STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT IV

Case No. 2019AP001996

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

REPLY BRIEF

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I. Watkins is entitled to a new trial based on the newly discovered evidence of the State's confidential informant impersonating law enforcement officials.

A. *The evidence that James repeatedly impersonated law enforcement officials shortly after Watkins's trial was not cumulative of other impeachment evidence at trial.*

The State, as it did in the circuit court, concedes that Watkins met the first three criteria for a newly discovered evidence claim: that the evidence was discovered after trial, that Watkins was not negligent for failing to discover it before trial, and that the evidence bore upon a material issue at trial, James's[1] credibility. (State Br. 10). *State v. Plude*, 2008 WI 58, ¶ 32, 310 Wis. 2d 28, 48, 750 N.W.2d 42, 52. The State only contests whether the evidence was "cumulative."

However, much of the State's "cumulative" argument addresses an entirely different argument made by Watkins: that in the first part of the circuit court's written decision, it erroneously exercised it discretion by applying its own definition of newly discovered evidence rather than the definition found

[1] The State confusingly uses a pseudonym for James, even though his identity has been known since at least the trial, and he is not a victim or a child or otherwise entitled to confidentiality under the statutes.

in *Plude* and elsewhere. In the second part of the circuit court's opinion, it addressed the *Plude* criteria. Watkins addressed each part separately in his brief. (Watkins Br. 17-18)

The State did not understand this. The State misleadingly quotes Watkins's brief, writing that Watkins wrongly argued that "the trial court totally ignored the *Plude* criteria." State Br. 11, quoting Watkins Brief at 17. The full quote from Watkins's brief is that "*In the first part of its decision*, the trial court totally ignored the *Plude* criteria" (Watkins Brief at 17) (emphasis supplied). The State likewise misattributes Watkins's argument about the circuit court erroneously focusing on the fact of James's convictions rather than the underlying conduct to Watkins's "cumulative" argument, when Watkins was addressing the first part of the circuit court's decision. (Compare State Br. 11 with Watkins Br. 17). In any event, the State does not argue that the circuit court properly exercised its discretion when it applied its own definition of newly discovered evidence in the first part of its opinion.

When the State does address Watkins's "cumulative" argument, it falls into the same trap as the circuit court, arguing that when a witness's credibility is challenged at trial, any additional impeachment evidence discovered after trial must perforce be cumulative. For instance, the State argues that "Watkins' 'newly discovered evidence' simply *furthers* attacks [James's] credibility, and so it is merely cumulative" and that "[t]he credibility of

[James] was thoroughly vetted at trial[.]" (State Br. 10) (emphasis in the original).

However, as discussed extensively in Watkins's brief-in-chief, the Wisconsin Supreme Court has held that impeachment evidence is only cumulative if it is "of the same general character and drawn to the same point" as impeachment evidence introduced at trial. *State v. McAlister*, 2018 WI 34, ¶ 49-51, 380 Wis. 2d 684, 707, 911 N.W.2d 77. (Watkins Br. 21-27). Watkins argued that the evidence James repeatedly impersonated a police officer while out in the public was not "of the same general character and drawn to the same point" as the impeachment evidence at trial in two respects: (1) it showed a "greater inclination and capacity to lie" than telling tall tales to his jailmates; and (2) it demonstrated a "bizarre fixation on being seen as a member of law enforcement" that suggests he ginned up this entire scheme to play the hero. (Watkins Br. 23-24).

The State does not address either point. Instead, the State points to the evidence "that [James] contacted a law enforcement agency to provide information *in order to make a deal*." (State Br. 15) (emphasis in original). However, the State does not explain how this evidence is drawn to the same point.

The State's attempt to distinguish *State v. Thiel*, 2003 WI 111, ¶78, 264 Wis. 2d 571, 665 N.W.2d 305, is unconvincing. (State Br. 12). Indeed, the State fails to recognize that in *Thiel*, the

complaining witness's credibility had been impeached, specifically with evidence that she had given the police demonstrably false information about an aspect of her claim. The *Thiel* court held that additional impeachment evidence, such as the witness's prior inconsistent statements, was not cumulative.

The State also attempts to distinguish *Thiel*, by claiming that there were "other witnesses and physical evidence showing Watkins' guilt" besides James's testimony. (State Br. 12-13). However, the evidence the State points to either (1) simply evidence of Watkins's ire towards his arresting or (2) dependent on James's credibility. Because the State relies on the same evidence to argue that Watkins is not entitled to a new trial even if the *Plude* criteria are met, Watkins discusses the evidence in the following section.

B. *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.*

The State argues that even if the evidence that James repeatedly presented himself as a law enforcement official meets the four *Plude* criteria, Watkins is not entitled to a new trial, because the evidence against Watkins was "overwhelming." (State Br. 16). However, the evidence that the State claims is independent of James and supports the claim that Watkins and James conspired to assassinate E.M. is either hopelessly ambiguous, a simple expression of

anger towards the arresting officer, or not actually independent of James.

The State first points to a jail call where Watkins "says that he wanted Officer E.M. id. get shot in the face while she was on duty." (State Br. 13). Here is transcript of the call referenced by the State:

> [inaudible] and then she fucking lies. She said they said that I (inaudible) they said that I hit the police, they said that I hit the police officer in the head, and that I lied and said that I injured the other police officer, so I got those bitches names, too, and I hope they fucking get shot in the fucking face while they on duty.

(R. 175:381; 159:1.) This call took place on July 13, 2015, shortly after Watkins's arrest and approximately 10 months before the alleged conspiracy with James in late May 2016. Watkins is clearly only expressing anger at being arrested, a sentiment probably shared by most in his situation. There is no hint of Watkins engaging in a conspiracy to murder E.M.

The State next points to Watkins having E.M.'s personal information in his jail cell. (State Br. 13). Contrary to the State's suggestion, Watkins did not seek out this information. The information was provided by *the State* to Watkins's attorney in the police reports and other material disclosed through discovery. (R. 175:235; 177:91–94). Watkins's attorney then forwarded the discovery to Watkins. (*Id.*)

Next, the State cites a jail call where Watkins says he has a plan to make a "mother fucker disappear and shit." (State Br. 13).

> Hey, and I got the perfect plan to make motherfucker disappear and shit. Oh, my God, this sound so hectic. I can't wait until I get out. So whenever you come up here for a visit or some shit I (inaudible) this shit you going to be like damn, bro (inaudible) that mother fucker scheming.

(R. 175:385–86; 161:1). First, this call took place on March 1, 2016, almost three months before the first alleged note to James on May 28, 2016. (R.176:95-100; R.70). Second, Watkins is talking about some kind of "plan" for when he gets out of jail. Thus, the timing and the substance of the call indicate that Watkins is not discussing the alleged conspiracy with James to hire someone to kill E.M. while Watkins is still in jail.

The State then references "several recorded conversations between Watkins and [James] that were played for the jury, where the jury was able to assess the meaning of the conversations and the things Watkins said." (State Br. 13, *citing* R. 146:2, 4–5). With one exception the State does not cite, let alone quote, any of these "conversations," so Watkins cannot explain why the State is misinterpreting them.

The only conversation between James and Watkins that the State cites was actually a conversation between James and his ATF agent

handler, who clearly misspoke when testifying. (State Br. 13 *citing* R. 176:221). When describing James's demeanor about wearing a wire, the agent testified:

> a lot of times we said, "If you do this, you know, there's no going back." And Watkins [*sic*] would say, "Yeah, I know what I'm getting into."

(R. 176:220-221). Clearly, the agent was testifying that *James* would say he knew what he was getting into by wearing a wire, not that *Watkins* would say that he knew what he was getting into by agreeing to the conspiracy.

The State next argues that "[t]he evidence includes a video of Watkins and [James] meeting at the jail." (R. 176:246.) However, the two were in the same jail pod, so the fact that they would sit together at times is not indicative of the two conspiring to murder a police officer.

Finally, the State claims that there is a recorded jail where "Watkins solicited [the ATF agent] to commit the homicide for thirty dollars" and "agreed to release the money to [James's] wife to commit the homicide." (State Br. 13, *citing* R. 177:32–33). Tellingly, the State does not cite to the actual jail call. That is because there is no such call. Watkins and the ATF agent discuss Watkins hiring the agent to fix his car, and James testified that this was code for murdering E.M. (R. 176:201-207). There was no evidence other than James's testimony suggesting that Watkins understood that he was

hiring the undercover agent to murder a police officer, and not actually fix his car, for $30.

Accordingly, the evidence that Watkins and James engaged in this conspiracy as far from "overwhelming" – it was non-existent, except for testimony from James himself.

The jury may have had its doubts about James's credibility based on the deal he cut with law enforcement officials as well as his habit to embellish his life story. Still, the jury may have concluded that it was too far-fetched for James to have concocted an elaborate scheme to falsely claim that Watkins wanted him to broker a hit on E.M.

However, the newly discovered evidence of James repeatedly presenting himself as a police officer – and in one episode, doing so in an attempt to defraud a bank – demonstrates that James is capable of dreaming up and carrying out elaborate hoaxes. In addition, it suggests a motive for James to conjure up a story about Watkins wanting to hire someone to assassinate E.M.: his bizarre fixation on appearing to be a member of law enforcement.

Given the lack of evidence against Watkins independent of James's testimony, there is a reasonable probability that if the jury had heard about James's multiple efforts to impersonate a police officer it would have found that the State failed to meet its burden of proof. Accordingly, Watkins is entitled to a new trial.

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

A. *Joinder of the assault and conspiracy charges was in error because they were not "connected together."*

The State abandons the rationale for joinder in the circuit court – that the charges were of "the same or similar character" – and now argues that joinder was appropriate because the charges were "connected together." (State Br. 20). The State also applies the wrong legal standard, asserting that the circuit court "properly exercised its broad discretion in joining the cases." (State Br. 21). Joinder decisions are reviewed de novo. *State v. Salinas*, 2016 WI 44, ¶ 30, 369 Wis. 2d 9, 35–36, 879 N.W.2d 609, 622

Regardless, the Assault and Conspiracy charges were not "connected together."

> In assessing whether separate crimes are sufficiently "connected together" for purposes of initial joinder, we look to a variety of factors, including but not limited to: (1) are the charges closely related; (2) are there common factors of substantial importance; (3) did one charge arise out of the investigation of the other; (4) are the crimes close in time or close in location, or do the crimes involve the same victims; (5) are the crimes similar in manner, scheme or plan; (6) was one crime committed to prevent punishment for another; and (7) would joinder serve the goals and purposes of Wis. Stat. § 971.12.

Salinas, 2016 WI 44, ¶ 43.

State first relies on the third factor, arguing that the Conspiracy charges arose "out of the investigation of the other." (State Br. 21). However, this is not true. The Assault charges fit this standard, as the assault against E.M. arose out of her investigation of the assault against V.C. However, law enforcement officials were not investigating either of the Assault charges when the Conspiracy charges arose.

The State next argues that the charges were "close in time or close in location." The State correctly notes that Watkins erroneously stated that the Assault and Conspiracy charges arose more than one year apart. They were actually eleven months apart, as the Assault occurred on June 27, 2015, and the alleged Conspiracy was between May 28 and June 9, 2016. (R. 31). Still, the two charges cannot be said to be "close in time."

The third factor cited by the State is that "one crime [was] committed to prevent punishment for another." However, the State cannot point to any evidence that the purpose of E.M.'s assassination was to avoid punishment on the Assault charges. E.M. was not a witness of the alleged assault against V.C. In addition, there was a second officer present at the alleged assault against E.M.

Finally, the State argues that joinder would serve the goals and purposes of Wis. Stat. § 971.12 because all the charges "were resolved in one trial,"

and it would allow E.M. to only testify once. First, by definition joinder allows all the issues to be "resolved in one trial," so that does not explain why the charges are "connected together." Second, the State does not explain why E.M. would have to testify at all at a trial on the Conspiracy charges. She was not involved in the conspiracy investigation at all. And while she could testify that she had arrested Watkins, there were numerous other witnesses who could testify to that fact, such as her partner during Watkins's arrest.

The misjoinder of the charges was not harmless. As discussed below and in Watkins's initial brief, the evidence against Watkins on the Conspiracy charge was extremely weak compared to the evidence supporting the Assault charges.

B. *Even if the statutory requirements for joinder were met, joinder prejudiced Watkins and he was entitled to having the charges severed.*

1. Watkins did not waive the severance argument.

The State claims that Watkins has waived his severance argument because he did file a motion to sever after the court ordered the Assault and Conspiracy charges. (State Br. 23-24). But Watkins explicitly argued in response to the State's "motion to consolidate" that "[e]ven where joinder is proper, a defendant may move to sever the counts on the basis of prejudice." (R. 20:15-17). Watkin then quoted the

severance provision, *i.e.* Wis. Stat. § 971.12(3) and explained why the charges should be severed even if the court concluded that the requirements for joinder were met. (Id.)

The State takes an absurdly formalistic approach, arguing that Watkins waived the severance argument because he did not file a separate document called a "motion to sever" after the court issued its joinder decision. (State Br. 23-24). However, an issue is preserved for appeal when the circuit court has had an opportunity to rule on the same issue. *See State v. Bustamante*, 201 Wis. 2d 562, 572, 549 N.W.2d 746, 750 (Ct. App. 1996). While issues may be raised with formal "motions," such as a motion in limine, issues may be raised on other fashions, such as an objection at trial. *Id*. There is no requirement that an issue be raised in a separate motion.

Indeed, Watkins would not have a claim for severance unless and until the court ruled that the charges should be joined. According to the State's logic, Watkins should not have addressed severance at all in his opposition to the State's joinder motion, and instead should have file a motion to sever after the court ruled on the joinder motion. This obviously is not an efficient use of judicial resources. In any event, waiver is a rule of judicial administration that should not be applied in these circumstances. *State v. Hayes*, 2004 WI 80, ¶ 21, 273 Wis. 2d 1, 11, 681 N.W.2d 203, 208.

2. *Court erroneously exercised its discretion by failing to sever the charges.*

The State acknowledges that the circuit court failed to rule on Watkins's severance argument, and so offers its own rationale for why severance was not appropriate. (State Br. 25-26). The State relies exclusively on the admissibility of certain evidence in each case under the other act test of *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998), without acknowledging Watkins's argument that such admissibility is only one factor in the analysis. (Watkins Br. 35-40). In addition, much of the State's *Sullivan* analysis relies on conclusory statements, such as about the relevance of the evidence, and fails to address Watkins's specific arguments regarding the specific evidence. (*See* Watkins Br. 35-40). Accordingly, Watkins relies on his initial brief for the severance argument.

CONCLUSION

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

Dated this 16th day of November, 2020.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,979 words.

CERTIFICATE OF COMPLIANCE

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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 November, 2020.

Signed:

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