STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2019AP1996-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ALIJOUWON T. WATKINS,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING A WIS. STAT.§ (RULE) 809.30 POSTCONVICTION MOTION FOR A NEW TRIAL ENTERED IN DANE COUNTY CIRCUIT COURT, THE HONORABLE JOSANN M. REYNOLDS, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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INTRODUCTION

The State charged Alijouwon T. Watkins with eleven counts in two separate cases. Before trial, the State moved to join the cases, and the trial court granted its motion. The State then filed an amended information joining the charges into one case. At no time did Watkins file a motion seeking severance.

Three of the eleven counts against Watkins involved a conspiracy between Watkins and confidential informant (CI) Dan Janson[1] to pay a sniper to assassinate a police officer. Janson testified against Watkins at trial, and a jury convicted Watkins of those three conspiracy-related counts. It also convicted Watkins of eight additional counts, but those convictions are not contested on appeal.

What is contested on appeal are the three conspiracy-related convictions. After Watkins' trial, CI Janson was twice arrested for impersonating a police officer. Watkins moved for postconviction relief requesting a new trial. He argued that Janson' subsequent arrests and conduct show that Janson was "fundamentally untrustworthy," and that they constitute newly-discovered evidence. The circuit court denied Watkins' motion for a new trial.

Watkins appeals, raising two issues.

ISSUES PRESENTED

1. Did Watkins meet his burden of proving that Janson's subsequent arrests and conduct constitute newly-discovered evidence, thereby entitling him to a new trial?

The circuit court held, No.

This Court should affirm.

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[1] The State uses a pseudonym.

2. Did the circuit court properly join the two criminal cases against Watkins?

The circuit court held, Yes.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication as it believes that this case can be decided by applying well-established legal principles to the facts of the case.

STATEMENT OF THE CASE

Pre-trial proceedings

On June 13, 2016, the State charged Watkins in case no. 2016CF1270 with three counts. (R. 1.) On February 7, 2017, the State charged Watkins in case no. 2017CF321 with eight counts. (R. 184.) The State moved to join the cases for trial under Wis. Stat. § 971.12. (R. 17.) Watkins objected, but the court granted the State's motion. (R. 23:2; 172:7.)

The State subsequently filed an amended information in case no. 2016CF1270, encompassing the 11 charges:

- Count 1: Misdemeanor battery,
- Count 2: Disorderly conduct,
- Count 3: Criminal damage to property,
- Count 4: Felony intimidation of a victim,
- Count 5: Felony intimidation of a victim,
- Count 6: Attempted battery of a peace officer,
- Count 7: Resisting an officer causing substantial bodily harm to the officer,
- Count 8: Escape,

- Count 9: Conspiracy to commit first degree intentional homicide,
- Count 10: Intimidation of a witness, and
- Count 11: Solicitation of perjury.

(R. 31.)

At no time did Watkins file a motion seeking severance of the joined charges.

With respect to counts, 9, 10, and 11—which are the only counts challenged on appeal—those counts arose between May 28, 2016 and June 9, 2016, while Watkins was an inmate in the Dane County Jail, *following* his arrest for Counts 1– 8. (R. 1:1–6; 31:1–4.) Counts 1 through 8 involve a June 27, 2015 domestic abuse incident and subsequent struggle with law enforcement officers. (R. 1:1–6; 31:1–4.) Counts 9, 10, and 11 involve Watkins soliciting CI Janson to hire a sniper to assassinate Madison police officer E.M., who was a key witness in the June 27, 2015 domestic abuse incident, and who was also involved in the physical struggle with Watkins. (R. 1:1–6; 184:6–8.)

Watkins pled not guilty to all counts (R. 10:2), and the consolidated case proceeded to trial.

Challenges to Janson's Character at Trial

Watkins appeals only the convictions for which Janson provided testimony: conspiracy to commit first-degree intentional homicide, intimidation of a witness, and solicitation of perjury. (R. 135:1.) Challenges to Janson's honesty and character at trial are detailed below; further testimony and evidence will be provided in the "Argument" section.

At trial, the State asked Janson about whether he had ever been convicted of a crime. (R. 176:233.) Janson responded

that he has been convicted of seven crimes.[2] (*Id*.) He testified that he would lie to other inmates and tell them that he "was associated with Italian organized crime and that I was a Marine Corps sniper." (R. 176:233; *see also* R. 176:109–10, 137.)

According to Janson, Watkins believed him that he was tied to organized crime. (R. 176:235.) Through a series of notes (introduced into evidence) and conversations, Watkins asked Janson for assistance in assassinating the officer who arrested him on June 27, 2015 for the domestic crimes. (R. 176:238–39.) Watkins told Janson "I want that bitch dead." (R. 176:239.) The jury also saw a video of a conversation that Janson had with Watkins in Watkins' cell, in which he was writing down the information of the officer he wanted killed. (R. 176:244–47.)

On cross-examination, Janson was asked about and discussed many of the lies he told to others. For example, he admitted that he was not honest and truthful with other inmates. (R. 176:281.) He admitted that he lied to his wife and to Detective Michael Blake. (R. 176:281, 285–86, 327–28.) He admitted that he disobeyed law enforcement when they told him not to do anything without their permission. (R. 176:288, 306.) Janson admitted that when he first met Detective Chapmen, he lied to him and stated, "I'm not a gang member. I'm a Marine." (R. 176:291–92.) Janson also admitted he lied to "Bear," a mutual friend of Watkins and Janson, when he told him that he served in Iraq and Afghanistan. (R. 176:199, 292–93.) Janson admitted he lied to detectives that he had PTSD from his time in the military. (R. 176:303.) Finally,

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[2] Janson had previously been arrested in 1999 and 2001 for impersonating a police officer. (R. 176:153.) The trial court ruled that Watkins could count those convictions outside the typical 10-year cut-off because those crimes "go to honesty." (R. 176:153.)

Janson admitted he lied to Watkins about setting up the "hit" through his "uncle." (R. 176:306.)

During cross-examination Detectives Scott Reitmeier and Blake both testified that they knew that Janson had lied to them about serving in the military. (R. 176:144–45; 177:211.) Detective Blake further testified that Janson had contacted law enforcement in 2008 to attempt to provide information and "make a deal." (R. 177:214.)

Watkins defense included inmates who were in jail during the same time as Janson. Inmate Julian Thomas testified that Janson was "sneaky" and "untruthful." (R. 177:237.) He never believed anything Janson said to him. (R. 177:239.) Thomas also testified that when he heard that Watkins was being charged with conspiracy to commit homicide, he and numerous other inmates signed an affidavit stating that Janson was not a truthful person, and that Janson had lied about numerous things while in the jail. (R. 177:246.) This affidavit was entered into evidence and presented to the jury at the trial. (R. 112.)

Inmate Jamal Scott testified that he thought Janson was "dishonest" and "conniving." (R. 177:253). Scott testified that Janson has told "a lot of lies," and that he would not believe anything Janson said under oath. (R. 177:254, 256–57.) Scott also signed the affidavit stating that Janson was untruthful. (R. 177:259; 112.)

Inmate Fabian Zepeda testified that Janson was "not trustworthy" and would make up stories about being in the Army or the Marines. (R. 177:266–67.) Janson also claimed to be a member of the Vice Lords criminal gang. (R. 177:267.) Zepeda signed the affidavit stating Janson was untruthful. (R. 177:272; 112.)

Finally, inmate Janson Thompson testified that Janson was an "untruthful" person because he lied about being in an Italian mob, being in the Marines, and being a sniper. (R. 177:

280, 283). Thompson also signed the affidavit stating Janson was untruthful. (R. 177:286; 112.)

Jury Instructions and Watkins' Closing Argument

The court provided Wis. JI–Criminal 325 (2001) to the jury, instructing them that "[e]vidence has been received that some of the witnesses in this trial have been convicted of crimes. The evidence was received solely because it bears upon the credibility of the witness." (R. 178:75.) The trial court also read Wis. JI–Criminal 245 (2000) to the jury, cautioning them to consider Janson's testimony with caution and great care:

> You have heard testimony from [Janson] who stated that he was involved in the crime charged against the defendant. You should consider this testimony with caution and great care, giving it the weight you believe it is entitled to receive. You should not base a verdict of guilty upon it alone, unless after consideration of all the evidence you are satisfied beyond a reasonable doubt that the defendant is guilty.

(R. 178:75–76.)

Defense counsel highlighted this jury instruction during his closing argument, telling the jury that the jury instruction provided some guidance on how they should view Janson's testimony. (R. 178:130.) Defense counsel also reiterated the opinions of the other inmates in jail who "categorically described him as a liar, untruthful, conniving." (R. 178:130–31.) Defense counsel argued that these inmates had nothing to gain by coming to court and testifying that Janson should not be believed. (R. 178:131.) Finally, defense counsel argued to the jury that, if they believed Janson was lying, they should acquit Watkins of Counts 9, 10, and 11. (R. 178:132.) They didn't. (R. 119.)

Verdicts

After a four-day jury trial, the jury found Watkins guilty of Counts 9, 10, 11, as well as six other counts (which are not at issue on appeal). (R. 119.) The jury acquitted Watkins of one charge of intimidation of a victim and of attempted battery of a law enforcement officer[3]. (*Id*.)

Postconviction proceedings

Watkins moved for postconviction relief, seeking a new trial on Counts 9, 10, and 11. (R. 135:1.) According to Watkins, he had newly-discovered evidence that after Watkins' trial, Janson was twice arrested for impersonating a police officer. (R. 135:10.) Watkins attached police reports setting forth Janson' actions to his postconviction motion. (R. 136.) Watkins argued that Janson's subsequent arrests and actions demonstrate that Janson is fundamentally untrustworthy. (R 135:2.) And, that the evidence presents a reasonable probability that had a jury heard this evidence, it would have had a reasonable doubt as to Watkins' guilt. (R. 135:10.)

The State conceded that Watkins met the first three factors of the newly-discovered evidence test—the evidence was discovered after conviction, Watkins was not negligent in seeking the evidence, and the evidence is material to an issue in the case. (R. 142:3; 145:9.) However, the State argued, Watkins failed prove the fourth factor—that the evidence is not merely cumulative. (R. 142:3.)

The postconviction court agreed, concluding that Watkins was "unable to prove the fourth factor." (R. 145:9.) In making this conclusion, it noted that there "is no doubt" that during the trial "there was a significant focus on [Janson's] credibility and truthfulness from his own testimony, the detectives involved, and all the other occupants of the jail pod

[3] The law enforcement officer involved in this charge was not Officer E.M. (R. 31:3.)

where the 'solicitation' was said to occur." (R. 145:11.) And, that "[Janson's] subsequent arrests and convictions for impersonating an officer are indeed confirmation of his character and lack of trustworthiness." (*Id.*) Consequently, "[g]iven the extent of the evidence on this issue during the underlying trial, it is apparent that these subsequent arrests are simply cumulative as to [Janson's] deplorable credibility." (R. 145:11–12.) The subsequent arrests "would simply add to the substantial amount of testimony and evidence presented at trial impugning [Janson's] character and credibility." (R. 145:12.) And, the arrests merely "support[ ] the fact already established at trial: that [Janson] 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.)

Finally, the postconviction court concluded that even if the evidence was newly-discovered, it "would not have created reasonable doubt as to the defendant's guilt." (*Id.*) The court noted that at trial, "so much time and latitude was allotted to challenging [Janson's] credibility. The jury heard all of that testimony and still convicted Watkins." (R. 145:13.) Therefore, "the newly discovered evidence is unlikely to create a 'reasonable doubt' which would result in a different determination." (*Id.*)

Watkins appeals this decision, as well as the trial court's decision joining the cases for trial.

ARGUMENT

I. The circuit court properly exercised its discretion when it denied Watkins' motion for a new trial based on newly-discovered evidence.

Watkins argues that "the evidence that [Janson] 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." (Watkins' Br. 16.) Because

Watkins cannot meet the four factors necessary for establishing newly-discovered evidence, Watkins is wrong.

A. Standard of review

Watkins requests that this Court grant him a new trial because his discovery of Janson's subsequent arrests constitutes newly-discovered evidence. (Watkins' Br. 16.) "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." *State v. Plude*, 2008 WI 58, ¶ 31, 310 Wis. 2d 28, 750 N.W.2d 42. "A circuit court erroneously exercises its discretion when it applies an incorrect legal standard to newly-discovered evidence." *Id.* (citing *State v. McCallum,* 208 Wis. 2d 463, 474, 561 N.W.2d 707 (1997)).

B. Watkins must prove the newly-discovered evidence factors

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." *McCallum,* 208 Wis. 2d at 473.

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. McAlister,* 2018 WI 34, ¶ 32, 380 Wis. 2d 684, 911 N.W.2d 77. "A reasonable probability of a different result exists if there is a reasonable probability that a jury, looking at both the old evidence and the new evidence, would have a reasonable doubt as to the defendant's guilt." *Id.* (citation omitted).

C. Watkins fails to prove the fourth factor that the evidence of Janson's subsequent arrests and conduct is not merely cumulative.

In this case, the State conceded below that Watkins met the first three elements of the newly-discovered evidence test; the postconviction court relied on that concession and agreed. (R. 145:9.) On appeal, the State does not argue differently. Rather, it agrees with the circuit court that Watkins fails to meet the fourth factor, which is that the evidence is not merely cumulative. *McCallum,* 208 Wis. 2d at 473. And, "newly discovered evidence that is merely cumulative is not grounds for a new trial." *McAlister,* 380 Wis. 2d 684, ¶ 37. *McAlister* provided that newly-discovered evidence is cumulative where it tends to address "a fact established by existing evidence" or is "of the same general character and drawn to the same point." *McAlister*, 380 Wis. 2d 684, ¶¶ 37, 50. That's what we have in this case.

Here, evidence that Janson was "fundamentally untruthful" is merely cumulative. Both the State and Watkins repeatedly probed Janson's credibility throughout the trial, both through Janson's testimony and through other witnesses, including law enforcement officers and inmates who knew Janson.

As previously discussed, Janson admitted to lying to other inmates in the jail, the detectives investigating the case, and his wife. (R. 176:233, 281, 285–86, 327–28.) He lied about having family in the Italian mafia and being a marine sniper, and he was extensively cross-examined about these lies by defense counsel on multiple occasions. (R. 176:281–93; 323; 327–32.) Watkins' "newly discovered evidence" simply *furthers* attacks Janson's credibility, and so it is merely cumulative. The postconviction court was correct: "The claimed 'newly discovered evidence' supports the fact already established at trial: that [Janson] 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.)

But Watkins argues that the postconviction court erroneously "made up its own criteria for newly discovered evidence" and "totally ignored the *Plude* criteria." (Watkins' Br. 17.) Not so. The court specifically recited "the *Plude* factors" in determining whether they were "met to justify a new trial." (R. 145:8.) After it recognized that the State conceded that Watkins met the first three elements of the newly-discovered evidence test, it concluded: "based on the entirety of the record in this matter Watkins is unable to prove the fourth factor to support his request for postconviction relief." (R. 145:9.) That fourth factor is whether the evidence was cumulative. *McCallum*, 208 Wis. 2d at 473. On this factor, the court specifically determined: "Given the extent of the evidence on this issue during the underlying trial, it is apparent that *these subsequent arrests are simply cumulativ*e as to [Janson's] deplorable credibility." (R. 145:11–12 (emphasis added).) So the arguments that the postconviction court "totally ignored the *Plude* criteria," and "made up its own criteria," and "applied its own standard" (Watkins' Br. 17, 18) is discredited by the record.

Watkins also argues that the court "misunderstood the nature of [his] argument," by focusing on Janson's convictions and not "the facts underlying the convictions." (Watkins' Br. 18.) But the court's decision shows that it completely understood Watkins' argument. The court noted Janson' specific convictions (R. 145:1–2, 4, 9), and it also recognized his argument "that [Janson's] *conduct,* arrests, and convictions following the 2017 verdicts demonstrate a fundamental untrustworthiness and a desire to be seen as a 'hero.'" (R. 145:4; *see also* Watkins' B. 25 (arguing that "[Janson] has the wherewithal to concoct a plot where he heroically saves" the police officer) (emphasis added).) The

court "understood" Watkins' argument. It just didn't agree with it.

Watkins also argues that in its decision, the court drew "the wrong lesson" from *State v. Thiel* 2003 WI 111, ¶ 4, 264 Wis. 2d 571, 665 N.W.2d 305 and *McAlister*. (Watkins' Br. 21–22, 27.) Again, the record reflects otherwise. In its *only* citation to *Thiel*, 264 Wis. 2d 571, the postconviction court provided that "[e]vidence is cumulative when it 'supports a fact established by existing evidence.'" (R. 145:12.)

Thiel is an ineffective-assistance-of-counsel claim, where the issue of whether the defendant met his burden of proving that the evidence is "cumulative" under the newly-discovered evidence test was not addressed. *Thiel* involved alleged sexual exploitation by a therapist in which "the credibility of the [victim] was central to the jury's verdict." 264 Wis. 2d 571, ¶ 4. Although Thiel's defense counsel had police reports and medical notes before trial, either he did not read or did not adequately review the documents. *Id.* ¶¶ 26, 27. Those documents revealed that the alleged victim had falsely told a different therapist that she had a sample of Thiel's semen and had threatened Thiel with the sample. *Id*. ¶ 27. The supreme court concluded that the "nature of the credibility evidence in this case cannot be characterized as merely cumulative." In doing so, it determined that "[t]he unreasonable errors that disabled Thiel's counsel from presenting material, discrediting facts pertinent to [the victim's] account of the alleged encounters shakes our confidence in the result of this proceeding." *Id*. ¶¶ 78, 79.

That is not the case here. In this case, as outlined above, not only was Janson's credibility challenged during cross-examination, it was also challenged through testimony of the detectives and the other inmates.

Also, unlike *Thiel*, 264 Wis. 2d 571, ¶ 79, in this case there *were* other witnesses and physical evidence showing

Watkins' guilt of Counts 9, 10, and 11. This evidence includes a jail call where Watkins says that he wanted Officer E.M. to get shot in the face while she was on duty. (R. 175:381; 159:1.) It includes that Watkins had E.M.'s personal information in his jail cell when it was searched by law enforcement. (R. 175:235; 177:93–94.) It includes a jail call where Watkins says he has a plan to make "mother fucker disappear and shit." (R. 175:385–86; 161:1.) It includes several recorded conversations between Watkins and Janson that were played for the jury, where the jury was able to assess the meaning of the conversations and the things Watkins said. (R. 146:2, 4–5.) These recorded conversations included Watkins telling Janson that Watkins knew what he was getting into, and that there was no going back on the conspiracy. (R. 176:221.) The evidence includes a video of Watkins and Janson meeting at the jail. (R. 176:246.) It includes the recorded jail call Watkins made to an undercover ATF agent, whom Watkins solicited to commit the homicide for thirty dollars. (R. 177:32–33.) In this call, which the jury heard, Watkins agreed to release the money to Janson's wife to commit the homicide. (*Id*.) Finally, the evidence includes Watkins' written request to release the thirty dollars to Janson's wife from his jail funds. (R. 177:65–67; 85.)

When citing and discussing *McAlister*, 380 Wis. 2d 684, ¶ 37, the postconviction court noted that the *McAlister* Court held that newly-discovered evidence that is merely cumulative is not grounds for a new trial. (R. 145:12.) The court also discussed some of the facts of *McAlister*, noting that in that case, the defendant attached affidavits to his postconviction motions, averring that the defendant's accomplices (witnesses at trial) admitted they intended to

perjure themselves in order to implicate the defendant.[4] (R. 145:7.) The postconviction court noted that the *McAlister* Court denied the defendant an evidentiary hearing because the proffered evidence was cumulative and of the same general character, which was attacking the accomplices' credibility. (R. 145:7–8.) The court noted in *McAlister*, "as here, defense counsel repeatedly challenged the witnesses' credibility." (*Id.*)

While Watkins agrees that *Thiel* and *McAlister* are similar in that in those cases the defendant's "credibility was attacked at trial," he argues that his case is different because "it was not 'established' that [Janson] was in fact lying during

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[4] McAlister was charged with multiple armed robbery-related crimes. *State v. McAlister,* 2018 WI 34, ¶ 1, 380 Wis. 2d 684, 911 N.W.2d 77. At trial, the State called Jefferson and Waters to testify that McAlister "was their accomplice in the robberies," and the defense attempted to impeach both Jefferson and Waters based on favorable deals they had with the State. *Id.* ¶¶ 1, 10–11, 16. Postconviction, McAlister argued he had newly-discovered evidence in the form of affidavits: (1) McPherson averred that, before McAlister's trial, while McPherson and Waters were incarcerated together, Waters told McPherson that he had lied to police about McAlister's involvement in the armed robberies and that he had written to Jefferson, instructing him what to tell police; (2) Prince averred that, starting before and ending after McAlister's trial, while he and Jefferson were incarcerated together, Jefferson told him that Waters had told Jefferson "exactly what to say regarding their pending charges," that McAlister "was never involved in any of the robberies they committed," and that Waters had "instructed him to lie" in order to win them shorter sentences; and (3) Shannon averred that, before McAlister's trial, he was incarcerated with Jefferson, who told Shannon that Jefferson and Waters were the only two people involved in one of the robberies that McAlister was charged with, but that Jefferson had struck a plea deal to testify against someone not involved in the robbery. *Id.* ¶¶ 2, 22–24. The postconviction court denied McAlister's motion without an evidentiary hearing. *Id.* ¶ 2. The supreme court affirmed, concluding that the affidavits "were merely cumulative evidence because they were additional evidence of the same general character as was subject to proof at trial, i.e., that Jefferson and Waters lied when they implicated McAlister in order to achieve favorable plea bargains for themselves." *Id.* ¶ 4.

his testimony against Watkins." (Watkins' Br. 22.) This is not true. The credibility of Janson was thoroughly vetted at trial, where often Janson himself "established" that he had lied to people, including his wife, detectives, and other inmates. (R. 176:233, 281, 285–86, 327–28.) Similar to *McAlister*, Janson's postconviction conduct and arrests "are merely cumulative evidence of the same general character and drawn to the same point for which proof was provided at trial." *See McAlister,* 380 Wis. 2d 684, ¶ 51.

Watkins next argues that the "jailhouse bluster" of claiming to be a marine sniper and gang member is different from impersonating a police officer because the latter shows "a much greater inclination and capacity to lie *for personal gain*." (Watkins' Br. 23 (emphasis added).) But that is not the only evidence that the jury heard regarding Janson's credibility. It also heard from Detective Blake that Janson contacted a law enforcement agency to provide information *in order to make a deal*. (R. 177:214.) As the postconviction court determined, "[t]his testimony was offered to impeach [Janson's] credibility in regards to an alleged history of seeking deals with law enforcement or acting as an asset to law enforcement for his personal benefit." (R. 145:10.) Watkins' additional evidence of Janson's "capacity to lie for personal gain" was, "established" at trial.

Next, the postconviction court did not "conclud[e] that simply because [Janson] faced some evidence impeaching his credibility any additional impeachment would be cumulative." (Watkins' Br. 27.) Rather, the court was clear that there was more than just "some" impeachment evidence, there was extensive impeachment evidence. Specifically, the court noted that "there is no question that during the actual trial, [Janson's] credibility was seriously and effectively impeached." (R. 145:6.) And, there was "extensive impeachment of [Janson] that occurred via his cross

examination and the testimony of numerous other witnesses during the trial in this matter." (R. 145:8.)

Because Watkins fails to prove that evidence of Janson's subsequent conduct and arrests are not cumulative, he similarly fails to prove that this evidence is newly discovered. This Court should affirm the postconviction court's decision denying Watkins' motion for a new trial.

D. Because the evidence against Watkins was overwhelming, a reasonable probability does not exist that, had the jury heard Janson's subsequent conduct and arrests, it would have had a reasonable doubt as to Watkins' guilt.

Finally, even if this Court agrees with Watkins that he has met the four factors of newly-discovered evidence, a reasonable probably does not exist that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to Watkins' guilt on Count 9, 10, and 11. *See McAlister,* 380 Wis. 2d 684, ¶ 32. The evidence against him was overwhelming.

Watkins argues that while there was "some evidence" attacking Janson's credibility, the new evidence of Janson's arrests and conduct "would have tipped the scales." (Watkins' Br. 28.) But as argued above in Section I. C., and to avoid repetition, there was not just "some evidence" of Janson's credibility, there was extensive evidence, including lies to his wife, the detectives on the case, and other inmates. (R. 176:233, 281, 285–86, 327–28.) The jury also heard that Janson has seven prior convictions, which directly relates to his credibility as a witness, as the court instructed the jury at the end of the trial. (R. 176:233.)

The jury found Watkins guilty because, even putting aside Janson's testimony, there was overwhelming evidence of Watkins' guilt as to Count 9, 10, and 11. As argued above

in distinguishing *State v. Thiel* (Section I. C.), in this case there were other witnesses and physical evidence showing Watkins' guilt of Counts 9, 10, and 11. It was based on all of this evidence that the jury was able to find, beyond a reasonable doubt, that Watkins was guilty of those crimes. The jury did not need to rely on Janson's testimony to find Watkins guilty, and it was instructed not to do so by the court. (R. 178:75–76.) So even if the newly-discovered evidence of Janson's subsequent convictions had come in at trial, the jury would not have had a reasonable doubt as to Watkins' guilt.

The postconviction court was correct: "The jury heard all of that testimony and still convicted Watkins. As such, the newly discovered evidence is unlikely to create a 'reasonable doubt' which would result in a different determination as to [Watkins'] guilt." (R. 145:13.) Finally, the State, like the postconviction court, could find no case that has allowed a defendant to be granted a new trial based on a witness's unrelated convictions that occurred after the defendant's trial was concluded. (R. 145:6.) To allow a defendant a new trial every time a witness gets convicted of a crime after a trial would undermine the finality of proceedings.

The postconviction court properly denied Watkins' motion for a new trial. This Court should affirm.

II. The circuit court's initial joinder of Watkins' two cases for trial was proper under Wis. Stat. § 971.12(1).

Watkins next argues that the trial court improperly joined the two cases against him for trial. (Watkins' Br. 30.) Because joinder was proper and the joinder statute is broadly construed in favor of joinder, this Court should affirm.

A. The applicable standard of review is the standard of review for joinder, not severance.

The initial decision on the joinder of charges for a trial is a question of law this this Court reviews de novo. *State v. Salinas*, 2016 WI 44, ¶ 30, 369 Wis. 2d 9, 879 N.W.2d 609.

At times in his brief, Watkins phrases the issue as whether the trial court should have granted *severance,* or that he was "entitled to severance." (Watkins' Br. 35, 39.) But this case does not involve a motion for severance after initial joinder. Watkins never filed a motion to sever[5], and therefore the court never ruled on "Watkins's request to sever the charges." (Watkins' Br. 40.) As the supreme court stated in *Salinas*, "the initial joinder decision and a decision to sever properly joined charges are distinct considerations that require different standards of review." 369 Wis. 2d 9, ¶ 30. And here, Watkins is correct that "it does not appear that the court ruled on the request" (Watkins' Br. 40), and that is because Watkins never made it. The only motion before the trial court was the State's motion to consolidate and join the cases. (R. 17; 172:2.) Because the issue in Watkins' case "involves only whether the initial joinder was proper, [this Court's] review is de novo." *See Salinas*, 369 Wis. 2d 9, ¶ 30.

B. The joinder statute is to be broadly construed in favor of joinder.

Joinder of cases is governed by Wis. Stat. § 971.12. Subsection (4) provides that the circuit "court may order 2 or

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[5] In defense counsel's response to the State's motion to consolidate, he recognizes that "where joinder is proper, a defendant may move to sever the counts on the basis of prejudice." (R. 20:15.) And, "When a defendant moves to sever, 'the trial court must determine what, if any, prejudice would result from a trial on the joined offenses." (R. 20:16.) The appellate record indicates that Watkins never moved to sever the cases.

more complaints, informations or indictments to be tried together if the crimes . . . could have been joined in a single complaint, information or indictment" under subsection (1). That section of the statute, entitled "joinder of crimes," provides that the State may charge two or more felony and misdemeanor crimes together, in a separate count for each crime, if the charges: (1) "are of the same or similar character"; (2) "are based on the same act or transaction"; (3) are based on two or more acts or transactions that are "connected together"; or (4) are based on two or more acts or transactions that constitute "a common scheme or plan." Wis. Stat. § 971.12(1); *Salinas*, 369 Wis. 2d 9, ¶ 31.

In determining whether two cases are "connected together" so that they may properly be joined for trial under Wis. Stat. § 971.12(1), a reviewing court considers factors including whether: the charges are "closely related"; the charges have "common factors of substantial importance"; one charge arose "out of the investigation of the other"; the charges are "close in time or close in location," or involve the same victims; the charges are "similar in manner, scheme or plan"; one of the crimes was "committed to prevent punishment for another"; and joinder would "serve the goals and purposes of Wis. Stat. § 971.12." *Salinas,* 369 Wis. 2d 9, ¶ 43. The goals behind the joinder statute include having the connected issues "resolved in one trial," allowing the victim to testify only once, and "efficiently conserv[ing]" the "judicial resources utilized to mete out justice." *Id.* ¶ 44 (citations omitted).

Initial joinder decisions are interpreted broadly "because of the goals and purposes of the joinder statute: (1) trial economy and convenience; (2) to promote efficiency in judicial administration; and (3) to eliminate multiple trials against the same defendant, which promotes fiscal responsibility." *Salinas,* 369 Wis. 2d 9, ¶ 36.

C. The circuit court's joinder of Watkins' crimes was appropriate because the crimes are "connected together" and joinder in this case served the purposes and goals of the joinder statute.

In seeking joinder, the State argued that "the facts of the latter are necessary to prove the elements of the former, and the former is necessary to prove [Watkins'] consciousness of guilt in the latter." (R. 17:14.) Both cases, the State noted, involved the same victim, occurred in Madison, and occurred within approximately one year of each other. (*Id.*) It also noted that its theory was that Watkins' "actions in 16CF1270 were motivated by his desire to avoid additional punishment for his actions in [case no.] 17CF321." (R. 17:18.) Watkins' actions in jail while awaiting trial of case no. 17CF321, according to the State, were compelling because of its "strong connection" with Watkins' actions in case no. 16CF1270. (R. 17:19.) And, that but for Watkins' actions and subsequent incarceration in 17CF321, "he would not have been soliciting a hitman or perjury in 16CF1270." (R. 17:19–20.) Further, at the motion hearing, the State argued:

- "Motive and intent would bring all of these acts into the same trial."
- "The conspiracy case unequivocally is pertinent to the domestic violence case because it's all consciousness-of-guilt evidence."
- "[T]he bulk of the conspiracy case would be admissible and would be incurred by the jury in the domestic violence case."
- "In order for the jury to be able to ascertain that what was being requested was perjury, the jury would have to know what the underlying facts of the first case are." And,

- "[I]t is in the public interest to avoid duplicitous time-consuming trials that the cases be joined."[6]

(R. 172:4–5.)

In granting the State's motion, the court noted that Officer E.M. "was material and hands-on in the original domestic incident." (R. 172:5–6.) And, that "without the domestic-abuse incidents coming in and that arrest and the surrounding circumstances coming in in the May 28, 2016 charges, there's no context for the jury." (R. 172:6.) So the cases "are clearly intertwined. Each is relevant in the other to give motive, intent, context. They are related." (*Id.*) The court also noted that the cases involve the same parties, and that joining them would further the "fundamental use of judicial resources, witnesses, court time, attorneys." (*Id.*) According to the court, "joinder is the only logical step to take." (*Id.*)

The circuit court properly exercised its broad discretion in joining the cases. The cases are "connected together" under Wis. Stat. § 971.12(1), as the conspiracy-related charges arose "out of the investigation of the other"; all of the charges are "close in time or close in location," occurring within a year[7] in the same city; and the victim of Counts 9, 10, 11, was involved in Watkins' arrest for Counts 1–8. *See Salinas,* 369 Wis. 2d 9, ¶ 43. And as the State alleged in its amended information, Watkins "knowingly and maliciously did attempt to prevent a

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[6] While Watkins is correct that the State argued that joinder was appropriate because the cases were of the same or similar character (Watkins' Br. 32–34), as shown above, that is not the only reason the State argued for joinder, and it is not the reason that the circuit court relied on in granting joinder.

[7] Watkins argues, with no citation to the record, that "the events underlying the Conspiracy case took place over a year after the Assault case." (Watkins' Br. 34.) This is incorrect. It was less than a year. (R. 1:1–6; 31:1–4.)

witness, [E.M.], from attending or giving testimony at" his trial for Counts 1–8. (R. 31:3.)

Finally, as the circuit court determined (R. 172:6), joinder would "serve the goals and purposes of Wis. Stat. § 971.12." *See Salinas,* 369 Wis. 2d 9, ¶ 43. Here, all of the charges against Watkins in this case were resolved in one trial, allowing Officer E.M. "to testify only once, and the judicial resources utilized to mete out justice were efficiently conserved." *See Salinas*, 369 Wis. 2d 9, ¶ 44.

In granting the State's motion for joinder, the circuit correctly exercised is broad discretion in finding the factors supporting joinder were present. This Court should affirm that decision.

D. Even if joinder was improper, the error was harmless because the evidence of Watkins' guilt was overwhelming.

If a circuit court errs in granting a motion for joinder, the decision is subject to a harmless error analysis. *State v. Davis*, 2006 WI App 23, ¶ 21, 289 Wis. 2d 398, 710 N.W.2d 514. "Such a policy is acceptable and even desirable when harmlessness is demonstrated by overwhelming evidence of guilt or when the court is convinced for other reasons that 'the error did not influence the jury or had but very slight effect.'" *Id.* (quoting *State v. Leach*, 124 Wis. 2d 648, 671–72, 370 N.W.2d 240 (1985)). To show that an error is harmless, the State must show that it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *State v. Nelson*, 2014 WI 70, ¶ 44, 355 Wis. 2d 722, 849 N.W.2d 317 (citation omitted).

Watkins argues that unlike the assault charges against Watkins which were "well-supported" (Watkins' Br. 37), "the State's case for the Conspiracy charges was paper thin." (Watkin's Br. 37.) The opposite is true.

Watkins was convicted on overwhelming evidence on Counts 9, 10, and 11. As argued in Section I., in addition to Janson's testimony, this evidence includes a jail call where Watkins says that he wanted E.M. to get shot in the face while she was on duty. (R. 175:381; 159:1.) It includes that Watkins had E.M.'s personal information in his jail cell when it was searched by law enforcement. (R. 175:235; 177:93–94.) It includes a jail call where Watkins says he has a plan to make "mother fucker disappear and shit." (R. 175:385–86; 161:1.) It includes several recorded conversations between Watkins and Janson that were played for the jury, where the jury was able to assess the meaning of the conversations and the things Watkins said. (R. 146:2, 4–5.) These recorded conversations included Watkins telling Janson that he knew what he was getting into, and that there was no going back on the conspiracy. (R. 176:221.) The evidence includes a video of Watkins and Janson meeting at the jail. (R. 176:246.) It includes the recorded jail call of Watkins to an undercover ATF agent, whom he solicited to commit the homicide for thirty dollars. (R. 177:32–33.) In this call, which the jury heard, Watkins agrees to release the money to Janson's wife to commit the homicide. (*Id.*) Finally, the evidence includes Watkins' written request to release the thirty dollars to Janson's wife from his jail funds. (R. 177:65–67; 85.) So as shown above, the State did not rely on Janson's credibility and testimony to show Watkins' guilt as to Counts 9, 10, and 11. (*See* Watkins' Br. 37.)

Because the evidence of Watkins' guilt was overwhelming, any error in joining the cases was harmless error.

E. By failing to make a severance motion, the issue of severance is not ripe for appeal.

Under Wis. Stat. § 971.12(3), a defendant may move to sever charges that have been joined for trial on the grounds

that severance is necessary based on prejudice to the defendant. *Salinas*, 369 Wis. 2d 9, ¶ 47. Specifically, "[i]f it appears that a defendant or the state is prejudiced by a joinder of crimes . . . for trial together, the court may order separate trials of counts, grant a severance . . . or provide whatever other relief justice requires." Wis. Stat. § 971.12(3). When a defendant fails to file a motion to sever under Wis. Stat. § 971.12(3) the charges that have been joined, prejudice is not at issue on appeal. *Salinas,* 369 Wis. 2d 9, ¶ 49 ("Failing to make a severance motion, regardless of the reason, however, results in this issue not being ripe for our consideration.").

In this case, Watkins argues that even if joinder was proper, joinder prejudiced him and he was entitled to having the charges severed. (Watkins' Br. 35.) But Watkins never filed a severance motion. And procedurally, this case is just like *Salinas*: the State moved to consolidate and join the cases, the defendant objected, the trial court granted the State's motion, the State filed an amended information consolidating the cases, and the defendant never "filed[d] a motion seeking severance of the joined charges." 369 Wis. 2d 9, ¶¶ 11, 13, 14, 16. Therefore, just like *Salinas*, this Court's opinion should be "limited to [its] holding that initial joinder here was proper." *See id.* ¶ 49. Watkins' argument that the trial court erroneously denied his "request" for joinder (Watkins' Br. 35–39) and that he was prejudiced as a result is not properly before this Court.

F. Watkins suffered no prejudice from joinder.

Should this Court part from the supreme court in *Salinas* and decide that this issue *is* ripe for appeal, Watkins loses on the merits. Under Wis. Stat. § 971.12(3), "[i]f it appears that a defendant . . . is prejudiced by a joinder of crimes . . . the court may order separate trials of counts." "Whether to sever otherwise properly joined charges on

grounds of prejudice is within the [circuit] court's discretion," *State v. Nelson*, 146 Wis. 2d 442, 455–56, 432 N.W.2d 115 (Ct. App. 1988). This Court conducts its review in light of the presumption that a defendant suffers no prejudice from joinder that is proper under Wis. Stat. § 971.12(1) & (4). *See Leach*, 124 Wis. 2d at 668–69.

"In evaluating the potential for prejudice, courts have recognized that, when evidence of the counts sought to be severed would be admissible in separate trials, the risk of prejudice arising because of joinder is generally not significant." *State v. Locke*, 177 Wis. 2d 590, 597, 502 N.W.2d 891 (Ct. App. 1993). Therefore, this Court assesses the prejudice in joining two criminal cases by analyzing whether evidence of one criminal episode would be admissible in a separate trial of the other criminal episode. *See id*.

"[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." Wis. Stat. § 904.04(2)(a). The statute, however, "does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id*. Admissibility of evidence under Wis. Stat. § 904.04(2)(a) is governed by a three-step inquiry to determine whether: (1) the evidence is offered for a permissible purpose, as required by section 904.04(2)(a); (2) the evidence is relevant within the meaning of Wis. Stat. § 904.01; and (3) the probative value of the evidence is substantially outweighed by the concerns regarding unfair prejudice, confusion, and delay enumerated in Wis. Stat. § 904.03. *State v. Sullivan*, 216 Wis. 2d 768, 772–73, 576 N.W.2d 30 (1998).

Here, the trial court did not conduct a thorough analysis on the record of each *Sullivan* factor (*see* Watkins' Br. 38–40), because a severance motion was never filed. Regardless, this Court's obligation is to "independently review the record to

determine whether it provides a basis for the circuit court's exercise of discretion." *See Sullivan,* 216 Wis. 2d at 781. And the record here shows that Watkins was not prejudiced by joinder.

The first step of the *Sullivan* analysis requires only an acceptable purpose for the proffered evidence. *See State v. Payano*, 2009 WI 86, ¶ 63, 320 Wis. 2d 348, 768 N.W.2d 832. In this case, the trial court found that *if* the acts in May of 2016 had involved officers "who had no active role in the June 2015 acts, it would be simply not relevant." (R. 172:5.) However, the court continued, "because it is the officer that was material and hands-on in the original domestic incident in 2015 that is the subject of the solicitation in the May 2016, it does become highly relevant and probative both as to his *motive and intent* to eliminate that officer's availability to come and testify at the trial." (R. 172:5–6 (emphasis added).) As the State argued below, "[d]ue to the strong nexus between the two cases, the other acts evidence has a tendency to make the consequential facts or propositions of intent and motive more probable than they would be without this evidence." (R. 17:20.) Here, the evidence serves the permissible purpose of demonstrating Watkins' intent and motive. *See* Wis. Stat. § 904.04(2)(a).

The second *Sullivan* step was satisfied because the evidence was relevant for these purposes. *See State v. Hall*, 103 Wis. 2d 125, 144–45, 307 N.W.2d 289 (1981) (providing that evidence of separate similar criminal episodes relevant to intent and modus operandi in each occurrence). As the court concluded, "[e]ach is relevant in the other to give motive, intent, context. They are related." (R. 172:6.)

The third *Sullivan* step requires that the probative value of the proffered evidence outweigh the risks enumerated in Wis. Stat. § 904.04(3), including unfair prejudice. *See Sullivan*, 216 Wis. 2d at 772–73. In determining that joinder was appropriate, the court

determined that "while there may be some prejudice, the probative value of all of this information clearly outweighs any prejudice." (R. 172:6.) This Court should affirm. Here, joining Counts 9, 10, 11 to the domestic-abuse crimes offered an explanation as to why Watkins may have conspired to kill Officer E.M.: she was a witness who was directly involved in a physical struggle with Watkins while she was investigating the domestic-abuse charges against him. Also, the record shows that the circuit court instructed the jury that each count charged a separate crime and that the jury must consider each count separately.[8] (R. 178:181.) The circuit court went on to instruct the jury explicitly that its "verdict for the crime charged in one count must not affect your verdict on any other count." (*Id.*) This Court presumes that juries follow instructions, and it views limiting instructions as "an effective means to reduce the risk of unfair prejudice." *State v. Marinez*, 2011 WI 12, ¶ 41, 331 Wis. 2d 568, 797 N.W.2d 399.

Watkins fails to show that he suffered the prejudice necessary to obtain severance.

[8] If Watkins had concerns with specific jurors being unable to consider each count separately, he could have challenged them for cause. (Watkins' Br. 35–36.) Regardless, the court addressed these concerns in its instructions.

CONCLUSION

This Court should affirm Watkins' judgment of conviction and his postconviction motion requesting a new trial.

Dated this 15th day of October 2020.

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 7,908 words.

Dated this 15th day of October 2020.

SARA LYNN SHAEFFER
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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 15th day of October 2020.

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