STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2023AP1273-CR
2023AP1274-CR
2023AP1275-CR
2023AP1276-CR
2023AP1277-CR
2023AP1278-CR
2023AP1279-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL ROBINSON,

Defendant-Appellant.

On Appeal from the Judgment of Conviction and Decision and Order Denying Postconviction Relief, Entered in the Rock County Circuit Court, the Honorable Karl Hanson, Presiding.

BRIEF OF DEFENDANT-APPELLANT

LEO DRAWS
Assistant State Public Defender
State Bar No. 1131806

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2123
drawsl@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

OTHER AUTHORITIES CITED

ISSUES PRESENTED

1. Is Daniel Robinson entitled to a new sentencing hearing because the circuit court demonstrated the appearance of bias and prejudged the outcome of the sentencing hearing?

The circuit court answered no. This Court should reverse the circuit court's order denying Mr. Robinson's postconviction motion and order a new sentencing hearing before a different judge.

2. Should Mr. Robinson's convictions for bail jumping in Counts 5-7 of Rock County Case No. 20CF602 be reversed for lack of sufficient evidence because he was acquitted of the underlying offense?

The circuit court answered no. This Court should reverse the convictions.

3. Did Mr. Robinson present a new factor that warranted modification of his sentence?

The circuit court answered no. This Court should reverse the circuit court's order denying the postconviction motion.

4. Did the circuit court err by denying trial counsel's motion to sever the bail jumping charges from the remaining misdemeanor charges in the cases tried before the jury?

The circuit court denied the motion. This Court should reverse the denial of the motion to sever charges and grant a new trial.

5. Did the circuit court err when it allowed the state to present an extremely low-quality recording of a recording of a recording and jail call audio turned over at the last-minute?

The circuit court answered no. This Court should reverse and remand for a new trial.

6. Did the circuit court err when it denied a motion for a mistrial after the state, without any evidence, argued to the jury that Mr. Robinson forced a victim into a coercive sexual relationship?

The circuit court denied the mistrial motion. This Court should reverse and remand for a new trial.

7. Should Mr. Robinson receive a new trial in the interest of justice due to cumulative errors in the trial?

While the issue was not raised in the circuit court, the circuit court denied or overruled defense concerns set forth in Arguments IV, V, and VI.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. It is anticipated that the issues will be sufficiently addressed in the briefs. Publication is not warranted because the issues raised involve the application of established legal principles to the facts of this case.

STATEMENT OF THE CASE

From November 26, 2018 through April 6, 2021, the state charged Daniel Robinson with a total of 12 criminal cases in Rock County. Robinson was convicted and sentenced in seven of these 12 cases. For this Court's convenience, details regarding those seven cases are set forth in the table below:

Case Number	**Count Number**	**Name of Charge**	**Disposition**
18CF1097	1	Possession with Intent to Deliver Cocaine	Guilty Plea
20CF604	1	Manufacture/Deliver Cocaine	Guilty Plea
21CF329	2	Recklessly Endangering Safety	Guilty Plea
21CF330	1	Witness Intimidation	Guilty Plea
20CF361	1	Misdemeanor Battery	Guilty Jury Verdict
	2	Disorderly Conduct	Guilty Jury Verdict
	3	Bail Jumping	Guilty Jury Verdict
	4	Bail Jumping	Guilty Jury Verdict
	5	Bail Jumping	Guilty Jury Verdict
	6	Bail Jumping	Guilty Jury Verdict
20CF395	1	Disorderly Conduct	Guilty Jury Verdict
	2	Bail Jumping	Guilty Jury Verdict
	3	Bail Jumping	Guilty Jury Verdict
	4	Bail Jumping	Guilty Jury Verdict
	5	Bail Jumping	Guilty Jury Verdict
20CF602	1	Disorderly Conduct	**Not Guilty Jury Verdict**
	2	Misdemeanor Battery	Guilty Jury Verdict
	3	Disorderly Conduct	Guilty Jury Verdict
	4	Bail Jumping	Guilty Jury Verdict
	5	Bail Jumping	Guilty Jury Verdict
	6	Bail Jumping	Guilty Jury Verdict
	7	Bail Jumping	Guilty Jury Verdict

20CF602(cont.)	8	Bail Jumping	Guilty Jury Verdict
	9	Bail Jumping	Guilty Jury Verdict
	10	Bail Jumping	Guilty Jury Verdict
	11	Bail Jumping	Guilty Jury Verdict

All charges against Robinson were resolved over the course of two different jury trials and a plea agreement.

On January 6, 2020, in Rock County Case 18CF1122, a jury acquitted Robinson of all three charges tried against him, and a later-added fourth charge was dismissed and read-in to Robinson's subsequent plea agreement. (R1. 116:3).[1]

[1] This brief contains references to the records in seven cases. In an effort to clarify as much as possible, the records will be labelled chronologically:

"R1" refers to the appellate record in 2023AP1273 (which corresponds to Rock County 18CF1097).

"R2" refers to the appellate record in 2023AP1274 (which corresponds to Rock County 20CF361).

"R3" refers to the appellate record in 2023AP1275 (which corresponds to Rock County 20CF395).

"R4" refers to the appellate record in 2023AP1276 (which corresponds to Rock County 20CF602).

"R5" refers to the appellate record in 2023AP1277 (which corresponds to Rock County 20CF604).

"R6" refers to the appellate record in 2023AP1278 (which corresponds to Rock County 21CF329).

"R7" refers to the appellate record in 2023AP1279 (which corresponds to Rock County 21CF329).

On March 15-17, 2021, Robinson faced another jury trial in Rock County Cases 20CF361, 20CF395, and 20CF602. (R4. 156,155,158).

Finally, Robinson entered a plea agreement as to all remaining cases on June 11, 2021. (R1. 83,122).

The circuit court sentenced Robinson to 43 years of imprisonment, consisting of 22 years of initial confinement and 21 years of extended supervision. (R4. 143:66).

The circuit court denied all claims in Robinson's postconviction motion. (R1. 150).

STATEMENT OF FACTS

Cases charged against Robinson

From November 26, 2018 through April 6, 2021, the state charged seven cases against Robinson that comprise this appeal. The state also charged Robinson with an additional five cases during this time period, but all charges in those cases were entirely dismissed and read-in as part of a later plea agreement. (R1. 83:2).

First jury trial

The first major event in these cases was a one-day jury trial in Rock County Case 18CF1122. (R1. 116). On the day of trial, the state added a fourth count that was later dismissed and read-in as a part of Mr. Robinson's plea agreement. (R1. 83:2; R1. 116:4).

There, the state sought convictions for two counts of second degree recklessly endangering safety by use of a dangerous weapon and one count of disorderly conduct. (R1. 116:85-86). The state's evidence for these charges was that Robinson was driving at the posted speed limit (25 mph) when a portion of his car crossed the center line for a "couple of seconds" and Robinson smiled afterward. (R1. 116:100-107). Robinson was acquitted by the jury after 21 minutes of deliberations. (R1. 116:150-153).

Pretrial motions leading to second trial

Prior to the second trial, the state sought to join four Rock County Cases: 19CF727, 20CF361, 20CF395, and 20CF602. (R4. 11). The state's theory was that all cases involved domestic violence and the same victim within a relatively short period of time. (R1. 111:3-5). Trial counsel noted that the 2019 case involved a different alleged victim, and the court ultimately allowed joinder of the three 2020 cases. (R1. 111:6,26).

Both parties filed several other important motions. The state moved to join a witness intimidation case that was charged 19 days prior to trial and to use evidence from that case at trial. (R4. 43; R4. 36). Trial counsel moved to sever the 16 bail jumping charges from the six misdemeanor charges for the three cases set for trial. (R2. 39:1). Trial counsel also asked the court to prohibit the use of a recording of a recording of a Ring doorbell camera

recording that allegedly depicted incidents from Rock County Case 20CF602. (R4. 19:3).

Admissibility of jail call audio

The newly-charged case the state sought to join and admit evidence of at trial involved a call to the alleged victim, J.R., made by Robinson while he was in jail. (R1. 120:210; R4. 120). The transcript of the relevant call showed Robinson inquiring about the state's investigation and whether J.R. was cooperating with it. (R4. 120). Robinson had made the calls from a different inmate number than his own. (R4. 155:22-23).

At the time the state filed its motion, trial counsel had not received any information about the call that was the basis of the witness intimidation charge. (R4. 157:3). Discovery related to all calls Robinson had made while in jail continued to be given to trial counsel as late as the morning of trial. (R4. 155:24).

The court denied the state's motion to join the new case to the three set for trial as arraignment had only occurred 10 days before the scheduled trial. (R1. 120:261). The court stated that there was not enough time for trial counsel to review all potential information related to the calls before the trial. (R1. 120:261-1262).

On the first day of trial in the other cases, the state renewed its motion to admit evidence of the jail calls. (R4. 156:121-122). Trial counsel argued several

ways the admission of the jail calls would unfairly prejudice Robinson, and the court agreed. (R4. 156:127-129). It denied use of the jail calls, "finding that the admission of those tape recordings at this time would essentially equate to [ ] a substantial prejudice." (R4. 156:141-143). The court also denied a defense motion for a continuance because its denial of the admission of this evidence resolved the issue. (R4. 156:143). After additional argument, however, the circuit court ultimately found that the state could play the jail call, which was subsequently played several times during trial. (R4. 155:32,47; 156:143-145,149-151).

Motion to sever felony bail jumping charges

Trial counsel filed a motion to sever the bail jumping charges from the other charges for purposes of trial. They argued that the sheer number of bail jumping charges was unduly prejudicial to Robinson and that it would make a fair trial impossible given the risk that the jury would cumulate the evidence against him. (R4. 34).

The state's argument against severing the charges relied on the fact that Robinson had already served a significant amount of time in pre-trial custody which would cover any potential sentences on the misdemeanor charges. (R1. 115:14). The court denied severance. (R1. 115:20).

Admissibility of the Ring doorbell recording

Prior to trial, defense counsel sought to prohibit the state from playing an "iPod recording of [J.R.]'s cell phone recording of what [J.R.] claims is a video from a [R]ing doorbell showing Mr. Robinson dragging her off a porch." (R4. 19:3). The recording at issue was purportedly evidence of two of the misdemeanor charges against Robinson. (R4. 2:1-2,4; R1. 120:233-234).

At the motion hearing, the state presented evidence showing that the recording it sought to introduce was not the original. Rather, the process of obtaining the recording sought to be introduced was as follows: the owner of the Ring camera played the recording on her cell phone while J.R. and her sister took a cell phone recording of that recording. (R1. 120:122). Later on, Officer Ryan Marro with the Beloit Police Department used an iPod to record that recording of the recording–which is what the state sought to introduce. (R1. 120:131-133). Vicky Hamilton, the owner of the doorbell camera, admitted she could not visually recognize anyone in the video. (R1. 120:114). J.R. testified that the quality of the recording the state sought to introduce was worse than what she initially saw. (R1. 120:101).

Defense counsel argued several grounds for exclusion of the recording: the video was extremely blurry, it had no date or time stamp, it consisted of 19 seconds of what would have been a much longer

video, it contained no metadata to confirm it had not been edited, it ran afoul of the best evidence rule and rule of completeness, and the probative value was small while the danger of unfair prejudice was high. (R4. 19:3; R1. 120:214-216,219-220). The court ruled the recording was admissible. (R1. 120:276-277).

Second jury trial

As set forth above, the court allowed joinder of three cases for trial. (R1. 111:28). The first alleged misdemeanor battery, disorderly conduct, and four counts of felony bail jumping, all occurring around March 21, 2020. (R2. 40:1-2). The second alleged disorderly conduct and four counts of felony bail jumping, all occurring around May 6, 2020. (R3. 38:1-2). The third alleged two counts of disorderly conduct, misdemeanor battery, and eight counts of felony bail jumping, all occurring around July 4 or 5, 2020. (R4. 35:1-3). The trial took place over three days. (R4. 156,155,158).

The state began its case by calling Christine Gunderson, who testified that a woman came up to her on March 21, 2020, and told Ms. Gunderson that she had escaped from her boyfriend's car at a gas station nearby. (R4. 156:194-195). Ms. Gunderson said the woman's eye was swollen and bruised. (R4. 156:196).

J.R. then testified. (R4. 155:52). When asked if she had made a false report to Rockford police in 2015, she claimed the report was not false. (R4. 155:122-123). J.R. then stated that she never admitted to filing

a false report to police in court before recanting that she had done so. (R4. 155:123).

J.R. stated that in March 2020, Robinson struck her in the eye, nose, and stomach. (R4. 155:60). J.R. ran out of Robinson's car at a gas station and met Ms. Gunderson nearby. (R4. 155:62,64).

J.R. next testified that on May 6, 2020, she was staying with her friend Ashauntee Spates when Robinson pulled into the driveway and yelled at her. (R4. 155:76-77). J.R. stated that she thought Robinson was going to hit her, but he did not. (R4. 155:78). Still, she said she was disturbed by the conduct. (R4. 155:79).

Next, J.R. stated that on July 4, 2020, Robinson dragged her off of Vicky Hamilton's porch. (R4. 155:80). J.R. said this injured her arm, leg, and foot as a result. (R4. 155:87). J.R. did not call the police but went back to Ms. Hamilton's house the next day. (R4. 155:90-91). J.R. obtained a copy of the recording of Ms. Hamilton's Ring doorbell camera by using a cell phone to record the video off of Ms. Hamilton's cell phone. (R4. 155:92-93). At this point, the state played the recording, which J.R. stated she recognized. (R4. 155:100).

J.R. then testified that Robinson had called her to discuss the cases and her testimony. (R4. 155:100). During these calls, J.R. said that Robinson asked if she was going to leave the case alone. (R4. 155:100). The state then played the recording of the phone call. (R4. 155:103-104).

Next, the state called Beloit police officer Jacob Mielke. (R4. 150:140). He was dispatched on March 21, 2020, where he met with Ms. Gunderson and J.R. and noted an injury to J.R.'s eye. (R4. 155:140-141). At no point did Mielke try to corroborate what J.R. had said about Robinson. (R4. 155:159).

Ashauntee Spates testified that in May 2020, Robinson had pulled up to her house while yelling and screaming. (R. 155:164-165). Spates also testified that Robinson had sent her a letter to try to dissuade her from testifying but that she no longer had the letter. (R4. 155:167, 170).

Beloit police officer Ryan Marro testified that while he was on duty on July 5, 2020, J.R. came in and showed him the Ring video recording. (R4. 155:213-214). Marro said that he recognized Robinson's hairline from the video. (R4. 155:217). Marro did not seek out additional witnesses to confirm J.R.'s story. (R4. 155:219).

Ms. Hamilton also testified, stating that she recognized J.R. from the video when the state played it but did not recognize the man in the video. (R4. 155:177).

J.R.'s mother ("R.R.") testified that on July 4, 2020, J.R. called her and that she heard Robinson making threats. (R4. 155:194,196).

In its closing argument, the state made the following comments:

> "[Trial counsel] painted a picture of someone who was, you know, just doing the right thing, that he was helping [J.R.] with her food and clothing, a place to stay. [Trial counsel] left out the part, however, that as an exchange for all of that, [J.R.] would have to have sex with someone who was 30 years older than she was[.]" (R4. 158:105).

Trial counsel immediately objected to the remarks, arguing that evidence of such a quid pro quo never came out at trial, no sexual relationship was mentioned by any party, and the state lacked a good faith basis for making such an argument. (R4. 158:105-106).

The state argued that it was a fair inference, but the court strongly disagreed: "the inference was well beyond the logic believed from the testimony adduced at trial." (R4. 158:107). In sustaining the objection, the court added, "there was no testimony here in the trial that would lead to a reasonable inference that sex was given in exchange or demanded in exchange for such items." (R4. 158:107).

Following the court's decision, trial counsel moved for a mistrial. (R4. 158:108). Counsel argued that the jury could not unhear the wrongful comment and Robinson would not be able to get a fair trial after the violation. (R4. 158:108).

The court denied the motion and decided it would give an instruction. (R4. 158:109). The jury was instructed that the evidence did not indicate such an arrangement and it should "disregard any statement

that may have made such an allegation or inference." (R4. 158:109).

During its deliberations, the jury asked to see the Ring video recording. (R4. 158:156). The jury came back into the courtroom where the video was played five times. (R4. 158:164-168).

Ultimately, the jury found Robinson guilty of 21 of the 22 counts against him—all but one count of disorderly conduct from July 4, 2020. (R4. 158:170-202).

Plea hearing

Following the trial, Robinson entered a plea agreement that resolved the remaining cases. (R1. 83; R1. 122). In total, Robinson pled guilty to two counts related to cocaine possession; one count of recklessly endangering safety; and one count of witness intimidation. (R1. 83:1,3). All other charges were dismissed and read-in, and the state agreed to recommend concurrent time between the plea cases and the trial cases. (R1. 83:3).

Carter's sentencing hearing

About an hour prior to Robinson's sentencing hearing, the court sentenced Steffon Carter in Rock County Case 20CM611. (R1. 144:12-32; App.4-24). Carter's sentencing hearing involved the same judge but did not involve the same defense attorney or prosecutor. (R1. 144:12; App.4). Carter's charges stemmed from domestic violence incidents from

September 2020 to April 2021. (R1. 144:16-17; App.8-9). During Carter's sentencing hearing, the court twice referenced Robinson's upcoming sentencing as a warning to Carter. (R1. 144:22-23,30-31; App.14-15,22-23). The court admonished Carter:

> "If I had you sit here in court, Mr. Carter, over the course of a day or a week, I could show you men who are in their 30's, their 40's, their 60's, and their 70's, in fact, I'm sentencing one at 10 o'clock today that it would be to your benefit to be sitting in the back of the room during that hearing because you're at a point where you can make some change here and you can try to understand what it means to respect others and you can take a look at what it is when somebody goes through life without respect for other people. And it's a very lonely experience, and it's one that usually involves wearing orange and sitting in the chair that you're in right now.
>
> If that's where you want to be in your 50's, that's a choice you can make, but it's going to be a really, really bumpy road and it's not going to be a pleasant one for you or for the people that you victimize along the way." (App.14-15).

Notably, Robinson was 50 years old at the time of his sentencing hearing, and, after sentencing Carter to jail, the court instructed him to stay and witness Robinson's sentencing hearing:

> "Mr. Carter, I'm inviting you to come back to court at 10 o'clock today to sit in the back of one of those brown chairs, if the jail has availability for it, because I think it would be to your benefit to hear

> the sentencing hearing for someone who is about 50 years old and he has not heeded the changes along the way and is facing sentencing for conduct that started in circumstances incredibly similar to yours and simply just never learned that lesson. If they're able to orchestrate that, I'd like to have you listen to that sentencing hearing today at 10:00. If not, we'll hope that you're going to be able to gain all the lessons you need on your own."

(R4. 143:44; App.22-23).

Robinson's sentencing hearing

The state recommended a sentence of 27 years of initial confinement and 27 years of extended supervision for both the jury trial cases and the plea cases. (R1. 98:7). The state noted that there was a "minefield of evidentiary decisions that the Court had to make" and was structuring its recommendation such that even if Robinson were successful on appeal, he would still serve the same amount of time. (R1. 98:9). The state also mentioned that Robinson had different children with different women, which drew an objection from trial counsel. (R1. 98:16-17). The court overruled the objection, reasoning that it was relevant to Robinson's background and the example he set for his children. (R1. 98:17).

Trial counsel argued that the state's recommendation was overly harsh as it was effectively a life sentence at Robinson's age and that the majority of the charges were misdemeanors with bail jumping charges attached. (R1. 98:31).

In giving its sentencing decision, the court called into question Robinson's relationships with his sons and their mother by stating that Robinson's son had appeared in court in a criminal matter and questioned whether it was due to Robinson's negative influence. (R1. 98:59-60). The court gave a lengthy, unclear proclamation but ultimately issued a 43-year sentence, consisting of 22 years of initial confinement and 21 years of extended supervision. (R1. 98:66).

Postconviction proceedings

Robinson filed a timely postconviction motion raising three claims. (R1. 144). Robinson argued that he was entitled to a new sentencing hearing before a different judge because the court's comments at Carter's sentencing hearing showed judicial bias. (R1. 144:5-7). Robinson also argued that three of the bail jumping convictions should be reversed because he was acquitted of the underlying offense. (R1. 144:8). Finally, he argued that his sentence should be modified based on the existence of a new factor. (R1. 144:9-10).

The court denied all claims. (R1. 144:28; R1. 150). Robinson now appeals.

ARGUMENT

I. Robinson is entitled to resentencing before a different judge because the sentencing court's remarks demonstrate an appearance of judicial bias.

Prior to Robinson's sentencing hearing, the sentencing court made comments showing that it had already made up its mind about Robinson and that it was going to use Robinson's sentence as an opportunity to teach Carter a life lesson. (App.14-15,22-23).

In particular, the court sentenced Carter and Robinson on the same day. (App.4; R4. 143). At Carter's sentencing hearing, the court clearly referenced Robinson's upcoming sentencing hearing twice on the record. (App.14-15,22-23). Robinson and Carter's cases had no connection to one another, except that both individuals were sentenced by the same judge on the same date. Still, the court stated that Carter should stay behind to watch Robinson's sentencing hearing so that it could use Robinson to make sure Carter would "be able to gain all the lessons" he needed. (App.22-23). The court's focus on using Robinson as an example to teach Carter a lesson would lead a reasonable person to believe that the court had made its decision about sentencing prior to Robinson's hearing and that nothing said or introduced at that hearing would've changed its mind.

A. Standard of review.

When a circuit court's partiality can be questioned, it is a matter of law that is reviewed independently. *State v. Goodson*, 2009 WI App 107, ¶7, 320 Wis.2d 166, 771 N.W.2d 385; *State v. Rochelt*, 165 Wis.2d 373, 379, 477 N.W.2d 659 (Ct. App. 1991).

B. Applicable law.

A fair and impartial decisionmaker is fundamental to due process. *Goodson*, 320 Wis.2d 166, ¶8; *State v. Gudgeon*, 2006 WI App 143, 295 Wis.2d 189, ¶11, 720 N.W.2d 114; *see also State v. Washington*, 82 Wis.2d 808, 266 N.W.2d 597 (1978) ("Due process requires a neutral and detached judge. If the judge evidences a lack of impartiality, whatever its origin or justification, the judge cannot sit in judgment."). While a judge is presumed to be fair and impartial, that presumption is rebuttable. *Gudgeon*, 295 Wis.2d 189, ¶20.

Determining whether an individual's due process right to an impartial and unbiased judge has been violated requires two inquiries: one into the judge's subjective bias and another into the judge's objective bias. Either sort of bias can violate one's due process right to an impartial judge. *Goodson*, 320 Wis.2d 166, ¶8; *Gudgeon*, 295 Wis.2d 189, ¶20.

Robinson only asserts an objective bias claim, as the court did not disqualify itself. *See State v. McBride*, 187 Wis.2d 409, 415, 523 N.W.2d 106 (Ct. App. 1994) (If a judge does not disqualify himself, he is presumed

to have believed himself capable of acting impartially.).

Objective bias can be shown in two ways: (1) by showing the appearance of bias, and (2) by showing actual bias. *Goodson*, 320 Wis.2d 166, ¶9. Robinson asserts an objective bias claim based on the appearance of bias. The appearance of bias exists "when a reasonable person could question the court's impartiality based on the court's statements." *Id.* *See Gudgeon*, 295 Wis.2d 189, ¶24 (Objective bias is demonstrated by the appearance of bias "whenever a reasonable person-taking into consideration human psychological tendencies and weaknesses-concludes that the average judge could not be trusted to 'hold the balance nice, clear and true' under all the circumstances."). "The appearance of bias violates due process when there is 'a great risk of actual bias.'" *State v. Herrmann*, 2015 WI 84, ¶40, 364 Wis.2d 336, 867 N.W.2d 772 (quoting *Gudgeon*, 295 Wis.2d 189, ¶23).

C. The court's comments about Robinson show judicial bias.

Not only were the sentencing court's comments unbecoming of a judge, the comments at Carter's sentencing hearing created an appearance of bias because they would lead a reasonable person to believe that the court had made up its mind before Robinson's sentencing hearing as to what the outcome would be. *See Goodson*, 320 Wis.2d at ¶17. The comments indicate a "great risk" that the court had determined

that it was going to impose a lengthy sentence and set an example, well before Robinson was able to present any argument at sentencing. *Herrmann*, 364 Wis.2d at ¶40.

Robinson's case and Carter's case had no connection to one another. Still, the court said it wanted Carter to stay behind to watch Robinson's sentencing hearing so that it could use Robinson's sentence to make sure Carter would "be able to gain all the lessons" he needed. (App.22-23). Even more troubling, these comments refrained from directly naming Robinson and took place outside the presence of Robinson, his attorneys, and the prosecutor. (App.4,14-15,21-22).

The court's focus on using Robinson as an example to teach Carter a lesson would lead a reasonable person to believe that the court had made its decision about sentencing prior to hearing arguments and that nothing said or introduced at Robinson's sentencing hearing would have changed its mind.

Additionally, the court's comments created an appearance of bias because a reasonable person, having heard the remarks, would question the court's impartiality. *Goodson*, 320 Wis.2d 166, ¶9.

In denying this claim at the postconviction motion hearing, the circuit court, while acknowledging the correct test, ultimately applied an incorrect standard. (R1. 153:13-14,18). Instead of examining whether a reasonable person, hearing the court's

remarks at Carter's sentencing hearing, would question the court's impartiality toward Robinson, the court stated that its intention was to simply give Carter life guidance. (R1. 153:18).

In conclusion, the court's remarks had the appearance of bias both because they indicate that the court had made up its mind to issue a lengthy sentence before the sentencing hearing even took place and because the remarks show that the court was unable to render fair judgment. The court's focus on wanting to teach Carter a lesson during Robinson's sentencing hearing indicates a serious risk of actual bias.

Had a reasonable person sat in the Rock County courtroom that day and listened to the court's comments to Carter, then stayed for Robinson's sentencing hearing, only one plausible view could be derived—that the court was biased against Robinson and was going to use him as an example to teach "lessons" to others. Even more troubling is the fact that the court went out of its way to avoid naming Robinson directly and made these comments outside the presence of Robinson, his attorneys, and the prosecutor on Robinson's case. This Court should find the appearance of bias in such a scenario.

The remedy for a violation of Robinson's right to an impartial judge is a new proceeding before a judge who is impartial. *See Goodson*, 320 Wis.2d 166, ¶18; *Gudgeon*, 295 Wis.2d 189, ¶30.

II. This Court should reverse the convictions for the bail jumping charges in Counts 5-7 of 20CF602.

In order to prove Robinson's guilt of the bail jumping charges as outlined in Counts 5-7 of 20CF602, the state needed to prove the underlying disorderly conduct charge in Count 1. (R4. 98:30,36-40). The charges in Counts 5-7 were predicated on Robinson having committed the disorderly conduct as alleged on July 4, 2020. (R4. 35:1-2). Ultimately, the jury acquitted Robinson of that charge. (R4. 87).

Given that Robinson was acquitted of that underlying offense, the associated bail jumping convictions should be reversed for lack of sufficient evidence.

A. Standard of review.

"[A]n appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Hayes*, 2004 WI 80, ¶56, 273 Wis.2d 1, 25, 681 N.W.2d 203, 215 (citing *State v. Poellinger*, 153 Wis.2d 493, 507, 451 N.W.2d 752 (1990)).

B. Applicable law.

Felony bail jumping requires the state to prove that an individual, having been charged with a felony and released from custody, intentionally fails to comply with the terms of their bond. Wis. Stat. § 946.49(1)(b). Here, the term of bond that was allegedly violated was the commission of a new crime, specifically the offense outlined in Count 1. (R4. 35:1-2).

When a bail jumping charge is based upon an individual committing a new offense and that individual is not convicted of that new underlying offense, the conviction for that bail jumping cannot stand. *See State v. Hansford*, 219 Wis.2d 226, 244-245, 580 N.W.2d 171, 179 (1998). "Absent a finding that the Defendant committed a crime, the State has not proved beyond a reasonable doubt an element of the bail jumping charge[.]" *Id.*

C. Because Robinson was acquitted of the underlying offense, the bail jumping convictions should be reversed as a matter of law.

To be clear, Counts 5-7 were linked to the allegation that a new crime was committed as charged in Count 1. As the basis for Counts 5-7, the state alleged that Robinson violated a bond condition by committing the offense of disorderly conduct on July 4, 2020, in Count 1. (R4. 98:36-40). However, the jury found Robinson not guilty of that disorderly conduct charge. (R4. 87).

Consequently, with respect to Counts 5-7, "as a matter of law [ ] the evidence, viewed most favorably to the State, does not support the Defendant's conviction for bail jumping." *Hansford*, 219 Wis.2d at 244-245. Because Robinson's convictions for bail jumping are entirely unsupported, this Court must reverse those convictions and remand for entry of judgments of acquittal on those counts, regardless of this Court's decision on Robinson's other arguments and requests for relief.

III. The circuit court erred in denying Robinson's motion for sentence modification.

As set forth in Argument II, this Court should reverse Robinson's convictions for the bail jumping charges in Counts 5-7 of 20CF602. Before the circuit court, Robinson argued that the reversal of those three felony charges would be a new factor warranting such modification. (R1. 177:7-10). The circuit court, while admitting that it was unclear about whether those convictions should be reversed, held that the convictions would stand. (R1. 153:25,27). Somehow, the court then held that even if the convictions were reversed (lowering the number of felony convictions in these cases), such reversal would not impact the sentence imposed. (R1. 153:28).

A. Standard of review.

The existence of a new factor is a question of law decided by this Court de novo. *State v. Harbor*, 2011 WI 28, ¶33, 333 Wis.2d 53, 797 N.W.2d 828.

Whether sentence modification is justified is a discretionary decision of the circuit court and reviewed for an erroneous exercise of discretion. *Id.*

B. Applicable law.

Sentencing decisions require a circuit court to exercise its discretion. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis.2d 535, 678 N.W.2d 197; *McCleary v. State*, 49 Wis.2d 263, 277, 182 N.W.2d 512 (1971). A court properly exercises its discretion when it uses a process of reasoning to apply the accepted legal standards to the facts of the record. *Gallion*, 270 Wis.2d 535, ¶19; *McCleary*, 49 Wis.2d at 277

As part of its exercise of discretion, a sentencing court must specify on the record the objectives of the sentence, the facts relevant to those objectives, the factors considered in arriving at the sentence, and how those factors fit the objectives and influenced the sentencing decision. *Gallion*, 270 Wis.2d 535, ¶¶40-43; *see also State v. Harris*, 2010 WI 79, ¶29, 326 Wis.2d 685, 786 N.W.2d 409. Further, the sentence imposed by the court must be the minimum amount of confinement consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant. *Gallion*, 270 Wis.2d 535, ¶44; *McCleary*, 49 Wis.2d at 276.

Even if a court has properly exercised its sentencing discretion, a circuit court has the inherent power to modify the sentence. Though it may not reduce a sentence merely upon "reflection" or second thoughts, a court may reduce a sentence on the basis

of a "new factor." *State v. Wuensch*, 69 Wis.2d 467, 472-473, 479-480, 230 N.W.2d 665 (1975); *State v. Franklin*, 148 Wis.2d 1, 8, 434 N.W.2d 609 (1989). A new factor is a fact or set of facts highly relevant to the imposition of sentence but not known to the court at the time of original sentencing, either because it was not then in existence or because, even though it was in existence, it was unknowingly overlooked by all of the parties. Thus, to prevail on a new factor claim the defendant must demonstrate both the existence of a new factor and that the new factor justifies modification of the sentence. *Harbor*, 333 Wis.2d 53, ¶¶35-44; *State v. Crochiere*, 2004 WI 78, ¶14, 273 Wis.2d 57, 681 N.W.2d 524.

The correction of erroneous or inaccurate information used at sentencing may constitute a "new factor" if the information was highly relevant to the imposed sentence and was relied upon by the trial court. *See State v. Norton*, 2001 WI App 245, ¶9, 248 Wis.2d 162, 635 N.W.2d 656.

C. Robinson's postconviction motion established a new factor that was highly relevant to his sentence.

As set forth in Argument II, it is clear that these three felony convictions for bail jumping should be reversed as a matter of law. *Hansford*, 219 Wis.2d at 244-245. Given that these convictions still have yet to be reversed, this is clearly new information that was not in existence or known at the time of Robinson's

sentencing. The first part of the *Harbor* test has been met.

The reversal of these convictions is also highly relevant to the imposition of Robinson's sentence. Despite the circuit court's ruling, it defies all logic to determine that the number of convictions is not highly relevant to the sentence they receive. (R1. 153:28).

The sentencing structure imposed by the court in these cases is fairly difficult to comprehend, with a total sentence of 22 years of initial confinement and 21 years of extended supervision. (R1. 98:62-66). In the case relevant to these bail jumping convictions (20CF602), Robinson was sentenced to four years of initial confinement and three years of extended supervision, running consecutively to all other cases. (R4. 137,141). That sentence was predicated on Robinson's convictions in that case—eight bail jumping charges and two domestic misdemeanors. (R4. 35). Given that Robinson should not have been convicted of three of the most serious charges in this case because he was acquitted of one of the misdemeanors, Robinson's overall sentence should have been adjusted downward.

Thus, the circuit court erred when it concluded that Robinson had not established that sentence modification was justified. (R1. 153:28). To the contrary, the new factor undermined the court's sentence because a criminal sentence is inherently based upon the type and number of convictions, and these reversed convictions necessarily influence the

"minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant." *McCleary*, 49 Wis. 2d at 263.

Because Robinson presented a new factor highly relevant to the imposition of his sentence, this Court should reverse the denial of the postconviction motion and remand for a sentence modification consistent with the charges Robinson was actually convicted of.

IV. The circuit court erred in denying the motion to sever.

Three of the cases against Robinson were joined together and tried before a jury. (R1. 111:28). These three cases consisted of a total of six misdemeanor charges and 16 felony bail jumping charges. (R2. 40:1-2; R3. 38:1-2; R4. 35:1-3). Trial counsel argued these categories of charges should be separated from one another as "[t]he sheer number of felony bail jumping charges alone is prejudicial to Mr. Robinson" and that trying the charges together created "the risk that the jury will cumulate the evidence of the crimes charged and find guilt when it otherwise would not if the crimes were tried separately." (R2. 39).

The circuit court erroneously exercised its discretion by denying the motion, and, as demonstrated in part by the facts in Argument II, Robinson was prejudiced as a result. This Court should reverse the denial of Robinson's motion to sever charges and order a new trial.

A. Standard of review.

The circuit court's decision regarding the motion for severance is reviewed for an exercise of discretion. *State v. Bettinger*, 100 Wis.2d 691, 696, 303 N.W.2d 585 (1981).

B. Applicable law.

A court may order separate trials if it appears that a defendant is prejudiced by joinder of charges. Wis. Stat. § 971.12(3). In considering severance, the trial court must consider what, if any, prejudice would result due to the trial of the joined charges. *Bettinger*, 100 Wis.2d at 696. This prejudice includes the risk "that the jury will cumulate the evidence of the crimes charged and find guilt when it otherwise would not if the crimes were tried separately." *Id.* at 697-698, citing *State v. Bailey*, 65 Wis.2d 331, 346, 222 N.W.2d 871 (1974); *State v. Kramer*, 45 Wis.2d 20, 36, 171 N.W.2d 919 (1969). The court must then weigh this prejudice against the public's interest in conducting a trial on the multiple counts. *Id.*

C. Robinson was severely prejudiced by the joinder of 16 felony bail jumping charges.

The court initially allowed the joinder of these three particular cases upon the state's motion. (R1. 111:26). Subsequently, trial counsel filed a motion seeking to sever all bail jumping charges in those three cases from the misdemeanor charges. (R2. 39). Trial counsel offered numerous reasons that such severance should be granted: the sheer number of bail

jumping charges (comprising 16 of the 22 total charges) was prejudicial; trying all charges together would make a fair trial impossible; and trying the charges created a risk the jury would cumulate the evidence to find guilt where it otherwise would not. (R2. 39:1). Ultimately, these concerns would come to pass.

The state's argument against severing the misdemeanor charges and bail jumping charges made little sense as it relied on the fact that Robinson had already served a significant amount of time in pre-trial custody to cover any potential sentences on the misdemeanor charges. (R1. 115:14). In other words, the state was using Robinson's pre-trial custody against him as it angled for even more prison time, a wish eventually granted. Trial counsel offered trying the misdemeanor cases first, then dealing with the bail jumping charges from there. (R1. 115:17). Logically, bail jumping charges are often severed from the underlying offenses in order to preserve a fair trial, with a defendant often stipulating to a number of the elements (such as bond conditions) or even entering a subsequent guilty plea to the bail jumping charge after a jury convicted them of the underlying offense. (R2. 105:55). However, the court denied severance. (R1. 115:20).

The court erroneously exercised its discretion in denying the motion as its decision ran afoul of the concerns stated under *Bettinger*. The state's goal of shoehorning every possible bail jumping charge into one trial against Robinson for misdemeanors occurring

on three occasions led to unfair prejudice. It led to bloated jury instructions that effectively restated the bail jumping charges over and over (16 times) again. (R2. 105:1-89). As trial counsel worried and argued, the sheer number of bail jumping charges prejudiced Robinson, as it was akin to the state throwing charges at the wall to see what would stick rather than proving its case beyond a reasonable doubt. (R2. 39:1).

The prejudice is also far from hypothetical here. As set forth in Argument II, the jury returned verdicts that made no sense in conjunction with one another. (R4. 87,91,92,93). It is clear from Robinson's acquittal on Count 1 of Case 20CF602 that the jury found the evidence not sufficient to convict Robinson of the disorderly conduct. (R4. 87). Despite this finding, the jury convicted Robinson of the three bail jumping charges predicated on that offense. (R4. 35:1-2; 91; 92; 93).

This is the exact situation trial counsel warned of—that the jury would find guilt on charges where they otherwise would not have done so based on the sheer number of charges brought. (R2. 39:1). The court's error allowed the state to obtain three convictions against Robinson where it obviously failed to prove an element of those offenses. The unfair prejudice to Robinson is evident by those verdicts themselves.

The sheer number of bail jumping charges brought to the jury is also problematic. Bail jumping is by far the most charged criminal offense in the State

of Wisconsin.[2] The question becomes at what point does the sheer number of bail jumping charges brought before a jury become unfairly prejudicial to the defendant. Would a four-to-one ratio have been allowable? A ten-to-one ratio?

Here, nearly three quarters of the 22 charges against Robinson were for bail jumping. (R2. 105:14-20,23-29,35-48). This near three-to-one ratio of bail jumping charges to the underlying misdemeanor charges was unfairly prejudicial as it confused the issues before the jury and caused the jury to cumulate the evidence of crimes to find guilt where it otherwise would not have done so. *Bettinger*, 100 Wis.2d at 696.

The court erred in its decision denying the motion to sever the bail jumping charges from the underlying charges. This resulted in the unfair prejudice outlined in *Bettinger*. For these reasons, this Court should reverse the denial of that motion, vacate the convictions, and remand this case so that Robinson can get a fair trial.

V. The circuit court erred when it allowed the state to present evidence of a recording of a recording of a recording and last-minute jail call audio at trial.

As noted by the state, "there were a minefield of evidentiary decisions that the Court had to make" in

[2] *See* Amy Johnson, The Use of Wisconsin's Bail Jumping Statute: A Legal and Quantitative Analysis, 2018 Wis. L. Rev. 619, 637 (2018)

Robinson's cases. (R4. 143:9) Virtually every single evidentiary decision made by the court in the lead up to, and during trial, went against Robinson. The court erred in those decisions and Robinson was prejudiced at trial as a result.

On appeal, Robinson contests the following two evidentiary decisions made by the court: (1) the decision to allow the recording of the recording of the Ring video camera recording (R1. 120:263-269; R4. 156:130-136); and (2) the decision allowing jail call recordings to be played at trial. (R4. 156:150-154; R4. 155:33, 158:38).

A. Standard of review and applicable case law.

All relevant evidence is admissible. Wis. Stat. § 904.02. Relevant evidence, however, may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Wis. Stat. § 904.03.

This Court generally reviews a circuit court's evidentiary decisions for an erroneous exercise of discretion. *State v. Jackson*, 188 Wis.2d 187, 194, 525 N.W.2d 739 (Ct. App. 1994). Importantly, exercising "discretion is not the equivalent of unfettered decision making." *State v. Daniels*, 160 Wis.2d 85, 100, 465 N.W.2d 633 (1991). Rather, a discretionary decision must result from "reasoned

application of the appropriate legal standard to the relevant facts in the case." *Id.*

B. The trial court erred in allowing the Ring video recording to be played multiple times.

The court erred in its decision allowing the Ring video to be entered into evidence and played at trial because the video, being a recording of a recording of a recording, was of such extremely poor quality that it bore next to no probative value.

Prior to trial, defense counsel sought to prohibit the state from playing an "iPod recording of [J.R.]'s cell phone recording of what [J.R.] claims is a video from a [R]ing doorbell showing Mr. Robinson dragging her off a porch." (R4. 19:3). This twice-removed recording formed the basis for two misdemeanor charges against Robinson. (R4. 2:1-2, 4; R1. 120:233-234).

At the hearing on admissibility, Vicky Hamilton testified that it was her Ring doorbell camera and that Ring only keeps recordings for 60 days. (R1. 120:111-112,118). The process of the numerous recordings was a convoluted one: Hamilton played the recording from her cell phone while J.R. and her sister took a cell phone recording of that recording. (R1. 120:122). Later on, Officer Marro used an iPod or similar device to record the recording of the recording. (R1. 120:131-133).

Hamilton admitted she could not visually recognize anyone in the video. (R1. 120:114). J.R. testified that the recording the state sought to introduce was worse than what she initially saw. (R1. 120:101). Marro testified absurdly that he could recognize Robinson's apparently distinctive hairline from the messy recording. (R1. 120:137; R4. 77).

This Court, however, can view the recordings itself. It is of such a poor quality that it is indicative of virtually nothing. (R4.197). The only thing remotely visible in the shaky, twice-removed recording is the reflection of Marro as he completed the chain of recordings. (R4.197).

Defense counsel argued several grounds for keeping the recording out of trial: the video was extremely blurry, it had no date or time stamp, it consisted of 19 seconds of what would have been a much longer video, it contained no metadata to confirm it had not been edited, and the probative value was small while the danger of unfair prejudice was high. (R4. 19:3; R1. 120:214-216,219-220).

The court rejected those arguments. It found that the prejudice of the recording did not substantially outweigh the probative value, but gave no real indication as to what the probative value of a recording that revealed so little was. (R1. 120:276-277). Its decision to allow admission of the recording was an erroneous exercise of discretion.

Robinson was unfairly prejudiced by the admission of the video during trial. The defense argued that the cumulative playing of the video would be prejudicial. (R4. 155:6-7). The state wanted to play the recording for the jury four times; the court said it would allow the state to play it twice and noted "the potential for a prejudicial effect of the video being played multiple times." (R4. 155:6,10,15). In total, the recording was played eight times over the final two days of trial. (R4. 155:99,216; R4. 158:140,166-168).

The state played the video during J.R.'s testimony. (R4 155:99). It played the video during Marro's testimony. (R4. 155:216). It played the video during its closing argument. (R4. 158:140). These first three times the video was played, the state and its witnesses claimed it was definitively Robinson in the poor-quality, twice-removed recording. (R4. 155:100,216,217; R4. 158:100). The recording was also played five times following a jury question during their deliberations.[3] (R4. 158:161,166-168).

The court's prediction about the prejudicial effect of the recording rang true. (R4. 155:10). The focus of three days' worth of trial evidence boiled down to what could or could not be seen in a 19-second recording of a recording of a recording. The only substantive jury question when deliberating involved

[3] This was done, in part, due to the pandemic courtroom setup, where the entire jury viewed the recording, then jurors came up to the television in groups of three to view the recording again. (R4. 158:163-168).

the recording. (R4. 125,126,127). The probative value of the recording was so incredibly low; the person who could be most well-seen in the video was Officer Marro making yet another recording of the recording. (R4.197). This low probative value coupled with the unfair prejudice to Robinson as the blurry video subsumed the trial demonstrates that the court erred. As the video colored all aspects of the trial, this Court should reverse Robinson's convictions and remand the cases for a trial with only relevant, probative evidence.

C. The court erred when it allowed Robinson's jail calls to be played at trial.

Shortly before trial, the state sought admission of jail calls made by Robinson. Notably, some of the recordings of these calls were not turned over until the morning of trial. (R4. 155:24). The court noted the prejudice that admission of these recordings could cause as it ruled in Robinson's favor on at least two occasions. (R4. 156:121-122,127-128,141-143; R4. 155:32). The court erred, however, when it ultimately ruled that the jail call recordings were admissible as evidence of Robinson's consciousness of guilt. (R4. 155:47). Because the probative value of the calls was substantially outweighed by the unfair prejudice to Robinson, and the calls were needlessly cumulative, this Court should reverse Robinson's convictions and remand for a new trial.

Specifically at issue was one call made by Robinson while he was in jail to J.R. in which he purportedly tried to dissuade her from testifying.

(R1. 120:210; R4. 120). The transcript of the call showed a conversation between J.R. and Robinson about the extent of the investigation and J.R.'s cooperation with it. (R4. 120).

i. Procedural history.

Nineteen days prior to trial, the state filed a motion arguing for joinder of a case charged earlier that day[4] to the three cases set for trial. (R4. 43). Similarly, the state filed a one-page motion arguing that evidence of witness intimidation in that newly-charged case should be allowed at trial as evidence of Robinson's consciousness of guilt. (R4. 46:1). At a hearing the next day, defense counsel had not received any information about this newly-charged case. (R4. 157:3). Information regarding jail calls was given to the defense as late as the morning of the first day of trial. (R4. 155:24).

Nine days before trial, the court denied the state's motion to join the new case to the other three, as it found prejudice was too high to Robinson because he was arraigned on the case just 10 days prior to trial. (R1. 120:261). The timeliness issue mattered to the court as it noted that the defense would need to review all potential calls rather than take state witnesses at their word that other calls were not relevant. (R1. 120:261-262).

On the first day of trial, the state again renewed its motion to admit evidence of the jail calls, and the

[4] Rock County Case 21CF185.

court noted questions "about whether we should allow any last minute potential for prejudice." (R4. 156:121-122). Trial counsel correctly argued several ways in which the late admission of the jail calls would unfairly prejudice Robinson: the last-minute evidence would effectively deprive Robinson of the right to effective assistance of counsel as they could not investigate all call information; there were not transcripts of all jail calls; and given that Robinson had a no-contact order with J.R., the jury would know Robinson was incarcerated. (R4. 156:127-129). Again, the court denied use of the jail calls because they came in at the last minute, counsel had no time to evaluate or investigate them, and there was a great inference that Robinson was in custody during the calls. (R4. 156:141-142). The court also denied a defense motion for a continuance because it denied the admission of this evidence, "finding that the admission of those tape recordings at this time would essentially equate to [ ] a substantial prejudice" that was resolved by the denial. (R4. 156:143).

After this latest denial, the state immediately asked the court to reconsider saying that it had a modified transcript of the call eliminating references to jail and that it should be able to play the audio if J.R.'s credibility was attacked. (R4. 156:143-145,149-150). Trial counsel argued the call being recorded was prejudicial since it was indicative that Robinson was in jail in the first place and that there was nothing prohibiting the state from asking witnesses about the call rather than playing audio. (R4. 156:149).

The court ultimately agreed that the audio of the calls could come in if J.R.'s credibility was attacked. (R4. 156:150). Trial counsel questioned whether this meant the audio would come in if J.R.'s credibility was attacked generally rather than credibility regarding the calls. (R4. 156:150-151). The court gave what was largely a non-answer on this question. (R4. 156:151).

In their opening statements before the jury, trial counsel stated that the charges against Robinson were fabricated by J.R. because their relationship had ended and that police did not do any investigation into the claims. (R4. 156:182-184).

The state then renewed its push for the admissibility of the jail calls on the grounds that J.R.'s credibility was generally attacked during opening statements. (R4. 156:186). The court again excluded recordings based on "the danger of tipping a very delicate balance after the joinder of these cases for prejudice issues." (R4. 155:32). The state immediately asked for reconsideration. (R4. 155:36). The state was somewhat successful this time—the court found the audio was admissible as evidence of consciousness of guilt. (R4. 155:47). Over the remainder of the trial, the state played the audio recording three times. (R4. 155:103-104; R4. 158:13,121).

ii. The jail calls lacked probative value, unfairly prejudiced Robinson, and were needlessly cumulative.

Regardless of the purpose for which the evidence was admitted, the evidence still needed to be excluded if the probative value was substantially outweighed by the danger of unfair prejudice or was needlessly cumulative. Wis. Stat. § 904.03.

The court had already determined that the state could question witnesses about having received calls from Robinson. (R4. 155:32). Therefore, the state could have already presented evidence about the calls without playing the audio recordings numerous times, rendering the evidence unnecessary and cumulative.

The state was not satisfied with that ruling as it asked for reconsideration again and again. Instead, the state wanted the recordings played for the jury because they were more prejudicial. This is because the most logical inference the jury could make as to why the call was recorded was that Robinson was already in jail. (R4. 156:149). That is why there were no further charged felony bail jumping offenses despite the no contact order. (R4. 156:129). That is why the state had an investigator testify about the call when he had no other plausible connection to the call. (R4. 158:40-41).

Additionally, Robinson was prejudiced when the state sought the admissibility of the jail calls just prior to trial, to the point that the state was still asking for permission from the court on the second day of trial.

(R4. 155:36). The court noted the prejudicial nature of allowing the evidence in so close to trial (and even during trial) yet still ultimately got the issue wrong. (R4. 156:141-142; R4. 155:32).

The court initially got this issue correct several times—the audio of the jail call was too prejudicial to be admitted during trial. (R1. 120:261; R4. 156:141-142; R4. 155:32). The evidence was unfairly prejudicial in that it alerted the jury to the fact that Robinson was in jail at the time, and because it was given to the defense in the moments leading up to trial. The evidence was also needlessly cumulative as the court already allowed the state to question witnesses about the calls without actually playing the calls. The court then erred when it finally caved into the state's repeated demands and allowed its admissibility. Because of the court's error, this Court should reverse Robinson's convictions and remand for a new trial.

VI. The court erred in denying trial counsel's motion for a mistrial in light of the state's egregious comments about a coercive sexual relationship in closing.

The court should have granted trial counsel's motion for a mistrial after the state, without any good faith basis, stated that Robinson forced J.R. to have sex with him. (R4. 158:105-109). None of the charges in the case related to sexual activity, and neither J.R. nor any other witness testified about the subject matter. Given that Robinson was on trial for misdemeanors and bail jumping charges, and given

the extremely unfounded and inflammatory nature of the state's comments, Robinson was prejudiced. Under these circumstances, the court should have granted a mistrial.

A. Standard of review.

"Whether to grant a mistrial is a decision that lies within the sound discretion of the circuit court." *State v. Doss*, 2008 WI 93, ¶69, 312 Wis.2d 570, 754 N.W.2d 150. A trial court addressing a motion for a mistrial "must decide, in light of the entire facts and circumstances, whether the defendant can receive a fair trial." *State v. Ford*, 2007 WI 138, ¶29, 306 Wis.2d 1, 742 N.W.2d 61. This Court reviews the circuit court's denial of a mistrial for an erroneous exercise of discretion. *State v. Ross*, 2003 WI App 27, ¶47, 260 Wis.2d 291, 659 N.W.2d 122.

B. Applicable law.

"An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence." *Bruton v. United States,* 391 U.S. 123, 132 (1968). Robinson's trial contained statements that, while struck, could not be unheard by the jury. The prejudicial nature of the state's inflammatory remarks about Robinson forcing J.R. to have sex with him was too great for the jurors to simply put it out of their minds. *See, e.g. Dunn v. United States*, 307 F.2d 883, 886 (5th Cir. 1962) ("[I]f you throw a skunk into the jury box, you cannot instruct the jury not to smell it.").

A curative instruction presumably erases the prejudice it was designed to address, and the law presumes that a jury followed the court's curative instruction. *State v. Sigarroa*, 2004 WI App 16, ¶24, 269 Wis.2d 234, 674 N.W.2d 894; *State v. LaCount*, 2008 WI 59, ¶23, 310 Wis.2d 85, 750 N.W.2d 780. However, some statements are sufficiently prejudicial such that they cannot be remedied by a curative instruction and cannot be unheard by the jury. *See, e.g. Dunn*, 307 F.2d at 886.

C. The state's inflammatory comments in closing were prejudicial to the point of depriving Robinson of a fair trial.

In its closing argument, the state almost immediately made bad faith, wrongful comments about Robinson's relationship with J.R.:

> "[Trial counsel] painted a picture of someone who was, you know, just doing the right thing, that he was helping [J.R.] with her food and clothing, a place to stay. [Trial counsel] left out the part, however, that as an exchange for all of that, [J.R.] would have to have sex with someone who was 30 years older than she was[.]" (R4. 158:105).

The state's remarks instantly drew an objection from trial counsel. (R4. 158:105). Trial counsel argued that evidence of such a quid pro quo never came out at trial, no sexual relationship was mentioned by any party, and the state lacked a good faith basis for making such an argument. (R4. 158:106).

While the state contended that its argument was a fair inference, the court strongly disagreed: "the inference was well beyond the logic believed from the testimony adduced at trial from [J.R.] and from other witnesses." (R4. 158:107). In sustaining the objection from trial counsel, the court added that "there was no testimony here in the trial that would lead to a reasonable inference that sex was given in exchange or demanded in exchange for such items." (R4. 158:107).

At this point, trial counsel moved for a mistrial. (R4. 158:108). Trial counsel argued that the jury was not going to be able to unhear the wrongful comment as it "was a very explicit, sex in return for items," and Robinson would not be able to get a fair trial after the violation. (R4. 158:108).

The court denied the motion for a mistrial and decided it would give a curative instruction. (R4. 158:109). The instruction, however, was merely that the evidence did not indicate such an arrangement and that the jury should "disregard any statement that may have made such an allegation or inference." (R4. 158:109).

Clearly, the court recognized how unfair and problematic the state's comments were. The court admonished the state about making the argument at length, finding that it went beyond all logic from the evidence adduced at trial. (R4. 158:107-108). However, the court erred by not granting the motion for a

mistrial in light of how prejudicial the statement was and how it made a fair trial impossible.

The court's exercise of discretion was erroneous because it did nothing to actually mitigate the content of the statement against Robinson. It is difficult to imagine a more impactful, inappropriate comment than what the state chose to lead its closing argument with here—that J.R. was forced to have sex with someone 30 years her elder in exchange for material support. With such an inflammatory backdrop, it is no wonder that the jury would convict Robinson of the misdemeanor offenses and bail jumping charges. However, the state's inappropriate, bad faith comments are picturesque of the pattern of unfairness and prejudice Robinson faced throughout evidentiary hearings, his trial, and ultimately his sentencing hearing, as argued throughout this brief.

Because the state's wrongful comments rendered a fair trial impossible, the court should have granted the motion for a mistrial. Robinson asks that this Court find the trial court erred in its denial of the motion and asks this Court to reverse that decision.

VII. This Court should order a new trial in the interest of justice due to the cumulative effect of the above errors.

The erroneous joinder of charges, admission of evidence, and statements by the prosecutor, as set forth above in Arguments IV, V, and VI, so clouded the crucial issue in this case–which was largely a credibility call–that it cannot be said that the real controversy was fully and fairly tried. Accordingly, Robinson asks this Court to use its discretionary authority under Wis. Stat. § 752.35 and grant him a new trial in the interest of justice.

This Court may reverse Robinson's convictions and remand for a new trial "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried...regardless of whether the proper motion or objection appears in the record." Wis. Stat. § 752.35; *Vollmer v. Luety*, 156 Wis.2d 1, 19-21, 456 N.W.2d 797 (1990). This Court need not find "the probability of a different result on retrial" in order to conclude that the real controversy has not been fully tried and grant reversal. *State v. Hicks*, 202 Wis.2d 150, 160, 549 N.W.2d 435 (1996).

Courts have granted reversal using this authority in situations, such as this case, where "the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried." *Id.*

The real controversy in this case revolved around the truthfulness of J.R.'s testimony, and the testimony of witnesses who were close with her, regarding six misdemeanor charges. Instead, Robinson was prejudiced by the 16 felony bail jumping charges tried along with the misdemeanor offenses, the admission of unfairly prejudicial evidence, the needless presentation of cumulative evidence, and the extremely inflammatory, untrue statements by the prosecutor during closing arguments. This case presents a straightforward example in which prejudicial joinder of charges, improper evidence, and inflammatory statements from the prosecutor prevented the real controversy from being fully tried. These errors misled the jury in its task of determining whether Robinson committed the offenses.

Because these errors, which are set out in detail in Arguments IV, V, and VI, prevented the real controversy from being fully tried, Robinson should receive a new trial in the interest of justice.

CONCLUSION

For these reasons, Daniel Robinson asks this Court for relief in the following order. First, this Court should reverse the three convictions for bail jumping in Counts 5-7 of Rock County Case 20CF602. Second, this Court should grant a new sentencing hearing before a different judge because of the sentencing judge's judicial bias. Alternatively, Robinson asks this Court to remand this case for sentence modification consistent with the charges he was actually convicted of; or grant a new trial in light of the circuit court's decisions denying the motion for a mistrial, the motion to sever charges, erroneous evidentiary rulings, or in the interest of justice.

Dated this 26th day of July, 2024.

Respectfully submitted,

Electronically signed by Leo Draws

LEO DRAWS
Assistant State Public Defender
State Bar No. 1131806

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2123
drawsl@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 10,623 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 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 s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules 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 or 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.

Dated this 26th day of July, 2024.

Signed:
Electronically signed by
Leo Draws
LEO DRAWS
Assistant State Public Defender