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STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT IV

Case No. 2019AP001996 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ALIJOUWON T. WATKINS,

Defendant-Appellant.

Appeal of a Judgment of Conviction
And An Order Denying Postconviction Relief
Entered in Dane County Circuit Court,
the Hon. Josann M. Reynolds, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

THOMAS B. AQUINO
Assistant State Public Defender
State Bar No. 1066516

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-1971
aquinot@opd.wi.gov

Attorney for Defendant-Appellant

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ISSUES PRESENTED

1. Whether the defendant was entitled to a new trial based on newly discovered evidence, when the jailhouse informant necessary to the prosecution's case was twice arrested and convicted for impersonating a police officer shortly after testifying against the defendant.

   The circuit court denied the defendant's motion for a new trial on the grounds that it was cumulative to other impeachment evidence introduced at trial.

2. Whether a criminal case against the defendant involving two altercations was properly joined for trial with a criminal case alleging conspiracy to commit first-degree homicide a year later; and if so, whether joinder was prejudicial and the defendant was entitled to severance of the charges.

   The circuit court granted the State's motion for joinder without specifically addressing the defendant's request for severance.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The defendant does not request oral argument, and does not believe that publication will be warranted.

STATEMENT OF THE CASE

I. Introduction

The trial in this case involved three separate incidents: (1) an alleged altercation between the defendant, Alijouwon T. Watkins, and his girlfriend; (2) an alleged altercation between Watkins and two police officers; and (3) an alleged conspiracy between Watkins and a jailmate, Damian James, to pay a sniper $30 to assassinate one of the arresting officers.

If the "conspiracy" seems too preposterous to be true, it was. The $30 figure came from a recorded jail phone call in which Watkins agreed to pay someone $30 to fix his car. According to James, and James alone, this was code for a "hit" on the arresting officer. James was an experienced jailhouse snitch, who knew that setting up Watkins for additional charges would get him out of jail early. In addition, James enjoyed telling tall tales about himself, lying to Watkins and others at the jail about being a member of the Italian Mafia, the Latin Kings street gang, and the United States Marine Corps. At trial James explained away these lies with the observation that "everyone in jail has a story."

James's fantastical bent took on a different character after he was released from jail for assisting in Watkins's prosecution. Twice after Watkins's trial, James was arrested and convicted for impersonating a police officer, replete with a fake badge and gun. In one episode, James's fake identity was part of a ploy to defraud a bank.

These post-trial incidents illustrate James's untrustworthy character in a manner and to a degree unlike any other evidence at Watkins's trial. They demonstrate a willingness to plan and execute sophisticated fraudulent schemes – such as falsely accusing a jailmate of soliciting an arresting officer's murder – much more so than examples of jailhouse bluster. They also illustrate for the first time a bizarre fixation on being perceived as a heroic member of law enforcement, suggesting a motive to falsely accuse Watkins of trying to solicit the officer's assassination: so that James could play the hero and turn him in. The trial court erroneously exercised its discretion when it denied Watkins's motion for a new trial on the grounds that the newly discovered impeachment evidence was cumulative to the impeachment evidence introduced at trial.

The assault and conspiracy-related allegations were charged in two separate criminal cases against Watkins. Two weeks before trial, the circuit court granted the State's motion to join the two cases, encompassing 11 separate charges, for trial. The court granted the motion. However, in doing so, the court erroneously combined the separate considerations for joinder under Wis. Stat. § 971.12(1) and severance under Wis. Stat. § 971.12(3). The improper joinder was highly prejudicial to Watkins, as the State's incredibly weak case for "conspiracy" was bolstered by its relatively strong case for the assaults. Watkins is thus entitled to a new trial.

II. Procedural History

The charges for the first two alleged incidents were first brought in an eight-count complaint filed in *State v. Watkins*, Dane County Case No. 2015-CF-1579.[1] The complaint was dismissed without prejudice on February 6, 2017, and the charges were re-filed the next day as Case No. 2017-CF-321. (R. 184). In the meantime, on June 13, 2016, the State filed the conspiracy-related charges in a three-count complaint against Watkins in Dane County Case No. 2016-CF-1270. (R. 1).

On April 19, 2017, the court ordered the two cases joined for trial over Watkins's objection. (R. 172, 183; App. 114-122). The State then filed in 2016-CF-1270 an 11-count amended information encompassing all of the charges in the both cases. (R. 31). The amended information charges Watkins as follows:

- Count 1: Misdemeanor battery, Wis. Stat. § 940.19(1);
- Count 2: Disorderly conduct, Wis. Stat. § 47.01;

[1] Watkins asks that this court take judicial notice of the Wisconsin Consolidated Court Automation Programs ("CCAP") records for the 2015 case against Watkins as well as the Dane County and Milwaukee County cases against James discussed below. Wis. Stat.§ 902.01; *Kirk v. Credit Acceptance Corp.*, 2013 WI App 32, ¶¶ 5, 19-20, n. 1, 346 Wis.2d 635, 829 N.W.2d 522 (taking judicial notice of CCAP records).

- Count 3: Criminal damage to property, Wis. Stat. § 943.01(1);
- Count 4: Felony intimidation of a victim, Wis. Stat. § 940.45(3);
- Count 5: Felony intimidation of a victim, Wis. Stat. § 940.45(3);
- Count 6: Attempted battery of a peace officer, Wis. Stat. § 940.20(2);
- Count 7: Resisting an officer causing substantial bodily harm to the officer; Wis. Stat. § 946.41(2r);
- Count 8: Escape, Wis. Stat. § 946.42(3)(a);
- Count 9: Conspiracy to commit first degree intentional homicide, Wis. Stat. §§ 939.31 & 940.01(1)(a);
- Count 10: Intimidation of a witness, Wis. Stat. § 940.43(7); and
- Count 11: Solicitation of Perjury, Wis. Stat. §§ 939.30 & 946.31(1)(a).

A four-day jury trial was held from May 2-5, 2017. The jury acquitted Watkins of one charge of intimidation of a victim and of attempted battery of a law enforcement officer, but found him guilty of the remaining nine charges. (R. 119). With concurrent and consecutive sentences factored in, Watkins was

sentenced to a total of six months in jail followed by nine years of initial confinement and ten years of extended supervision. R. 126, 132).

Watkins filed a motion for postconviction relief based on newly discovered evidence. (R. 135). The court denied the motion in a written order, and this appeal follows. (R. 145; App. 101-113).

III. Factual Background

A. *The McDonalds Incident*

On June 27, 2015, a McDonald's employee working the drive-thru saw a man and woman in a car "swinging back and forth at each other." (R.175:91-94). The employee could not recall if the man actually struck the woman. (*Id.*) However, the woman yelled to call the police, so the employee told her shift manager of the commotion, and he called the police. (R.175:78).

The woman, V.C.,[2] testified that she had an argument with Watkins about using her car that day. (R.175:130-131). She admitted having a hold of his hair, and testified that he "flailed his arms" and did not necessarily intend to hit her. (*Id.*) Further, they were both yelling to call the police. (R.175:135).

[2] In order to protect their privacy, the victims are referred to by their initials in this brief.

B. *Evading Arrest*

After speaking with V.C., police escorted V.C. to the home she shared with Watkins and his mother so she could retrieve her belongings. (R. 175:194-197). Police went first to the door, and spoke with Watkins's mother to ensure that Watkins would not be present when V.C. went inside to gather her personal items. (*Id.*) The police were told that Watkins was not present, and they were given permission to walk through the home to confirm this. (*Id.*)

While the officers were inside, they heard someone leave through the garage. (R. 175:197-198). The officers went out the garage, and confirmed with some neighbors that a man had just ran out of the garage. (*Id.*) They went the direction that the neighbors pointed, and saw a man fitting the description that V.C. gave them sitting on the front steps of a house.(R. 175:201-203).

One of the officers, E.M., approached Watkins and ordered him to stand up and put his hands behind his back. (R. 175:206). When Watkins asked why he needed to do that, E.M. refused to answer him. (R. 175:206-208). Watkins eventually stood up, and turned around with his hands behind his back. (R. 175:209). After one officer put Watkins's left hand in handcuffs, the second officer, E.M., saw Watkins move his right hand toward his waistband. (R. 175:209-210). E.M. thought that Watkins was

possibly reaching for a weapon, and so bear-hugged him. (R. 175:210).

According to E.M., the officers attempted to push Watkins to the ground, but he was able to stay on his feet. (R. 175:214-215). E.M. testified that she then decided to use her electronic control device (a/k/a a "Taser") on Watkins. (R. 175:217). However, one of the probes bounced off. (*Id.*) E.M. put Watkins in a bear hug again, although the officers then realized that they had called in the wrong address for backup. (R. 175:218). E.M. testified that during the struggle, she got knocked off of Watkins and landed spine first on a fire hydrant. (R. 175:221). When E.M. tried to reengage Watkins, he elbowed her in the head. (R. 175:223).

E.M. and the other officer were able to push Watkins against a mailbox, and then radio in their correct location to the backup officers. (R. 175:225). However, the mailbox broke and Watkins was able to wriggle free and run away. (R. 175:227-228).

C. *The Alleged Conspiracy with An Ex-Latin King/Mafioso/Marine Sniper To Assassinate His Arresting Officer.*

Watkins was eventually arrested and brought to Dane County Jail. According to the complaint, the conspiracy and intimidation charges arose from an alleged plot by Watkins and James while in the jail to hire a sniper to assassinate E.M. (R. 1). The solicitation charge was based on a note that Watkins

allegedly sent to James asking him to find someone to commit perjury in his upcoming trial. (*Id.*)

At trial, jail officials explained how James approached them with a claim that Watkins solicited his help to find someone to kill E.M. On May 28, 2016, James sent jail officials a note claiming that "I have come across information that an inmate I am housed with has been trying to place a hit on an officer." (R.176:95-100; R.70).

Jail officials then interviewed James about his claim. (R. 176:125-136). James gave officials an anonymous note (referred to as "Note 1" during the trial) that he claimed he found in his cell. (R. 71; 176:237). The note read as follows:

> D.J.
>
> Bro, I heard that you may know people who will do my friend a favor. He will pay whatever to have two pigs in madison slaugter and the bitch who called them on him. They say he batterd two pigs and his ex. He will work for you until his debt is pay off. He already try something else but they was all talk. Let me know if you can help. This no joke, this is real.
>
> Please flush this.
>
> P.S. If you can't help can you point me in the direction of who can? Someone say they will do it but we want to be sure it is done for real.
>
> With all respect.

(R.176:124-129; R.71) (all *sic*).

James told officials that he wrote a note asking who had sent him the first note, and placed it in a public area. (R. 176:237-238). James claimed that he then received a second anonymous note ("Note 2"), which he also gave to officials. The note read:

> Bro
>
> He just scare to approach you so he ask me to. This is not a setup. I swear on my life!

(R.176:128-130; R.72) (all *sic*).

James claimed he did not know who had sent him the notes, or on whose behalf they were sent. (R. 176:240). However, James said he suspected that the notes were sent on Watkins's behalf because Watkins had seen his arresting officer, E.M., on television, and said something to the effect of "I want that bitch dead. That's the bitch that arrested me." (R.176:239).

James told jail officials that he was a Marine sniper in Iraq and Afghanistan. (R.176:138). Prosecutors later determined that James never served in the military. (*Id*. at 144-45).

Law enforcement officials met with James, and told him that they were "thinking that we could get you out of here quicker" with James's cooperation. (R.176:140-141). Officials arranged for James to wear a wire to gather evidence that Watkins was attempting to hire someone to kill E.M. (*Id*. at 168-176). Although James was instructed not to contact Watkins about the alleged plot without the wire, James purported to write Watkins a note pushing

Watkins to make a decision about the scheme. (R. 74; 176:241-242, 319). Watkins supposedly wrote in reply "I need her gone." (*Id*.)

James also wrote a note, again against law enforcement's instructions, asking Watkins for personal information about E.M. (R. 75; 176:240-243; 177:50). Watkins purportedly replied with E.M.'s name and other information. (*Id*.) This information was in police reports provided to Watkins's as discovery, and James admitted that he had reviewed the reports as Watkins's jailmate. (R.176:207).

James wore a wire twice, each time for two hours. James was instructed not to discuss the alleged plot when he was not being recorded, but did so anyway. (R. 176:319; 177:38-42). During the recording, Watkins supposedly asked James to find someone who would testify favorably about Watkins's altercation with police. James testified that Watkins wrote him another note outlining the prospective witness's testimony. (R.176:258; R. 77).

Because the recordings did not establish the conspiracy to kill E.M., law enforcement and James concocted a plot for Watkins to call an ATF official posing as James's uncle's friend who would carry out the "hit." (R.176:206). As part of the plan, to avoid explicitly talking about a murder-for-hire plot, the ATF and James agreed that Watkins should be told to speak in code, by referring to a car that needed fixing. (R.176:201-207). However, it was undisputed

that Watkins and James had legitimately discussed how Watkins's car needed repairs. (*Id.*)

Watkins was recorded asking the ATF agent to fix his car, and agreeing to transfer $30 as gas money to fix the car. (177:35). Watkins then arranged for James's girlfriend to receive the $30 from his account. (*Id.*)

D. *After the Trial*

After Watkins's trial, Damian James was twice arrested and convicted of impersonating a police officer. Watkins moved for a new trial based on this newly discovered evidence. (R. 135). The parties stipulated that the police reports describing James's exploits could be used in lieu of calling the officers as witnesses at a postconviction hearing. (R. 146:1).

According to the first report, on or about June 13, 2017 (about one month after Watkins's trial), James came into a convenience store dressed as a Marine. (R. 136:8). A store clerk happened to be a former member of the armed forces, and observed that James' "uniform" was not assembled correctly. (*Id.*) The clerk started questioning James about his service, prompting James to leave the store. (*Id.*) Days later, James returned to the store wearing a gun on his hip, and identified himself to the clerk as a City of Madison police officer. (*Id.*)

Then, on June 23, 2017, a special agent with the Wisconsin Department of Justice overheard James jokingly tell a convenience store clerk that

James was going to go behind the counter and arrest her. (R.136:3). The agent made eye contact with James, who then told him "I'm a Madison Police Officer." (*Id.*) The agent could see a gold badge on James's waist and a bulge in James's shirt suggesting a gun was underneath. (*Id.*)

The owner of the convenience store contacted police on June 27, 2017, after James again came into the store "open carrying a pistol on his hip with a badge." (R. 136:7). The next day police interviewed one of the store clerks, who said that James was a regular customer, and two weeks earlier had started claiming that he was in training to be a Madison police officer. (R. 136:10). He promised he would visit the store in uniform soon, and one time said he had to leave because he had to go on a call involving a "suicidal female." (*Id.*)

James was arrested later that day. (R. 136:12). James was carrying in a hip holster what looked like a semi-automatic pistol, but was actually an airgun. (*Id.*) Police also found a gold badge with his belongings. (*Id.*)

James was charged with impersonating an officer, in violation of Wis. Stat. § 946.70(1)(a). *State v. James*, Dane County Case No. 2017CM1362. (R. 137). On September 28, 2017, James pleaded guilty and was sentenced to six months jail. (*Id.*)

James again falsely claimed to be a police officer the following year. While opening a bank account on July 26, 2018, James claimed to be a

Milwaukee County Sheriff who had recently transferred from the Madison Police Department, showing the bank employee what he claimed was his badge. (R. 144:3-4). James further claimed that he was on the detail for transporting the body of Officer Michael Michalski of the Milwaukee Police Department, who was killed the day before in the line of duty. (*Id*.)

As per bank policy, the bank accepted James's badge as identification, and allowed him to open an account. (R. 144:4). Hours after opening the account, James deposited a fake check in the amount of $2,500 and then attempted to withdraw $1,200 from the account. James was unsuccessful, but his activities caused the bank to call the police. (*Id*.)

On August 13, 2018, James was charged with multiple counts arising from the incident. *State v. James*, Milwaukee County Case No. 2018CF003798. (R. 138:1-2). James pleaded guilty to impersonating a police officer on October 11, 2018, and was sentenced to nine months of jail.

E. *Postconviction Litigation*

As noted above, Watkins moved for a new trial based on newly discovered evidence. Wis. Stat. § 809.30. (R. 135). Watkins also moved to reconstruct the record with the numerous audio and audio/video recordings during trial. The clips were entered into evidence as files on six different flash drives, and many of the flash drives contained multiple copies of the same clips, as well as recordings that were not

played at trial. In addition, trial counsel did not consistently indicate the start and stop time of each recording being played. Further, transcripts were provided to the jury and the court, but not marked for identification and not included in the record. The parties ultimately entered into a joint stipulation approved by the court that collected all the clips played at trial as well as the corresponding transcripts. (R. 146-167).

The court denied Watkins's motion for a new trial in a written order. (R. 145; App. 101). The court's decision is discussed in context below.

ARGUMENT

I. Newly discovered evidence

A. *Legal Standards*

The standard for granting a new trial based on the discovery of new evidence is well-established:

> When moving for a new trial based on the allegation of newly-discovered evidence, a defendant must prove: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. If the defendant is able to prove all four of these criteria, then it must be determined whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt.

State v. Plude, 2008 WI 58, ¶ 32, 310 Wis. 2d 28, 48, 750 N.W.2d 42, 52 (citation and quotation marks omitted). "The decision to grant or deny a motion for a new trial based on newly-discovered evidence is committed to the circuit court's discretion." *Id.* at ¶ 31.

"Newly discovered evidence" is not limited to substantive evidence of guilt or innocence. "Wisconsin law has long held that impeaching evidence may be enough to warrant a new trial." *Plude*, 2008 WI 58, ¶ 47. "It may well be that newly discovered evidence, impeaching in character, might be produced so strong as to constitute ground for a new trial, as for example where it is shown that the verdict is based upon perjured evidence." *Birdsall v. Fraenzel*, 154 Wis. 48, 142 N.W. 274, 275 (1913).

In *Plude*, a jury heard conflicting expert opinion testimony explaining the mechanism of the death of the defendant's wife. It was discovered after the verdict that one of the experts lied about his credentials, including a professorship. The Wisconsin Supreme Court concluded that there was a reasonable probability that if the jury had been aware that the expert testified falsely, it would have a reasonable doubt as to Plude's guilt. *Id.* at 49.

Here, the evidence that James was repeatedly masquerading as a police officer shortly after a trial in which he claimed to have caught Watkins in a murder-for-hire plot warrants a new trial. The evidence meets the four criteria to be "newly

discovered," and there is a reasonable probability that a jury hearing this evidence would have a reasonable doubt as to Watkins's guilt.

B. *The trial court erroneously applied its own criteria to hold that James's repeated impersonations of a police officer was not "newly discovered evidence."*

In the first part of its decision, the trial court totally ignored the *Plude* criteria. Instead, the court ruled as follows:

> Watkins presents an entirely new set of purported facts, wholly distinct from the issue that was tried in the 2016 case. The subsequent arrests have no relation to the charges or verdict and they did not stem from any actions or testimony that occurred during the trial. ….
>
> Criminal trials often rely on testimony from witnesses that engage in criminal activities themselves, and the judicial system could not function if every conviction were subject to re-litigation once a witness engaged in new criminal activity following his or her testimony. As such, I find that the subsequent arrests are not "newly discovered evidence" for the purposes of postconviction relief particularly in light of the extensive impeachment of James that occurred via his cross examination and the testimony of numerous other witnesses during the trial in this matter.

(R. 145:8; App. 108). The court thus made up its own criteria for newly discovered evidence. According to the court, newly discovered evidence must "stem from [the] actions or testimony that occurred during the

trial," and categorically rejects "subsequent arrests" as ever being "newly discovered evidence."

"A circuit court erroneously exercises its discretion when it applies an incorrect legal standard to newly-discovered evidence." *Plude*, 2008 WI 58,¶ 31. Since the court here applied its own standard, not the *Plude* criteria, the court was erroneously exercising its discretion.

In addition, the court misunderstood the nature of Watkins's argument. Watkins is not claiming that James's convictions, in and of themselves, constitute "newly discovered evidence." It is true that the mere fact of a criminal conviction may be used to impeach a witness under Wis. Stat. § 906.08. However, Watkins is relying on the facts underlying the convictions to impeach James's credibility. As discussed below, James repeatedly impersonating a police officer demonstrates a much more devious and untrustworthy character than the jailhouse bluster admitted at trial, and suggests he has a pathological fixation on seeming to be a hero. The court's initial conclusion that these actions do not fit the court's own definition of "newly discovered evidence" was in error.

C. *Watkins Established The Four Plude Criteria For Newly Discovered Evidence.*

In the second part of the trial court's decision, the court writes "[e]ven if I considered the subsequent arrests as 'newly discovered evidence,' adequate grounds for a new trial do not exist."

(R. 145:8). The court then endeavors to apply the *Plude* criteria. However, the court's conclusion that Watkins failed to meet the criteria was in error.

1. *The evidence was discovered after conviction.*

James's arrests and convictions for impersonating a police officer occurred after Watkins's trial. They were thus "discovered" after Watkins's convictions. Wis. Stat. § 972.13. The State conceded below and the court likewise found that this first criterion for *Plude* was met.

2. *Watkins was not negligent in seeking the evidence.*

Watkins similarly could not be "negligent" for seeking James's convictions, because they did not occur until after Watkins's trial. Again, the State properly conceded and the trial court properly found that the second *Plude* was met.

3. *The evidence was material to an issue in the case: James's credibility.*

The State had no case without James. If James did not testify, the only evidence supporting a conspiracy charge against Watkins would have been recorded phone calls where Watkins (1) expressed anger at his arresting officer, and (2) hired the undercover ATF agent to fix his car. Indeed, if that was the only evidence put on by the State, Watkins

would have been entitled to a directed verdict at the end of the State's case.

James's testimony, and thus his credibility, was absolutely essential to the State's case. In order to convict Watkins for the "conspiracy" to kill E.M. – *i.e.*, that Watkins believed there was an agreement between himself and the ATF agent to assassinate E.M. – and to convict Watkins for "intimidation," the jury had to believe James's testimony that they had set up a code where "fixing a car" meant murdering a police officer, not actually fixing a car. (R. 176:201-207). To prove that Watkins had solicited James to kill E.M. in one of the notes James gave to the authorities, the jury had to believe James's testimony that Watkins gave him the note. (R. 176:124-129).

The State and the circuit court were thus correct in their conclusion that James's credibility was material to the State's case, the third factor under *Plude*.

4. *The evidence was not cumulative.*

Finally, the "evidence is not merely cumulative." *Plude*, ¶ 32. "[E]vidence is cumulative where it tends to address 'a fact *established* by existing evidence.'" *State v. McAlister*, 2018 WI 34, ¶ 37, 380 Wis. 2d 684, 707, 911 N.W.2d 77, 88 (*quoting State v. Thiel*, 2003 WI 111, ¶78, 264 Wis. 2d 571, 665 N.W.2d 305) (emphasis supplied). Simply attacking a witness's credibility will not "establish" the "fact" that the witness was lying on the stand, and thus will not make all additional impeachment

evidence "cumulative." *Thiel*, 2003 WI 111, ¶¶ 78-80. On the other hand, impeachment evidence may be cumulative if it only tends to prove a specific reason for disbelieving the witness that was already established at trial. *McAlister*, 2018 WI 34, ¶ 37.

In *Thiel*, the defendant, a psychiatrist, was accused of having sexual relations with a patient. 2003 WI 111, ¶ 5. When the complainant first brought this claim to the police, she also brought what she claimed was the defendant's semen. *Id*. at ¶ 7. However, a DNA test established that this was false, and the complainant later admitted that she fabricated this part of the story to hopefully spur a confession from the defendant. *Id*. at ¶ 8.

Even though the complainant's credibility was significantly impeached with evidence of her falsely telling the police that she had the defendant's semen, the Wisconsin Supreme Court held that additional impeachment evidence would not be "cumulative." 2003 WI 111, ¶¶ 75-79. The additional impeachment evidence went to different reasons to disbelieve the complainant, such as her inconsistent statements and motive to lie. *Id*. at ¶¶ 64-71. Notably, the Court also stated that it was "concerned about underestimating the importance of cumulative credibility evidence in a case that depends so heavily on the credibility of the complainant." *Id*. at ¶ 79.

In *McAlister*, however, the additional impeachment evidence was "drawn to the same point" already established at trial: that the witnesses

were motivated to lie about McAlister to curry favor with the prosecutors in their own cases. 2018 WI 34, ¶¶ 49-51. At McAlister's trial for armed robbery, two of his accomplices testified against him. *Id*. McAlister impeached their credibility by extensively cross-examining them on the point that they both hoped to receive favorable treatment from prosecutors and the courts by testifying against McAlister. *Id*. The motion for newly discovered evidence was supported by affidavits from three individuals claiming that the two accomplices had admitted to the affiants that they had concocted McAlister's involvement in order to obtain a better plea deal. *Id*. The court concluded that the affidavits were cumulative to the testimony at trial. "[G]iven the testimony at trial, the three affidavits were of the same general character and drawn to the same point[: the witnesses] lied about McAlister to benefit themselves." *Id*.

As in *Thiel* and *McAlister,* while James's credibility was attacked at trial, it was not "established" that he was in fact lying during his testimony against Watkins. If it had been, Watkins would have been acquitted. As noted above, James was essential to explaining that when Watkins hired the agent to fix his car, he was speaking in code and actually conspiring to commit first-degree homicide.

And although Watkins attacked James's credibility, his attacks did not "establish" any of the facts that make the newly discovered police impersonations powerful impeachment evidence. Watkins pointed out James's prior convictions, his

belief that assisting law enforcement would help get him out of jail faster, and his false boasts of being in the military and the Italian mafia. Clearly, James impersonating a police officer is not cumulative to his prior convictions or his belief that he would get out of jail sooner by giving testimony against Watkins.

The State may argue that falsely claiming to be a police officer is cumulative to the testimony of James falsely claiming to be a marine and gang member, since they both involve James claiming he is someone he is not and are admissible to show his "character for truthfulness." Wis. Stat. § 906.08(2). In both cases, the evidence suggests that James is such an untrustworthy character, his testimony against Watkins simply cannot be believed.

However, there is a significant difference between jailhouse bluster, and going out into society with a fake badge and gun and telling store clerks, bank officials, and even a real law enforcement officer that he himself was a police officer. The latter demonstrates a much greater inclination and capacity to lie for personal gain.

Jail is a rough-and-tumble place, and an easy way to puff up status is by embellishing one's history in a way that cannot be verified by the listeners. There is little risk, and it does not require any props or planning, just a big mouth. As James himself put it: "Everyone in jail has a story." (R.176:233).

Impersonating a police officer is a horse of a different color. It carries a tremendous amount of

risk. Unlike making up stories about one's past, going out into the wild and impersonating a police officer carries significant criminal penalties. Wis. Stat. § 946.70(1)(a). This shows a greater toleration of risk in the service of a lie than any other impeachment evidence at trial.

In addition, James took great care to plan out his schemes to impersonate a police officer. In the Madison case, James obtained a fake badge and an airgun to carry out his ruse. (R. 136:12). In the Milwaukee case, James's impersonation of a police officer was part of a scheme to defraud money from a bank. (R. 144:3-4).

These incidents thus demonstrate that James has a willingness -- a proclivity, even -- as well as the ability to come up with elaborate cons in order to get what he wants. A jury hearing that James puffed himself up in jail might not think that means he would also risk criminal charges by falsely claiming that Watkins solicited him to murder a police officer. It would be a different matter if the jury heard that James was brazen enough to twice claim that he was a police officer, replete with fake badge and gun, and in an effort to defraud a bank.

In addition, the new evidence would suggest a motive or bias to testify against Watkins and for the State that was not raised at trial: a bizarre fixation on being seen as a member of law enforcement. "For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness

for or against any party to the case is admissible." Wis. Stat. § 906.16. Just like the firefighter who secretly commits arson to be hailed a hero,[3] these episodes suggest that James has the wherewithal to concoct a plot where he heroically saves E.M. from Watkins's efforts to solicit her murder.

In the Madison case, James carried out his ruse for weeks before being caught, repeatedly going into a convenience store and claiming he was a Madison police officer. At one point, he claimed he had to leave to go on a "call" involving a suicidal woman. (R. 136:10). In the Milwaukee case, James falsely claimed to be part of the detail that escorted the body of a police officer shot and killed in the line of duty. (R. 144:3-4).

Moreover, these recent episodes shed new light on James's two prior convictions for impersonating a police officer in 1999 and 2001. (R. 176:153-154). While those prior instances were on their own too remote in time to suggest any kind of fixation on being seen as a police officer, when they are considered in conjunction with his recent efforts it appears that there is a deep-seated obsession with being perceived as a police officer.

James was able to act out his fantasy of being in law enforcement by "assisting" real law enforcement officers in building a case against Watkins. He had numerous conversations with the

[3] https://en.wikipedia.org/wiki/Firefighter_arson

investigating officers on how to gather evidence against Watkins, suggested that they use "fixing a car" as code for hiring a "hit," and even got to wear a wire like he was an undercover agent.

A jury could reasonably conclude that it was not mere coincidence that a person who clearly is obsessed with appearing to be a police officer found himself in a position where he could act like a police officer in order to save a police officer. A jury could quite easily conclude that James dreamed up the entire story as a scheme to live out his fantasies. Thus, this is impeachment evidence of a different kind than what was introduced at trial, and thus not "cumulative" under *McAlister*.

The trial court relied on *McAlister* to conclude that evidence of James twice impersonating a police officer would have been cumulative. Specifically, the court held that the evidence

> supports the fact[s] already established at trial: that James was, and is not, a truthful person; that he seeks out deals with law enforcement; and he has a history of lying about his status to anyone that will listen.

(R. 145:12; App. 112). The court misunderstood James's arguments and *McAlister*.

First, the proffered evidence has nothing to do with James "seek[ing] out deals with law enforcement," and thus cannot be cumulative to the evidence of such behaviors at trial.

Second, the court's reference to a form of impeachment not invoked by James here, and references to evidence that James was not "a truthful person," demonstrates that the court is concluding that simply because James faced some evidence impeaching his credibility, any additional impeachment would be cumulative. As discussed above, this is the wrong lesson to draw from *McAlister* and *Thiel*. Further, as a simple logical matter, it is certainly conceivable that additional impeachment evidence may become the straw that breaks the camel's back for the jury, and causes them to conclude that they cannot trust a witness sufficiently to sustain a conviction. The court was thus not applying the correct legal standard, and the court's conclusion that such evidence was "cumulative" was in error.

D. *There is a "reasonable probability" that a jury hearing the evidence that James was impersonating an officer would have reasonable doubt of Watkins's guilt.*

Once a defendant establishes the four *Plude* criteria, the court must "determine[] whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt." *Plude*, 2008 WI 58, ¶ 32. "A reasonable probability of a different result exists if there is a reasonable probability that a jury, looking at both the old and the new evidence, would have a reasonable doubt as to the defendant's guilt." *McAlister*, 2018 WI 34, ¶ 32.

As discussed above, James's credibility was critical to the State's case. James's testimony was necessary to decipher the supposedly coded talk between Watkins and the ATF agent. James is the one who explained that when Watkins was agreeing to pay $30 to have the agent fix his car, Watkins was actually hiring the ATF agent to kill E.M. (R. 176:201-207). James was also needed to authenticate Watkins as the author of the various notes introduced at trial. (R. 176:124-129). James was similarly necessary to give context and explain his recorded conversations with Watkins.

And although there was some evidence impeaching James's credibility, there is a reasonable probability that additional evidence of his untrustworthiness would have tipped the scales in Watkins's favor. As discussed above, it would be reasonable for a jury to conclude that impersonating a police officer outside of jail was of a different character than his stories in jail, and that he simply cannot be believed. It would likewise be reasonable for a jury to conclude that the episodes demonstrate a willingness to lie to appear the hero, and that James concocted the entire scheme to fulfill his bizarre fantasy to appear to be in law enforcement. (See pages 23-26 above).

The circuit court erroneously exercised its discretion when it determined that Watkins failed to show a reasonable probability of a different outcome. The court made no mention of the fact that James's testimony was necessary to prove that Watkins had

conspired with the ATF to assassinate E.M. and not just to fix Watkins's car. (R. 145:12-13; App. 12-13).

In fact, other than discussing the impeachment evidence, the court makes no examination of any of the evidence for or against Watkins. Instead the court concluded that it did "not believe that the evidence of similar charges involving James would have changed the jury's view of the balance of the physical and testimonial evidence." (R. 145:12-13; App. 12-13). At no point does the court describe the "physical and testimonial evidence" it is referencing, let alone explain why it outweighed any additional impeachment of James.

The court's reference to "evidence of similar charges involving James" is puzzling. James had been convicted of impersonating a police officer in 1999 and 2001, and was included in the number of convictions for the purposes of impeaching James under Wis. Stat. § 906.09. (R. 176:153-154). However, the facts underlying the conviction were not introduced into evidence.

The court failed to apply the facts to the correct standard of law. Accordingly, it erroneously exercised its discretion when it held that even if Watkins met the *Plude* criteria, he was not entitled to a new trial.

II. The Court Erroneously Granted The State's Motion to Join The Assault and Conspiracy Cases for Trial.

Review of a decision to join charges for trial is a two-step process. *State v. Locke*, 177 Wis. 2d 590, 597, 502 N.W.2d 891, 894 (Ct. App. 1993). The court first assesses whether the statutory requirements for joinder are met under Wis. Stat. § 971.12(1). If joinder is proper under the statute, the court next determines whether joinder is nonetheless prejudicial to the defendant or the State, and if so may sever the charges under Wis. Stat. § 971.12(3). *State v. Salinas*, 2016 WI 44, ¶ 30, 369 Wis. 2d 9, 26, 879 N.W.2d 609, 618.

Here, the State and the court confused the standards between joinder and severance. The State argued that joinder was appropriate because evidence in 17CF0321 (the "Assault" case) would be admissible as other act evidence in 16CF1270 (the "Conspiracy" case) and vice versa. While an "other acts" analysis may be one factor under the severance standard, it is irrelevant to the initial joinder decision. *Locke*, 177 Wis. 2d at 597.

The court followed the State's lead, and erroneously granted the State's joinder motion based on its conclusion about the admissibility of the evidence in each case. The court's decision to join the two cases for trial was in error. But even if joinder had been proper under Wis. Stat. § 971.12(1), Watkins was entitled to severance under Wis. Stat.

§ 971.12(3), because joinder created "substantial prejudice." *Locke*, 177 Wis. 2d at 597.

A. *The circuit court erroneously applied the standard for severance rather than joinder.*

In *Salinas*, 2016 WI 44, ¶ 30, the court observed that "the initial joinder decision and a decision to sever properly joined charges are distinct considerations that require different standards of review." The initial joinder decision is based on a straightforward application of the alleged fact to the statutory requirements of Wis. Stat. § 971.12(1). As such, it is a legal determination that is reviewed by appellate courts de novo. *Id*.

Severance, on the other hand, is governed by Wis. Stat. § 971.12(3), which grants trial courts the discretion to sever properly joined crimes if the "defendant or the State is prejudiced by a joinder." Whether a party is prejudiced by joinder will turn on a number of factors, including the extent to which evidence in one case could be introduced in the other as "other act" evidence. *Locke*, 177 Wis. 2d at 597. The decision to sever is reviewed for an erroneous exercise of discretion. *Salinas*, 2016 WI 44, ¶ 30.

The State's motion to join the Assault and Conspiracy cases repeatedly conflated the tests for joinder and severance, erroneously stating that *joinder* is appropriate so long as the evidence passes the "other act" test. For example, the State asserted that "in *State v. Hall,* [103 Wis. 2d 125, 144-145,

307 N.W.2d 289, 298 (1981)], the court ruled that it was proper to join two cases where the same evidence would be admissible under section 904.04 if there were separate trials." (R.17:14-15). However, in *Hall* the "defendant does not now nor has he ever claimed that the 12 counts tried to the jury were misjoined under sec. 971.12(1) & (4)." 103 Wis. 2d at 139. Instead, the defendant moved to *sever* the charges because they were prejudicial. *Id*.

The circuit court relied on the State's "other act" rationale for joinder in deciding to consolidate the cases for trial. (R. 172:5-6). The court was clearly in error.

B. *Joinder of the assault and conspiracy charges was in error because they were not of the "same or similar character."*

As an alternative to its erroneous "other acts" basis for joinder, the State did rely on one of the statutory grounds for joinder under Wisconsin Stat. § 971.12(1): that the charged crimes are of "the same or similar character."

Specifically, the State observed that

> [t]he statutory requirement for joinder that the crimes charged be of the "same or similar character" is satisfied where the crimes involve the "same type of offenses, occurring over a relatively short period of time, and the evidence as to each count overlaps."

(R. 17:13-14) (*quoting State v. Hoffman*, 106 Wis. 2d 185, 208, 316 N.W.2d 143 (Ct. App. 1982)). The State

then argued "[j]oinder is appropriate in the defendant's cases because they are essentially the same in nature; [the Conspiracy case] is a continuation of the defendant's attempts to avoid repercussions in [the Assault case]." (R. 17:14).

In *Hoffman*, the Court of Appeals determined that two counts of first-degree murder were properly joined because they were of the "same or similar character." First, they were the "same type of offense": murder. Second, the two murders "occurred over a relatively short period of time," three months. Third, there was a significant amount of overlapping evidence. For instance, the mode of commission in both case was, unusually, cyanide poisoning.

In another case cited by the State, *State v. Hamm*, 146 Wis. 2d 130, 138, 430 N.W.2d 584, 588 (Ct. App. 1988), the defendant was charged with multiple counts of sexual assault and burglary for incidents that occurred fifteen to eighteen months apart. The court found that they were "the same type of offenses, since each incident gave rise to armed burglary and first-degree sexual assault charges." *Id.* at 139. In addition, "the evidence overlaps … [because] the similarities between acts in each incident tended to establish the identity of the criminal." *Id.* Finally, fifteen to eighteen months was a "relatively short period of time" given the nature of the offenses involved." *Id.*

Unlike in *Hoffman* and *Hamm*, the Assault and Conspiracy charges did not involve the "same type of

offenses." It is one thing to get into a physical altercation with a girlfriend and to resist arrest; it is quite another to conspire to assassinate a police officer. Moreover, the events underlying the Conspiracy case took place over a year after the Assault case, not a "relatively short period of time."

Finally, while there was some "overlapping evidence" in the two cases, the existence of overlapping evidence alone is not enough to support joinder. The test is conjunctive. Again, joinder is appropriate when the cases involve the "same type of offenses, occurring over a relatively short period of time, *and* the evidence as to each count overlaps." *Hoffman*, 106 Wis. 2d at 208 (emphasis supplied). In addition, the degree of overlap is not significant. Unlike in *Hoffman* and *Hamm*, there was not overlapping evidence used to show a modus operandi and identity.

In sum, while the State claimed that joinder of the Assault and Conspiracy charges was appropriate because they were of the "same or similar character" under Wis. Stat. § 971.12(1), the facts do not bear this out. Joinder under the statute was thus incorrect as a matter of law. The burden is thus on the State to show that the error was harmless beyond a reasonable doubt. *State v. Leach*, 124 Wis. 2d 648, 671, 370 N.W.2d 240, 253 (1985).

C. *Even if the statutory requirements for joinder were met, joinder prejudiced Watkins and he was entitled to having the charges severed under Wis. Stat. § 971.12(3).*

Watkins argued in response to the State's joinder motion that even if the requirements for joinder were met, it would prejudice Watkins at trial and he was thus entitled to severance of the Assault and Conspiracy cases. (R. 20:15-17) (*citing* Wis. Stat. § 971.12(3). Severance is appropriate when the defendant will show "substantial prejudice" to the defense. S*tate v. Prescott*, 2012 WI App 136, ¶ 13, 345 Wis. 2d 313, 322, 825 N.W.2d 515, 519. As noted above, the decision to sever charges is reviewed for an erroneous exercise of discretion. *Salinas*, 2016 WI 44, ¶ 30.

One of the principal dangers of joinder is "the jury may perceive a defendant accused of several crimes is predisposed to committing criminal acts." *Leach*, 124 Wis. 2d at 672. Indeed, several members of the jury venire – including three who ended up on the jury – made "where there's smoke there's fire" type comments during voir dire.

Specifically, at the very beginning of voir dire, one prospective juror said in open court "If he's got 11 counts against him, why are we doing this?" (R. 174:14). When the judge asked if she would be able to maintain the presumption of innocence, she responded "I think he's guilty" and was promptly dismissed. (*Id.*)

Later on defense counsel more directly addressed the jurors on whether they would be influenced by the sheer number of counts against Watkins:

> **Attorney Stegall**: How many people candidly as you sit here today think if he's in court and the State charged 11 counts, like that one juror said, "[W]hat are we doing. He must be guilty."…
>
> **Prospective Juror Osborne**: You know, I'm certainly open to—but 11 counts is a lot….
>
> **Prospective Juror Smith**: 11 seems like a little much. No one has that much bad luck to get arrested….
>
> **Prospective Juror Bah**: I kind of agree…Because like you can see somebody getting pulled over or they're charged with allegations, I can see once or twice or maybe even three but that is a lot….
>
> **Prospective Juror Lloyd**: Yeah, I mean, it's a lot of stuff and I wish I could say we're all innocent and we do have bad days and things happen, but that's a lot of counts.

(R. 174:86-89).

Osborne, Smith and Bah were all selected to sit on the jury, and all three made it to the jury deliberation room (*i.e.*, none were excused as an alternate). (R. 174:100; 178:176). Although the jurors were all instructed to follow the law, including the presumption of innocence, their candid comments illustrate the natural prejudice that will result from joining such disparate crimes.

The risk of prejudice from the appearance of a "predisposition" is mitigated when "evidence of the defendant's guilt of each offense is overwhelming." *Leach*, 124 Wis. 2d at 672. Here, however, the Assault case was much stronger than the Conspiracy case. Thus, there is a significant risk that Watkins was convicted on the Conspiracy charges due to the strong evidence in the Assault case. "In a trial on joint charges, there is also the possibility that the jury will cumulate the evidence of the crimes charged and find guilt when it otherwise would not if the crimes were separately tried." *State v. Bettinger*, 100 Wis. 2d 691, 696–97, 303 N.W.2d 585, 588 (1981).

The State's case for the Assault charges was well-supported. There were multiple witnesses of both altercations, as well as physical evidence of injuries to both victims.

On the other hand, the State's case for the Conspiracy charges was paper thin, as it relied on the credibility of the preposterous Damian James. Again, it was James who supplied the key piece of evidence, explaining that when Watkins said he wanted to pay someone $30 "to fix his car" he actually meant "to murder a police officer." Also, the plot makes little sense. The $30 fee is ridiculously low, and because there were witnesses besides E.M. of each assault, it would not have helped Watkins at trial. And there is every reason to believe that James concocted this entire scheme as a way to get out of jail. Thus, there is a significant risk that the jury improperly

convicted Watkins on the Conspiracy counts because of the strength of the Assault case.

Another factor in the prejudice analysis is the extent to which evidence supporting both counts would the admissible in separate trials. *Bettinger*, 100 Wis. 2d at 696–97. This was the only factor touched upon by the trial court, albeit in the wrong context of deciding the State's joinder motion. In any event, the court's decision that *all* the evidence admissible in one case would be admissible in the other to provide "motive, intent, and context" was clearly erroneous. (R. 172:5-6).

The facts underlying the Assault charges would not have been admissible in a separate trial on the Conspiracy charges. They constituted "other act" evidence that would have to pass the three-part test laid down in *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998) to be admissible; *i.e.* that they are offered for permissible purpose under Wis. Stat. § 904.04; are relevant under Wis. Stat. § 904.01; and the probative value is not substantially outweighed by the risk of unfair prejudice under Wis. Stat. § 904.03.

While "motive," "intent," and to a lesser extent, "context," are proper purposes under Wis. Stat. § 904.04, the court does not explain why blow-by-blow descripts of the alleged assaults against V.C. and E.M. were relevant to prove Watkins's motive and intent, as well as the context, of the Conspiracy case. "When a circuit court exercises its discretion, it

must explain on the record its reasons for its discretionary decision to ensure the soundness of its own decision making and to facilitate judicial review." *State v. Scott*, 2018 WI 74, ¶ 38, 382 Wis. 2d 476, 492, 914 N.W.2d 141, 149 (citation and quotation marks omitted).

Indeed, it was the fact of E.M.'s arrest of Watkins that gave rise to his alleged motive in the Conspiracy, not the details of the alleged assaults. However, the detailed descriptions of the altercations naturally gave the impression that Watkins was simply a dangerous person, inviting the jury to make the impermissible "propensity" inference.

Nor would the Conspiracy charges be admissible in a trial in the Assault case. Again, the court makes no explanation for why the Conspiracy charges would provide "motive, intent, and context" for the Assault charges. Indeed, how could it? How does the alleged conspiracy to assassinate E.M. explain Watkins's motive to assault V.C. a year earlier?

The court also suggested that the Conspiracy charges would constitute "consciousness of guilt" evidence in the Assault case. However, that does not track. Certainly, an innocent person would be upset at being arrested, and motivated to stop a witness from testifying falsely against them. The conclusion that a person who engages in witness intimidation is guilty of the underlying crime requires an impermissible propensity inference: that only the

type of person who is actually guilty of the underlying crime would try to stop a person from testifying against them. Thus, the Conspiracy charge would be inadmissible character evidence under Wis. Stat. § 904.04.

***

The court did not exercise its discretion correctly when ruling on Watkins's request to sever the charges. In fact, it does not appear that the court ruled on the request, as it seemed to only address joinder, but under the wrong standard. Further, to the extent that the court's rulings on the other act grounds for joinder can be construed as a ruling on severance, it again was not an application of the correct legal standard, as the only looked at one of many prejudice factors. Moreover, the court's conclusory statements about the admissibility of the evidence did not adequately explain the basis of its decision. Accordingly, the court erroneously exercised its discretion. Watkins was entitled to severance of the Assault and Conspiracy cases then, and is now entitled to a new trial.

CONCLUSION

For the reasons stated above, Watkins is entitled to severance of the charges joined at trial and a new trial on each.

Dated this 16th day of July, 2020.

Respectfully submitted,

Thomas B. Aquino
Assistant State Public Defender
State Bar No. 1066516

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-1971
aquinot@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATIONS

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 8,932 words.

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.

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 including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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 16th day of July, 2020.

Signed:

Thomas B. Aquino
Assistant State Public Defender

APPENDIX

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