeil is not entitled to relief.

A. Legal standards and standard of review.

This Court grants high deference to the factfinder when reviewing a challenge to the sufficiency of the evidence. *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). This Court "may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *Id.* "If any possibility exists that the trier of fact could have drawn the appropriate

inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it." *Id.*

Thus, this Court "will only substitute its judgment for that of the trier of fact when the fact finder relied upon evidence that was inherently or patently incredible—that kind of evidence [that] conflicts with the laws of nature or with fully-established or conceded facts." *State v. Tarantino*, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990). "It is vitally important to maintain this standard of review. An appellate court should not sit as a jury making findings of fact and applying the hypothesis of innocence rule de novo to the evidence presented at trial." *State v. Watkins*, 2002 WI 101, ¶ 77, 255 Wis. 2d 265, 647 N.W.2d 244 (citing *Poellinger*, 153 Wis. 2d at 505–06).

To prove possession of each of the drugs (THC, heroin, and cocaine), the State had to prove (1) that McNeil "had actual physical control" or otherwise "exercise[d] control over the substance, (2) that the substance in McNeil's possession was a controlled substance, and (3) that McNeil knew or believed the substance to be a controlled substance. Wis. JI-Criminal 6030.

McNeil incorrectly claims that the evidence was insufficient to support either the first or the second prongs.

B. The evidence was sufficient for the jury to find that McNeil possessed the drugs found next to him.

Here, the jury heard evidence that after seeing Officer Ruegg, McNeil ran. (R. 94:60–61.) A bystander, seeing the resulting chase, ran after McNeil and pushed him, causing McNeil to fall to the ground in a vacant lot. (R. 94:61–62.)

When Ruegg caught up, McNeil had his hands under his body, which took her a few seconds to pull out and handcuff behind his back. (R. 94:61.) According to Ruegg, "[r]ight next to where [McNeil's] right hand was," she saw "a small Baggie on the ground right next to him." (R. 94:62.) The temperature of the bag was "normal room temperature" even though the outside temperature was around 30 degrees. (R. 94:62.) To Ruegg, the bag appeared to contain marijuana; the officer took the bag and secured it into inventory under incident number 163410068. (R. 94:62–63.)

That evidence, taken in the light most favorable to the State, was sufficient to allow the jury to find that McNeil possessed the drugs found next to him. McNeil argues that those facts could not establish either actual or constructive possession because the officer did not describe the bag in detail, the officer did not testify to multiple baggies, the officer never saw McNeil actually touching the drugs, the bystander could have dropped the drugs, and the State never tested the bag for DNA or fingerprints. (McNeil's Br. 48.) But he disregards that the jury was aware of all of those gaps and still found that McNeil possessed the drugs. Based on the testimony and evidence presented, the jury was entitled to infer that McNeil possessed the baggie that the officer inventoried.

C. The evidence was sufficient for the jury to find that the substances that McNeil possessed were cocaine, heroin, and THC.

As noted, Office Ruegg testified that she seized the baggie next to McNeil and inventoried it under incident number 163410068. (R. 94:62.) The bag was sent to the crime lab for testing. (R. 94:62.) Eberhardy, a crime lab analyst, testified that he received items for testing attached to the agency case number 163410068 and "Bobby McNeil" listed as the defendant. (R. 95:61.) Eberhardy stated that the items

included Item A, a sealed envelope that contained plastic packaging designated as items A1 (a ziplock plastic bag containing aluminum foil pieces and a paper fold containing a powdery substance), A2 (one paper fold containing plant material), and A3 (a paper fold containing a powdery substance). (R. 95:62.) Testing revealed that item A1 contained 0.0280 grams of cocaine, item A2 contained 1.3964 grams of THC, and item A3 contained 0.9200 grams of heroin. (R. 95:65–67.)

The State also admitted a copy of the original request for testing from the State and Eberhardy's report. (R. 43.) The request was dated February 2, 2017, and listed Bobby McNeil as the defendant, his date of arrest as December 6, 2016, the case number, trial date, agency number (which included the incident number 163410068), along with the test results. (R. 43:1–3.) The State also admitted the drugs as evidence. (R. 38:2, 95:88–89.)

Again, taking that evidence in the light most favorable to the verdict, it was sufficient to allow the jury to find that the items in the baggie that Officer Ruegg found next to McNeil contained the THC, heroin, and cocaine that Eberhardy later tested.

McNeil complains on several grounds. First, he asserts that Officer Ruegg violated department protocols for following up with witnesses when she failed to get the identification of the bystander who knocked McNeil down. (McNeil's Br. 48–49.) To the extent that that is relevant to the testing of the drugs, Ruegg acknowledged that she could not obtain the bystander's information because she was the only officer initially arresting McNeil and, by the time she secured him, the bystander had left. (R. 94:69.) As for McNeil's suggestion that Ruegg did not have a "stellar" recollection of inventorying the THC baggie, it is not clear what he means. Ruegg testified that she inventoried the baggie, she confirmed the inventory number that she assigned, and she was aware that it was sent

to the crime lab but testified that she was not involved with that step. (R. 94:69.)

Second, McNeil complains that there was no evidence presented establishing the chain of custody between Ruegg's seizure of the baggie and Eberhardy at the lab. (McNeil's Br. 49–50.) As an initial matter, if McNeil believed at trial that the chain of custody was insufficient to support admission of the drugs and Eberhardy's test results, he needed to timely object at trial. *See State v. Buck*, 210 Wis. 2d 115, 127, 565 N.W.2d 168 (Ct. App. 1997). Moreover, if McNeil is asserting that the evidence of the chain of custody was insufficient to support the jury findings based on the gaps in the State's evidence, "gaps in the chain of evidence 'go to the weight of the evidence rather than its admissibility.' *State v. McCoy*, 2007 WI App 15, ¶ 19, 298 Wis. 2d 523, 728 N.W.2d 54. (citation omitted).

In presenting this type of evidence, "the government need only show that it took reasonable precautions to preserve the original condition of the evidence, it does not have to exclude all possibilities of tampering with the evidence." *Id*. "A presumption of regularity exists with respect to official acts of public officers and, absent any evidence to the contrary, the court presumes that their official duties have been discharged properly." *Id.* (quoted source omitted).

Here, the State satisfied this standard. The State's witnesses explained that they inventoried the evidence and that it was sent to the crime lab for testing. This Court presumes that the police and district attorney properly discharged their duty with this process. McNeil offers nothing to overcome the presumption of regularity.

In any event, McNeil is raising a sufficiency challenge, not a preserved challenge to the chain of custody. As discussed, the jury was entitled on this record to find that the items Eberhardy confirmed to be cocaine, heroin, and THC,

were the same items Officer Ruegg seized when she found the baggie next to McNeil. McNeil is not entitled to relief.

CONCLUSION

This Court should affirm the judgment of conviction and the postconviction order denying relief.

Dated this 12th day of November 2019.

Respectfully submitted,

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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 10,949 words.

_____
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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 12th day of November 2019.

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