STATE OF WISCONSIN

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

DISTRICT IV

Case Nos. 2024AP1941-CR & 2024AP1942-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EMIL L. MELSSEN,

Defendant-Appellant.

APPEAL FROM JUDGMENTS ENTERED IN
LAFAYETTE COUNTY CIRCUIT COURT,
THE HONORABLE R. ALAN BATES, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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ISSUES PRESENTED

The State charged Emil L. Melssen with substantial battery, criminal damage to property, and disorderly conduct for his conduct stemming from his fight with Bobby.[1] Officers obtained a search warrant to search Melssen's cellphone for information about events leading to the fight and drug activity. Based on additional information, officers subsequently obtained a search warrant for Melssen's residence for drugs. Following the seizure of contraband at Melssen's residence, the State charged Melssen with possession with intent to deliver methamphetamine, possession of drug paraphernalia, and maintaining a drug trafficking place. The circuit court denied Melssen's motion to suppress evidence seized through the search warrant. Melssen's substantial battery case and his drug case were tried separately.

1. Did the search warrant's supporting affidavit establish probable cause to search Melssen's residence?

The circuit court answered: Yes.

This Court should answer: Yes.

2. Did the State present sufficient evidence to support Melssen's convictions for substantial battery and disorderly conduct?

The circuit court answered: Yes.

This Court should answer: Yes.

[1] The State uses pseudonyms to refer to the victims and witnesses. *See* Wis. Stat. § (Rule) 809.86(4).

3. Did the circuit court err when it admitted some evidence about Melssen's drug activities in the assault case?

The circuit court answered: No.

This Court should answer: No or, alternatively, any error in its admission was harmless.

4. Did the State present sufficient evidence to support Melssen's convictions for possession with intent to deliver methamphetamine, possession of drug paraphernalia, and keeping a place for drug trafficking?

The circuit court answered: Yes.

This Court should answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.

STATEMENT OF THE CASE

A. The State charged Melssen in two separate cases for conduct that occurred days apart.[2]

1. The State charged Melssen for an incident stemming from a fight with Bobby.

The State charged Melssen with substantial battery, criminal damage to property, and disorderly conduct stemming from a May 25, 2021 altercation between Melssen and Bobby. (R. 2:1.)

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[2] This is a consolidated appeal. Appeal number 2024AP1941-CR relates to Lafayette County Circuit Court case number 2021CF26. The State refers to the record on appeal in this case as "(R. __:__.)." Appeal number 2024AP1942-CR relates to Lafayette County Circuit Court case number 2021CF29. The State refers to the record on appeal in Melssen's second case as: "(R2. __:__.)"

According to the complaint, officers interviewed Bobby, who had blood coming from his left eyebrow, red marks on his cheek, and a swollen jaw. (R. 2:2.) Bobby had a fight with his girlfriend Mary because she was getting methamphetamine from Melssen and was having sex with him. (R. 2:3.) Mary claimed that Bobby physically assaulted her and that she called Melssen and told him what happened. (R. 2:10–11.) Bobby admitted that he pushed Mary. (R. 2:3.) Mary saw Melssen pull up in his truck behind Bobby's Chevy Tahoe to block him from leaving. (R. 2:3, 11.) Melssen exited his truck, approached Bobby's driver's side door, grabbed the front of Bobby's shirt, and punched Bobby in the face. (R. 2:3.) When Melssen grabbed and punched Bobby, Bobby took his pocket knife and lunged it at Melssen. (R. 2:3.) Bobby drove away. (R. 2:4.) Mary saw Melssen bleeding from his arm as he stood outside Bobby's car while they argued. (R. 2:11.) Melssen, who had sustained a stab wound to his arm, claimed that Bobby had swung his right hand out of the driver's side window and stabbed him in the arm. (R. 2:8.)

2. The State later charged Melssen with several drug offenses after officers seized methamphetamine from his home.

In his second case, the State charged Melssen with possession with intent to deliver methamphetamine, possession of drug paraphernalia, and keeping a drug house, after officer's searched Melssen's residence. (R2. 2:1–4.) During a search of the residence, officers recovered approximately two grams of suspected methamphetamine from a nightstand in the master bedroom, glass smoking devices, a large glass bong with suspected methamphetamine residue, a digital scale that tested positive for the presence of methamphetamine, and $2,250 in U.S. currency. (R2. 2:5.) Officers also found approximately 13 grams of meth in a locked Audi on the property. (R2. 2:6.) Melssen admitted that

he used methamphetamine at his residence and that he ingested it using a bong. (R2. 2:3.)

B. The circuit court[3] denied Melssen's motion to suppress drug evidence seized during the execution of a search warrant at his residence.

In both cases, Melssen moved to suppress evidence seized through the execution of search warrants for his cellphone and his residence. (R. 28:1–2.) The circuit court denied Melssen's suppression motion. (R. 35:15; 58:9.)

C. A jury found Melssen guilty in the first case of substantial battery and disorderly conduct.

1. Both before and during his battery trial, Melssen moved to exclude evidence related to his drug activity.

Before and during trial, Melssen moved to exclude evidence related to allegations about his drug-related activities. (R. 130:8–9, 14, 140–42; 131:4–6.) The court admitted some of this evidence and excluded other evidence. (R. 130:230–231; 131:99–106.)

2. Bobby and Mary had a fight before Melssen's altercation with Bobby.

Bobby testified that he had been dating Mary and that he also knew Melssen as a mechanic and fellow drug user. (R. 130:110–11, 131.) Bobby got into a fight with Mary after

[3] The Honorable Duane M. Jorgenson presided over Melssen's motion to suppress evidence, which was filed in both cases. (R. 58:1.) The Honorable Alan Bates presided over the trial in the assault case. (R. 130:1.) Although the Honorable Mark A. Frankel presided over the trial in the drug case, Judge Bates presided over the sentencing by the parties' consent. (R2. 120:1–2; 132:1.)

he found a text message between Mary and Melssen about having sex, and he later left Mary's residence. (R. 130:112, 115, 126.) Mary later asked Bobby to return. (R. 130:112, 128.)

Mary testified that she dated Bobby until May 2021. (R. 130:144.) Mary also knew Melssen, describing him as "an ex-boyfriend of mine and [her] drug dealer," who did not make her pay for drugs. (R. 130:146–47.) Mary was using methamphetamine daily when the incident happened. (R. 130:163.) According to Mary, Bobby became upset when he saw text messages between Mary and Melssen. (R. 130:164.) Mary explained that she wanted to end her relationship with Bobby, that they fought over her belongings that Bobby took, and that Bobby "put his hands on me." (R. 130:149.) After Bobby left, Mary called Melssen about Bobby "going crazy again," and she and Melssen agreed that Melssen would confront Bobby about how he treated her. (R. 130:149.) Through text and phone calls, Mary communicated with Melssen so that he would show up at her place when Bobby was there. (R. 130:150, 159–62.) Mary denied asking Melssen to assault Bobby. (R. 130:172.)

Melssen testified that he knew Bobby through his car repair business and that Bobby owed him $200 for work that Melssen performed on his car. (R. 131:7–10, 15.) Melssen also repaired Mary's car and had regular contact with her. (R. 131:10.) Melssen denied supplying Mary with drugs, and he claimed that Mary shared drugs with him, paid him with drugs for her car repairs, and used methamphetamine with him a couple times per week. (R. 131:37–38, 44–45.) Melssen explained that on the day of the incident he planned to pick Mary up and go to Dubuque with her. (R. 131:12.) Melssen denied that he had any plans to confront Bobby and insisted that he did not know Bobby would be at Mary's. (R. 131:13, 60.)

3. Melssen fought with Bobby.

Bobby testified that he returned to Mary's residence, called to let her know that he was there, and waited outside while Mary finished showering. (R. 130:113, 129.) While Bobby waited, a white truck raced down the driveway and came "to a screeching halt" right behind Bobby's Tahoe. (R. 130:113.) Melssen "jumped out and then ran up to my Tahoe window" and grabbed Bobby by his t-shirt, which caused it to rip, and hit him. (R. 130:113, 118.) Bobby was not sure how many times Melssen hit him. (R. 130:119.) Bobby acknowledged grabbing a knife when Melssen raced down the driveway because Bobby believed that he may need to protect himself, but he claimed that he did not open the knife until after Melssen hit him. (R. 130:117, 119.) Bobby explained that he intended to scare Melssen "away from me so I could start my vehicle and leave." (R. 130:113.) Melssen ripped off Bobby's mirror and kicked his car door. (R. 130:113.) Bobby sustained injuries, including a split to his left eyebrow, which was treated and closed with superglue. (R. 130:124.) Bobby admitted using methamphetamine before the fight. (R. 130:123–24.)

Mary testified that after exiting the shower she went to the front door and saw Melssen "punch [Bobby] through the car window" at least two or three times and knock down Bobby's mirror. (R. 130:152–54, 169.) Bobby was unable to back up as Melssen had blocked him in. (R. 130:153.) Mary believed that Melssen struck Bobby's Tahoe with a pipe. (R. 130:174.) Bobby eventually drove away. (R. 130:153, 156.) Mary called 911 after realizing that Melssen had been stabbed and was bleeding. (R. 130:157.)

Melssen testified that he saw Bobby's Tahoe when he arrived at Mary's. (R. 131:14.) Bobby was standing outside his Tahoe when Melssen exited his truck and approached Bobby to ask for the money that Bobby owed him. (R. 131:15.) Bobby

got into his Tahoe. (R. 131:16.) When Melssen asked Bobby for the money through the driver's side window, Melssen felt a prick to his arm and then swung at Bobby, striking him in the face. (R. 131:16–17, 64–65.) Melssen looked down and saw a knife. (R. 131:18.) Melssen ducked and grabbed the mirror, pulling it off the Tahoe when Bobby attempted to throw the knife at him. (R. 131:19–20.) Bobby backed into Melssen's truck and pulled forward before turning and driving off. (R. 131:21.) Melssen denied having any objects in his hand during his interaction with Bobby and said that another person, Brandon, had a vacuum cleaner tube in his hand and told Bobby to leave. (R. 131:24–25.) Melssen received stiches to his wound. (R. 131:27.)

4. Officers responded.

Deputy Brandon Gudgeon responded to Mary's residence and observed that Melssen had a puncture wound consistent with a knife wound. (R. 130:97–98.) Deputy Gudgeon later located Bobby and noticed that he was shirtless, that his shirt was torn, and that he had "a pretty significant facial injury" near his left eyebrow. (R. 130:100.)

Detective Jerrett Cook examined Mary's phone with her consent and determined that there were 17 calls between Mary's and Melssen's phone and several text messages between them before the fight. (R. 130:219, 221–22.) While searching Bobby's car, Detective Cook found drug paraphernalia, i.e., a syringe, that Bobby admitted possessing. (R. 130:234.)

5. Rebuttal Evidence

The court allowed the State to present a detective's testimony about drugs seized during the warrant's execution at Melssen's residence several days after the incident and Mary's testimony that Melssen was her supplier and that they used drugs together after the fight. (R. 131:112–14, 123–30.)

6. The Jury's Verdict

The jury found Melssen guilty of substantial battery and disorderly conduct and acquitted him of criminal damage to property. (R. 97.)

D. A jury found Melssen guilty of the drug-related crimes.

At a separate trial related to the seizure of drugs from his residence, the jury found Melssen guilty of possession with intent to deliver more than ten grams of methamphetamine, possession of drug paraphernalia, and maintaining a drug trafficking place. (R2. 104; 113:1.)

1. Officers found evidence of both methamphetamine distribution and use inside Melssen's home.

Detective Erik Longseth testified that he participated in the execution of the search warrant at Melssen's residence, which included a home, large buildings on the property, and over a hundred vehicles on the property. (R2. 132:133–34.) Detective Longseth identified a bedroom that had Melssen's mail, identification, and documents related to his business. (R2. 132:134, 136.) In the dresser drawer where he found Melssen's passport, Detective Longseth also seized two plastic bags of suspected methamphetamine. (R2. 132:136.) A crime laboratory analyst later testified that one bag contained residue and that the other bag contained 0.705 grams of a substance that she identified as methamphetamine. (R2. 132:177–79.)

Detective Longseth found a digital scale with white residue on it and a revolver on a television stand. (R2. 132:135–36.) He explained that people who distribute methamphetamine use scales to repackage methamphetamine and sell it in smaller quantities. (R2. 132:145–46.) Detective Longseth also found in the

bedroom closet a clear pipe that had suspected methamphetamine residue on it and a wallet with $2,250 in cash nearby. (R2. 132:147.) He also recovered a straw, which may be used to package methamphetamine or to consume it. (R2. 132:147–48.) Under the bathroom sink, Detective Longseth located a bong, which he suspected was used to smoke methamphetamine. (R2. 132:153.) In a kitchen drawer, he found a bag containing approximately 100 clear pill capsules which are often used to package illegal substances like methamphetamine. (R2. 132:156–58.)

2. Officers found methamphetamine in a locked Audi on the property.

Detective Longseth testified that officers searched a gray Audi on the property and found a pill capsule with a white powder that weighed 0.29 grams and a package with a large crystal or chunk of methamphetamine that weighed approximately 13.2 grams. (R2. 132:158–59.) He explained that a chunk this size would likely be broken down and repackaged into smaller quantities. (R2. 132:160.)

The crime laboratory analyst later testified that she identified this substance as methamphetamine and that it weighed 11.701 grams without the packaging. (R2. 132:179.) She identified the substance inside the capsule as methamphetamine and determined that it weighed 0.088 grams. (R2. 132:180.)

Detective Sergeant Richard Severson testified that the Audi was registered to someone from Ohio and that he did not know how it got to Melssen's property. (R2. 132:223.) He explained that they could not find a key for the Audi, that they had to use a key lockout kit to enter the car, and that Melssen's friend, Casey Radke, had keys for the Audi at his residence. (R2. 132:225.) Melssen's mother testified that she went to Melssen's home the night before the search warrant

was executed and saw Radke and his wife scrounging through a gray Audi. (R2. 132:273–74.)

3. Mary testified about obtaining methamphetamine from Melssen.

Mary testified that she was dating Melssen in May 2021 and knew that Melssen and Radke were best friends. (R2. 132:186–87.) She and Melssen returned to his home a few days after the search warrant was executed. (R2. 132:188.) According to Mary, there was a bag containing five grams of methamphetamine in a shirt of his that was hanging in the closet, Melssen knew where the bag was, and they used the methamphetamine. (R2. 132:188–89, 193–94.) In her texts to Melssen, Mary used "candy" when she wanted methamphetamine and used "t-shirt" when she wanted a 1.75-gram quantity of methamphetamine. (R2. 132:189–90.) Mary either provided her own container for the drugs or he would give her a quarter-gram baggie. (R2. 132:191, 196.)

Detective Longseth found a note on a bedroom dresser that stated, "We were discussing the breakdown on a quarter pound is how many grams or 'Gs'." (R2. 132:138–39.) Mary explained that she wrote the note and that she was referring to a quarter pound of methamphetamine. (R2. 132:191–92.) Detective Longseth explained that a quarter pound is roughly four ounces, that there are 28.4 grams in an ounce, that deals in the area are typically for a gram and up to 3.5 grams, and that a meth user uses between a quarter and a half gram at a time. (R2. 132:139–41.)

4. Melssen's Text Messages

Detective Paul Klang testified that he examined Melssen's cellphone, that there was relatively little data on it, but that he found some recent text messages between Melssen's phone and phones associated with Radke, Becky and Christie. (R2. 132:201–02, 206, 210.)

In Melssen's and Becky's text message exchanges, Becky told Melssen that she was "waiting for my buddy to show up . . . to grab [the] last of what I have, so I'll have more cash. Plus, then, I won't be riding dirty." (R2. 132:207–08.) After some text messages about when Becky would get there, Melssen said, "I can bring it tomorrow when I come down." (R2. 132:208.) Based on the context of the conversation, Detective Klang believed that someone was "going to grab the last of Becky's drugs," and that Becky used the phrase "I won't be riding dirty" to mean that she would not have contraband or drugs in her car. (R2. 132:209, 213.)

In Christie's text messages to Melssen, Christie described herself as "Bill's girlfriend," addressed Melssen using his nickname "Amos," told Melssen that Bill "doesn't have a cell," and wanted Melssen to know that Bill was "still interested in that basketball." (R2. 132:209–10.) Melssen did not respond to the texts about "the basketball." (R2. 132:214.) According to Detective Klang, a basketball refers to a 3.5-gram quantity of drugs. (R2. 132:210.)

In Radke's text message exchanges with Melssen, Radke asked Melssen what he wanted him "to bring for tools" and later texted that he was at Melssen's. (R2. 132:211–12.) Detective Klang agreed that Melssen had a lot of tools in his shop. (R2. 132:212.)

5. The Jury's Guilty Verdicts

The jury found Melseen guilty of possession with intent to deliver ten or more grams of methamphetamine, possession of drug paraphernalia, and maintaining a drug trafficking place. (R2. 113:1.) The court entered a judgment on the verdict. (R2. 113:1.)

Melssen appeals.

ARGUMENT

I. The search warrant affidavits established probable cause to search Melssen's cellphone and his residence.

A. Standard of Review

This Court reviews "a warrant-issuing magistrate's determination of whether the affidavit in support of the order was sufficient to show probable cause with 'great deference.'" *State v. Tate*, 2014 WI 89, ¶ 14, 357 Wis. 2d 172, 849 N.W.2d 798 (citation omitted). This deferential standard of review furthers "the Fourth Amendment's strong preference for searches conducted pursuant to a warrant." *State v. Romero*, 2009 WI 32, ¶ 18, 317 Wis. 2d 12, 765 N.W.2d 756 (footnote omitted).

B. This Court will uphold a search conducted pursuant to a search warrant unless the alleged facts are *clearly insufficient* to support probable cause.

The United States and Wisconsin Constitutions protect people from unreasonable searches and establish the requirements for the issuance of a search warrant. *Tate*, 357 Wis. 2d 172, ¶ 27. Among these requirements, there must be "probable cause to believe that evidence is located in a particular place." *State v. Ward*, 2000 WI 3, ¶ 26, 231 Wis. 2d 723, 604 N.W.2d 517.

Courts determine whether probable cause exists based on the totality of the circumstances. *Ward*, 231 Wis. 2d 723, ¶ 26. Probable cause exists if there is a "'fair probability' that contraband or evidence of a crime will be found in a particular place." *State v. Tullberg*, 2014 WI 134, ¶ 33, 359 Wis. 2d 421, 857 N.W.2d 120 (citations omitted). "Probable cause [for a search warrant] is not a technical, legalistic concept[,] but a flexible, common-sense measure of the plausibility of

particular conclusions about human behavior." *State v. Kerr*, 181 Wis. 2d 372, 379, 511 N.W.2d 586 (1994) (citation omitted).

A magistrate's task is "simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). The test is not whether the inference that the issuing magistrate drew is the only reasonable inference, but "whether the inference drawn is a reasonable one." *Romero*, 317 Wis. 2d 12, ¶ 41 (citation omitted). Thus, when a "reasonable inference support[ing] the probable cause determination" suffices, it does not matter that a competing inference of lawful conduct exists. *State v. Dunn*, 121 Wis. 2d 389, 398, 359 N.W.2d 151 (1984).

"The person challenging the warrant bears the burden of demonstrating that the evidence before the warrant-issuing judge was clearly insufficient." *State v. DeSmidt*, 155 Wis. 2d 119, 132, 454 N.W.2d 780 (1990).

C. Melssen did not prove that the evidence before the judge was clearly insufficient to issue a search warrant for his cellphone.

The circuit court denied Melssen's motion to suppress evidence seized from his cellphone based on its determination that the affidavit stated probable cause. (R. 35:15.) In its decision, the circuit court explained how the information in the affidavit supported a probable cause determination. (R. 35:10–15; 58:3–5.) The record supports the circuit court's decision.

The judge issued the search warrant for Melssen's phone on May 25, 2021, the same day as the altercation. (R. 29:5, 8.) The search warrant identified the phone to be searched, i.e., the seized "Apple iPhone, with a black and gray protective case." (R. 29:3.) The search warrant identified the evidence that the officers wanted to find through a "forensic examination" of the cellphone, including images, text files, and correspondence about "battery, domestic abuse incidents, and/or narcotic activity," text messages, and incoming and outgoing telephone numbers and call details. (R. 29:3–5.) The judge identified the applicant for the search warrant, Paul Klang. (R. 29:5.)

Detective Klang's supporting affidavit identified "one Applie iPhone, with a black and gray protective case" that was found on Melssen as the object he wanted to search. (R. 29:6.) His affidavit specified the crimes he was investigating, including "battery, domestic abuse incidents, and/or narcotic activity." (R. 29:7–8.)

Detective Klang's affidavit detailed the totality of circumstances of the battery between Bobby and Melssen and the domestic incident between Bobby and Mary.

- In a 911 call, Mary reported that Bobby stabbed the victim, Melssen, that another person, Brandon Pollard, witnessed the incident, and that Bobby fled. (R. 29:8.)
- Deputy Gudgeon located Bobby and took him into custody. (R. 29:8.)
- Detective Klang noted that Bobby had sustained substantial facial injuries. (R. 29:8.)
- Bobby told deputies he stabbed Melssen to stop Melssen from striking him. (R. 29:8.)
- Detective Klang noted that Melssen had sustained a puncture wound to a bicep. (R. 29:9.)

- Detective Klang detailed Melssen's statement, including that he called Mary to ask her if she wanted to go to Dubuque and that Mary told him that Bobby struck her and pushed her against the wall; that Bobby was at Mary's when Melssen arrived; that Melssen approached Bobby when he was sitting in the truck; that Bobby stabbed him in the arm; and that Melssen punched Bobby twice in the head in "self-defense." (R. 29:9.)
- Detective Klang explained, by reference to evidence found at the crime scene, why they found Bobby's statement "appeared more accurate." (R. 29:9.)
- Detective Klang found the Apple iPhone and a wallet with $1,000 in cash when he arrested Melssen. (R. 29:9.)

Based on these circumstances, it was reasonable for the officers to believe that a search of Melssen's cellphone would assist their investigation in establishing the sequence of events. As Detective Klang's affidavit explained, a search of the cellphone could "establish a timeline . . . to establish an accurate record of events." (R. 29:10.) Electronic data on a phone constitutes evidence of a crime for which officers may obtain a search warrant. Wis. Stat. § 968.13(1)(d), (2).

The judge reviewing these circumstances would have reasonably inferred that officers were investigating two separate, but related crimes: (1) the domestic dispute in which Bobby struck Mary, and (2) the subsequent fight between Bobby and Melssen that resulted in injuries to both. Importantly, the affidavit provided a plausible basis to conclude that Melssen's cellphone would contain evidence relevant to the investigation of both crimes, including that:

- Melssen told officers about his phone call with Mary, who told him about the domestic incident with Bobby, including her allegations that Bobby struck her and pushed her against the wall. (R. 29:9.)
- An officer observed Melssen sending text messages to someone after the fight when he was in the ambulance and at the medical center. (R. 29:9.)
- Mary reported that Melssen was sending her numerous text messages when he was in the ambulance. (R. 29:9.)

When considered in conjunction with both incidents, the judge could reasonably conclude that Mary and Melssen were discussing what happened in the first instance, the circumstances that resulted in Bobby and Melssen converging at Mary's at the same time, and the fight between Bobby and Melssen. Therefore, there was "a fair probability that contraband or evidence of a crime" would be found on his cellphone. *Gates*, 462 U.S. at 238.

To support the allegations that Melssen used his phone for drug-related activity, the affidavit included Bobby's report that Mary and Melssen "constantly communicate[d] via text messages and phone calls" and that they "are constantly communicating about drugs and refer to drugs as 'groceries.'" (R. 29:10.) Based on the investigation of the domestic abuse and battery matters, the magistrate could reasonably infer from the relationships between Bobby and Mary and Melssen and Mary, that Bobby would have known about Mary's drug use. Detective Klang's knowledge from past investigations that Mary used drugs and that methamphetamine sales occurred at that residence corroborated Bobby's information about Mary. (R. 29:10.) Bobby's disclosure of a specific detail about Mary's and Melssen's communications, i.e., use of the coded word "groceries" to refer to drugs, allowed the judge to

draw a reasonable inference that Bobby's information was based on actual knowledge and not merely speculation.

Melssen concedes that Mary and Melssen had a relationship and were likely communicating about his condition after experiencing a traumatic event, but he contends that such communications do "not indicate criminal activity in anyway." (Melssen's Br. 11–12.) That is certainly one inference, but not the only inference, that could be drawn from this information. While Melssen's phone may not have been "involved" in the altercation between him and Bobby (Melssen's Br. 11), the judge could draw a reasonable, alternative inference that Melssen's text messages included information about Bobby's earlier assault of Mary and the circumstances surrounding the altercation between Melssen and Bobby. These messages would constitute evidence about the crimes under investigation and, therefore, constituted evidence of a crime subject to seizure through a warrant. Wis. Stat. § 968.13(1)(d).

To the extent that Melssen argues that his conduct had an innocent explanation (Melssen's Br. 11–13), he forgets that probable cause does not require the police to rule out the possibility of innocent behavior or other plausible explanations; rather, the question is whether the inference that the magistrate drew was reasonable. *Ward*, 231 Wis. 2d 723, ¶ 30. Moreover, in challenging probable cause (Melssen's Br. 11–13), Melssen attempts to isolate individual facts, but he forgets that "[t]he totality-of-the-circumstances test 'precludes this sort of divide-and-conquer analysis.'" *District of Columbia v. Wesby*, 583 U.S. 48, 61 (2018) (citation omitted). Finally, without really developing an argument, Melssen suggests that officers used the investigation of the domestic abuse and altercation as a pretext to search for other activity. (Melssen's Br. 11.) Even assuming officers acted with a pretext, their subjective motivations do not matter under the Fourth Amendment. Rather, courts apply an objective

standard when assessing a Fourth Amendment challenge to a search or seizure. *State v. Sykes*, 2005 WI 48, ¶ 29, 279 Wis. 2d 742, 695 N.W.2d 277.

The totality of circumstances articulated in Detective Klang's affidavit provided probable cause to issue the search warrant for Melssen's cellphone. *Romero*, 317 Wis. 2d 12, ¶ 27. Therefore, Melssen did not meet his burden of demonstrating that the evidence in support of either warrant was "clearly insufficient" to support a probable cause determination. *DeSmidt*, 155 Wis. 2d at 132.

D. Melssen did not prove that the evidence before the judge was clearly insufficient to issue a search warrant for his residence.

A day after the judge issued a search warrant for Melssen's cellphone, the same judge issued a search warrant authorizing a search of Melssen's residence for evidence related to methamphetamine distribution. (R. 29:18–20.) The judge based his probable cause determination on Detective Klang's second affidavit. (R. 29:18.)

Detective Klang's second affidavit described the place to be searched and the objects to be seized. (R. 29:13–15.) It also identified the crimes under investigation, including the manufacture, delivery, and possession of methamphetamine. (R. 29:15); *see* Wis. Stat. § 961.41(1)(e), (3g)(g).

Importantly, Detective Klang explained why he believed that there was probable cause to search for evidence of these methamphetamine-related crimes at Melssen's residence. (R. 29:15–16.) That evidence included Melssen's admission to a detective that he had a "Methamphetamine bong" at his residence and that "a bong is a device used to smoke drugs and would be considered Methamphetamine paraphernalia." (R. 29:16.) Because a bong constitutes drug paraphernalia, *see* Wis. Stat. § 961.571(1)(a)11.L., and because it is a crime to possess drug paraphernalia, *see* Wis.

Stat. § 961.573(1), Melssen's admissions against his interest were sufficient to establish probable cause to search his property for evidence of this crime. Indeed, the U.S. Supreme Court has noted, "People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime . . . carry their own indicia of credibility—sufficient at least to support a finding of probable cause to search." *United States v. Harris*, 403 U.S. 573, 583 (1971).

And if Melssen admitted to a detective that he had a "Methamphetamine bong" at his residence, (R. 29:16), it was certainly reasonable for the judge to draw an inference that he also possessed methamphetamine at the residence—either in the form of residue of smoked methamphetamine or methamphetamine that had not yet been consumed. Possession of methamphetamine is a crime, Wis. Stat. § 961.41(3g)(g). In conjunction with Melssen's admission, Detective Klang's awareness from other investigations that Melssen was reportedly selling methamphetamine from his residence, (R. 29:16), reinforced an inference that evidence of methamphetamine possession was present at his residence.

In addition to Melssen's admissions, Detective Klang's affidavit included information from the search of Melssen's cellphone that supports probable cause. (R. 29:15.) A detective recovered evidence of text messages dated May 25, including text messages between Melssen and "Becky" and Melssen and "Bill's Girlfriend" about purchasing drugs. (R. 29:16.) Becky text messaged Melssen that she was "waiting for my buddy to show up on his bike to grab last of what I have so ill have more cash. Plus then I won't be riding so dirty ya know he should be here any minute." (R. 29:16.) According to Detective Klang, "riding dirty" referred to having drugs or other contraband in the car. (R. 29:16.) The judge could reasonably infer from the statement that Becky would "have more cash" when the guy showed up "to grab [the] last of what I have" that Becky would

be selling the drugs she had left and that she would have more money to purchase drugs from Melssen. (R. 29:16.) Melssen's text responses, including "Still waiting," and "I can bring it tomorrow" support an inference that Melssen was supplying Becky with drugs. (R. 29:16.)

Similarly, "Bill's Girlfriend's" request to Melssen about "that basketball . . . if you have it" and Detective Kang's knowledge that "basketball" sometimes refers to "3-3.5 grams" of drugs, also supports an inference that Melssen was involved in drug trafficking. (R. 29:16.) Further, it also reinforces the conclusions that Becky was texting him about obtaining drugs. And both texts reinforce other more general information that Melssen had been selling "methamphetamine and/or other illegal drugs from his residence." (R. 29:16.)

Melssen's primary challenge to the second search warrant was that it was based on the allegedly unlawful search of his cellphone. Probable cause supported that search. *See supra* Section I.C. Moreover, this challenge fails because other independent evidence in the warrant, i.e., Melssen's admissions, separately support probable cause, even without the text messages.

The totality of the circumstances supported the judge's decision to issue the warrant for Melssen's phone and then his residence. Melssen did not meet his burden of demonstrating that the evidence in support of either warrant was "clearly insufficient" to support a probable cause determination. *DeSmidt*, 155 Wis. 2d at 132.

E. If this Court finds that the warrant did not state probable cause and that the admission of the evidence was not harmless, then remand may be necessary to determine whether the exclusionary rule should apply.

1. The evidence is not subject to suppression if an exception to the exclusionary rule applies.

Melssen contends that suppression is the remedy if this Court determines that the search warrant affidavit failed to state probable cause. (Melssen's Br. 15.) The State disagrees.

"The fact that a Fourth Amendment violation occurred--i.e., that a search or arrest was unreasonable--does not necessarily mean that the exclusionary rule applies." *Herring v. United States*, 555 U.S. 135, 140 (2009). Rather, the exclusionary rule is a "judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule's general deterrent effect." *Arizona v. Evans*, 514 U.S. 1, 10 (1995). "Therefore, exclusion is warranted only where there is some present police misconduct, and where suppression will appreciably deter that type of misconduct in the future." *State v. Burch*, 2021 WI 68, ¶ 17, 398 Wis. 2d 1, 961 N.W.2d 314.

In adopting the good-faith exception to the exclusionary rule, the Supreme Court explained that "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." *United States v. Leon*, 468 U.S. 897, 922 (1984). The good-faith exception applies when "officers act in objectively reasonable reliance upon the warrant, which had been issued by a detached and neutral magistrate." *State v. Eason*, 2001 WI 98, ¶ 74, 245 Wis. 2d 206, 629 N.W.2d 625.

Because the circuit court determined no Fourth Amendment violation occurred, it had no reason to address whether the exclusionary rule should apply in Melssen's case. When this Court disagrees with the circuit court's conclusion that no Fourth Amendment violation occurred, it has remanded the case to the circuit court to determine whether an exception to the exclusionary rule applies. *See, e.g., State v. Anker*, 2014 WI App 107, ¶ 27, 357 Wis. 2d 565, 855 N.W.2d 483 (remanding for hearing to determine whether independent source or inevitable discovery applied); *State v. Marquardt*, 2001 WI App 219, ¶¶ 23, 53, 247 Wis. 2d 765, 635 N.W.2d 188 (remanding for a hearing to determine whether the good-faith exception applied).

Here, there is good reason to remand for a hearing if this Court finds that probable cause did not support either or both search warrants. Both affidavits reflect that several officers participated in a significant investigation and that a knowledgeable government attorney, i.e., the district attorney, reviewed the warrant applications. *Marquardt*, 247 Wis. 2d 765, ¶ 21; (R. 29:12, 17). Therefore, remand would be appropriate for the State to demonstrate that the officers acted in good faith reliance on the search warrant.

Moreover, remand is appropriate if this Court concludes that the affidavit for the search of the cellphone established probable cause to search for evidence related to the domestic abuse incident and subsequent altercation but not evidence of drug activity. As the circuit court recognized, officers could, during a lawful search of the cellphone, find evidence of other activity in plain view. (R. 35:14–15.) Under the plain view doctrine, officers may seize evidence of other criminal activity when they have a prior, lawful justification to search the place where the evidence was found. *See State v. Abbott*, 2020 WI App 25, ¶ 24, 392 Wis. 2d 232, 944 N.W.2d 8 (discussing plain view doctrine). Remand would allow the State to demonstrate that drug-related text messages on Melssen's cellphone were

in plain view while they lawfully searched it for evidence of the domestic abuse incident and altercation.

Should this Court find a Fourth Amendment violation when the circuit court did not, this Court should remand the matter to the circuit court to determine what evidence, if any, is subject to exclusion in the drug case.

2. Any error in denying Melssen's suppression motion was harmless in the battery case.

The erroneous admission of evidence, including evidence obtained in violation of a constitutional right, is subject to harmless error analysis. *State v. Martin*, 2012 WI 96, ¶¶ 43–44, 343 Wis. 2d 278, 816 N.W.2d 270; *State v. Flynn*, 190 Wis. 2d 31, 54 & n.10, 527 N.W.2d 343 (Ct. App. 1994) (listing categories of constitutional errors, including Fourth Amendment violations, subject to harmless error analysis). Therefore, this Court need not remand the matter for a hearing on a remedy if it determines that the admission of the evidence would have been harmless in either Melssen's substantial battery case or the drug case.

Any error in admitting evidence in the battery case about the drugs seized during the search warrant was harmless. Most of the evidence about Mary's and Melssen's drug related activities at the battery trial came in through Mary's and Melssen's testimony. *See supra* Statement of the Case, Sections B. and C. The evidence about the officers' execution of the search warrant was introduced in the State's rebuttal case and comprised no more than a few pages of testimony. Specifically, Detective Klang's testimony was limited to discussing the recovery of packaging material and suspected methamphetamine found in the car, and he did not discuss its weight, value, or whether it was possessed with intent to deliver. (R. 131:104, 113–14.) Moreover, it was cumulative to other admitted evidence about drug activity.

See infra Section II.D. Because only limited evidence related to the search warrant was received in the battery trial, the admission of the search warrant evidence was harmless in that case. Remand would be unnecessary to decide whether, assuming a violation, the exclusionary rule should apply.

II. Sufficient evidence supported Melssen's convictions for substantial battery and disorderly conduct.

A. Standard of Review

Whether the evidence was sufficient to sustain a guilty verdict presents a legal question that this Court reviews independently. *State v. Smith*, 2012 WI 91, ¶ 24, 342 Wis. 2d 710, 817 N.W.2d 410. In reviewing the sufficiency of the evidence, this Court gives great deference to the factfinder's determinations, examining the record to find facts that uphold its guilty verdict. *State v. Hayes*, 2004 WI 80, ¶ 57, 273 Wis. 2d 1, 681 N.W.2d 203.

B. Melssen bears a heavy burden in his challenge to the sufficiency of the evidence.

"[A] defendant challenging the sufficiency of the evidence bears a heavy burden to show the evidence could not reasonably have supported a finding of guilt." *State v. Beamon*, 2013 WI 47, ¶ 21, 347 Wis. 2d 559, 830 N.W.2d 681. Evidence is insufficient only if it "is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

This Court assesses "the sufficiency of the evidence against the jury instructions" and considers "the totality of the evidence when conducting a sufficiency of the evidence review." *State v. Coughlin*, 2022 WI 43, ¶¶ 25, 27, 402 Wis. 2d 107, 975 N.W.2d 179. If more than one reasonable inference

may be drawn from the evidence, including circumstantial evidence, this Court accepts the inference drawn by the factfinder that supports the verdict "unless the evidence on which that inference is based is incredible as a matter of law." *Poellinger*, 153 Wis. 2d at 506–07. This Court will affirm a verdict "based on a reasonable inference drawn from the evidence." *Smith*, 342 Wis. 2d 710, ¶ 33.

The factfinder possesses exclusive responsibility for determining witness credibility and weighing the evidence. *Poellinger*, 153 Wis. 2d at 504. "It is the function of the trier of fact, and not of an appellate court, to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id.* at 506. This Court will not substitute its judgment for that of the factfinder unless the evidence relied upon "was inherently or patently incredible—that kind of evidence which conflicts with the laws of nature or with fully established or conceded facts." *State v. Below*, 2011 WI App 64, ¶ 3, 333 Wis. 2d 690, 799 N.W.2d 95.

Finally, sufficiency-of-the-evidence analysis considers all admitted evidence, regardless of whether the admission was in error. *State v. LaCount*, 2008 WI 59, ¶ 25, 310 Wis. 2d 85, 750 N.W.2d 780. Therefore, a court does not excise erroneously admitted evidence under this analysis.

C. Sufficient evidence supported Melssen's substantial battery and disorderly conduct convictions.

Melssen contends that the State presented insufficient evidence to show that he "was not acting in self-defense" during the altercation with Bobby. (Melssen's Br. 22–23.)

Consistent with the State's obligation to negate the self-defense privilege, *State v. Staples*, 99 Wis. 2d 364, 376, 299 N.W.2d 270 (Ct. App. 1980), the circuit court's substantial battery instruction included language that guided the jury's

consideration of Melssen's self-defense claim. (R. 94:7–8.) The instruction also discussed the interplay between self-defense and the related principles of retreat and provocation and placed the burden of disproving self-defense on the State. (R. 94:9.)

To begin, the State proved the underlying elements of substantial battery: (1) Melssen "caused substantial bodily harm to [Bobby]"; and (2) Melssen "intended to cause bodily harm to [Bobby]." (R. 131:140–41 (citing Wis. Stat. § 940.19(2)).)

First, the jury could infer from the evidence that Melssen caused substantial bodily harm to Bobby. (R. 131:140.) According to Bobby, Melssen struck him in the face as he sat in the truck. (R. 130:113, 124.) Mary saw Melssen "punch [Bobby] through the car window." (R. 130:152–53.) Melssen agreed that he punched Bobby in the face. (R. 131:64–65.) Moreover, based on testimony that Bobby sustained a cut above his left eyebrow that was treated with superglue (R. 88:3, 14; 130:100, 124), the jury reasonably concluded that Bobby sustained substantial bodily harm. Wis. Stat. § 939.22(38) ("Substantial bodily harm' [includes] bodily injury that causes a laceration that requires . . . a tissue adhesive.").

Second, the jury could also infer from the evidence that Melssen *intended* to cause Bobby bodily harm—either because that was Melssen's purpose or "his conduct was practically certain to cause [it]." (R. 131:140–41.) That evidence included Mary's observation that she saw Melssen punch Bobby through the window "[a]t least two or three times" and Melssen's admission that he punched Bobby in the face. (R. 130:154; 131:65.)

Having proved the elements of substantial battery, the jury then had to determine whether the State disproved Melssen's claim that he acted in self-defense. (R. 131:141–43.) Bobby and Melssen gave conflicting accounts of whether Bobby stabbed Melssen before Melssen punched him. Melssen claimed that when he approached Bobby's car window to ask for the money that Bobby owed him, he felt a prick to his arm, "looked up and swung quick." (R. 131:16–17.) But Bobby unequivocally testified that he took out his knife and opened it after Melssen hit him. (R. 130:119.) Bobby's and Melssen's conflicting testimony required the jury to assess their credibility, guided by the court's instruction for assessing witness credibility. (R. 131:154–55.)

The jury's rejection of Melssen's self-defense claim demonstrates that it found his testimony less credible than Bobby's testimony. This decision was consistent with its obligation to determine the credibility of witnesses, weigh evidence, and resolve conflicts in testimony. *Poellinger*, 153 Wis. 2d at 504, 506. Here, the jury acted "within the bounds of reason" to resolve conflicting inferences by adopting an inference consistent with Melssen's guilt. *Id*. at 506–07. Based on the evidence, including Bobby's testimony, the jury drew the inference that Melssen did not act in self-defense. Because this inference was not "incredible as a matter of law," *id*. at 506–07, this Court must affirm the verdict on the substantial battery count "based on a reasonable inference drawn from the evidence." *Smith*, 342 Wis. 2d 710, ¶ 33.

D. Sufficient evidence supported Melssen's disorderly conduct conviction.

As to the disorderly conduct charge, the court instructed the jury that the State had to prove two elements: "[1] the defendant engaged in violent, abusive, boisterous, or otherwise disorderly conduct; and, [2] the conduct of the defendant under the circumstances as they existed tended to

cause or provoke a disturbance." (R. 131:146 (citing Wis. Stat. § 947.01).) Importantly, Melssen requested a self-defense instruction only in conjunction with the substantial battery count. (R. 72.) The court's instructions limited the self-defense privilege to the substantial battery count. (R. 131:141–43.)

The jury could reasonably conclude that Melssen engaged in conduct that was disorderly and caused a disturbance based on Bobby's testimony. According to Bobby, Melssen's conduct included "racing down the driveway" in his truck and boxing Bobby's Tahoe in so he could not get out, grabbing him by the shirt with such force that it destroyed it, and punching Bobby in the face. (R. 130:116–18, 124.) Moreover, that Melssen's behavior caused others to react demonstrates that it provoked a disturbance. Specifically, while inside changing, Mary "heard Brandon yell, 'Oh, boy,'" which prompted Mary to go to the door in time to see Melssen punch Bobby and to see that Bobby was unable to immediately drive away because Melssen had blocked him in. (R. 130:152–53, 169–70.)

Because the jury drew a reasonable inference from Bobby's and Mary's testimony that Melssen's conduct was disorderly, this Court should affirm the disorderly conduct verdict. *Smith*, 342 Wis. 2d 710, ¶ 33.

III. The circuit court did not err when it admitted limited evidence about Melssen's drug activities at the trial on the assault charge.

Melssen challenges the court's decision to admit evidence about his drug-related activities, first, during the State's case-in-chief, and second, during its rebuttal case to impeach Melssen's testimony. (Melssen's Br. 19–21.) The State addresses each separately.

A. Standard of Review

The decision to admit evidence rests "within the circuit court's discretion." *State v. Warbelton*, 2009 WI 6, ¶ 17, 315 Wis. 2d 253, 759 N.W.2d 557. This Court will not find an erroneous exercise of discretion if the record contains a reasonable basis for the circuit court's ruling. *State v. Hammer*, 2000 WI 92, ¶ 21, 236 Wis. 2d 686, 613 N.W.2d 629. This Court "look[s] for reasons to sustain a trial court's discretionary decision." *State v. Gutierrez*, 2020 WI 52, ¶ 27, 391 Wis. 2d 799, 943 N.W.2d 870 (citation omitted).

B. The court did not erroneously exercise its discretion when it admitted Mary's testimony that Melssen was her drug dealer.

1. Other acts evidence is admissible under Wis. Stat. § 904.04(2)(a).

Generally, "evidence 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). However, other acts evidence may be admissible when it is offered for a proper purpose. *Id*. Courts apply a three-step test to determine the admissibility of other acts evidence under Wis. Stat. § 904.04(2)(a). *State v. Sullivan*, 216 Wis. 2d 768, 771–73, 576 N.W.2d 30 (1998).

First, the evidence must be offered for an admissible purpose under section 904.04(2)(a), such as to establish "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," although this list is not exhaustive or exclusive. *Sullivan*, 216 Wis. 2d at 772. Other acts evidence is also admissible "to complete the story of the crime[s] on trial by proving its immediate context of happenings near in time and place." *State v. Pharr*, 115 Wis. 2d 334, 348, 340 N.W.2d 498 (1983) (citation omitted);

State v. Hunt, 2003 WI 81, ¶¶ 56, 58, 263 Wis. 2d 1, 666 N.W.2d 771 (background, context, and credibility).

Second, the evidence must be relevant, which means it must both be "of consequence to the determination of the action" and tend to "make the consequential fact or proposition more probable or less probable than it would be without the evidence." *Sullivan*, 216 Wis. 2d at 772.

Third, the probative value of the evidence must not be substantially outweighed by the considerations set forth in section 904.03, including the danger of unfair prejudice. *Sullivan*, 216 Wis. 2d at 772–73. The prejudice inquiry focuses on "whether the evidence tends to influence the outcome of the case by 'improper means.'" *State v. Marinez*, 2011 WI 12, ¶ 41, 331 Wis. 2d 568, 797 N.W.2d 399 (citation omitted). To minimize the risk that the jury will decide a case based on improper means, a court may give a cautionary instruction, which jurors are presumed to follow. *Id.*

The proponent of the other acts evidence bears the burden on the permissible purpose and relevance prongs of the *Sullivan* test, while the opponent bears the burden on the unfair prejudice prong if the first two prongs are satisfied. *Marinez*, 331 Wis. 2d 568, ¶ 19.

2. The court's decision to admit testimony that Melssen was Mary's drug dealer

Melssen recognized "that drugs [were] a part of this case." (R. 130:140.) Indeed, Melssen asked to introduce evidence about Bobby's drug usage when the altercation occurred, did not object when Bobby testified that he and Melssen did drugs together, and was allowed to introduce evidence that officers found methamphetamine and a syringe in Bobby's Tahoe. (R. 130:7, 111, 230–32.) But Melssen objected to Mary's anticipated testimony that Melssen was her drug dealer. (R. 130:8, 14, 140.)

The State asserted that this testimony was relevant to understanding Melssen's and Mary's relationship to each other, including how it started when Melssen began supplying her with drugs and only later became intimate. (R. 130:12–13.) It also argued that Melssen's relationship with Mary provided motive for assaulting Bobby. (R. 130:141–42.) Later, when asked how she knew Melssen, Mary testified, "He's an ex-boyfriend of mine and was my drug dealer." (R. 130:145–46.) She explained that she did not pay Melssen for drugs and that they became intimate after she and Bobby broke up. (R. 130:147.)

The court agreed that this evidence explained the nature of Melssen's and Mary's relationship and determined that the prejudice of admitting this evidence did not outweigh its probative value. (R. 130:142.) The record demonstrates that the court did not erroneously exercise its discretion to admit this evidence.

3. Mary's testimony was admissible other acts.

First, the evidence was admissible for several allowable purposes under section 904.04(2)(a), including motive, background, context, and credibility. *See Hunt*, 263 Wis. 2d 1, ¶¶ 58–59. Here, it was important for the jury to understand the overlapping and complicated relationships between Mary, Melssen, and Bobby. All three admitted using drugs, including methamphetamine, at the time. (R. 130:111, 123–24, 163; 131:37.) Bobby's and Mary's relationship came to a tumultuous end immediately before Melssen assaulted Bobby. (R. 130:112–13, 115, 149.) Meanwhile, Mary's relationship with Melssen began with him giving her drugs, and it had developed into an intimate relationship. (R. 130:146, 162.) Melssen agreed that he was using methamphetamine with Mary and that they had developed an intimate relationship before the incident, but he contended

that Mary shared her drugs with him. (R. 141:37–38, 47.) And it was Mary's relationship to Melssen that explains why Mary contacted Melssen to confront Bobby about how he was treating her. (R. 130:149.) This background about the multifaceted nature of Melssen's and Mary's relationship placed Melssen's assault of Bobby into context and helps explain why Melssen was motivated to confront Bobby when he returned to Mary's residence.

Second, this evidence was relevant because it related to a fact or proposition of consequence, including motive, background, intent and credibility. *See Sullivan*, 216 Wis. 2d at 772. Melssen's motive, i.e., whether he acted aggressively because of his relationship to Mary or defensively in response to Bobby's actions, constituted a fact or proposition of consequence. Likewise, context and background also related to facts of consequence in this case. *See Hunt*, 263 Wis. 2d 1, ¶¶ 65–67.

Third, as to prejudice, Melssen bears the burden of showing that the risk of unfair prejudice substantially outweighed the probative value of the evidence. *Marinez*, 331 Wis. 2d 568, ¶ 19. Melssen fails to meet this burden. He overlooks the court's cautionary instruction that limited the jury's consideration of this evidence to its assessment of "motive, context, or background" and its admonishment to the jury not to consider this evidence for an improper purpose, i.e., character or propensity. (R. 131:153–54.) Because of the cautionary instruction, this Court should "hold that [Melssen] failed to meet his burden of showing that the probative value of the other-acts evidence was substantially outweighed by any alleged unfair prejudicial effect." *Hunt*, 263 Wis. 2d 1, ¶ 75.

The circuit court did not erroneously exercise its discretion when it admitted Mary's testimony that Melssen was both her boyfriend and drug dealer.

C. Mary's rebuttal testimony about Melssen's drug activity was admissible, while a detective's limited rebuttal testimony about finding drugs at Melssen's residence was not.

1. The court's decision to admit limited rebuttal evidence

After Mary testified, the court denied the State's request to admit evidence found several days later at Melssen's residence. (R. 130:230–32.) But the court's position changed after Melssen testified.

Melssen testified that he and Mary did drugs together between 6 and 12 times, that Mary supplied the drugs that they used, that Mary paid him in drugs to fix the car, and that she stopped supplying him with drugs after Dave Hudnut, another boyfriend of Mary's and her supplier, went to prison. (R. 131:28–29, 37–40.) Melssen insisted that he never bought drugs, that other people shared them with him, and that Mary would have supplied the drugs if they did any drugs together after May 25, when he hit Bobby. (R. 131:44–45.)

Based on Melssen's testimony, the State asked to present rebuttal evidence that Melssen was selling drugs and that Mary and Melssen did drugs together after May 25. (R. 131:82.) Melssen conceded that if Mary was "going to testify to things that he testified to . . . that's fair game," but he objected to the admission of evidence from officers about the seizure of drugs from his residence. (R. 131:82–83.) After an offer of proof, the court sustained Melssen's objection to the detective's testimony about evidence of drug dealing on the cellphone. (R. 131:95–96, 102.) But it determined that evidence about drug-related evidence found at his residence was admissible because it explained why he was arrested and was part of the case's facts. (R. 131:105–06.)

Detective Klang testified about the evidence seized during the search warrant, including paraphernalia and packaging material found in the home and the recovery of suspected methamphetamine from a car on the property. (R. 131:104, 113–14.) Mary testified that Melssen was her dealer, that she did not supply him with drugs, and that, after the warrant's execution, they used methamphetamine that Melssen removed from a shirt hanging in his closet.

2. Melssen conceded that Mary's rebuttal testimony was admissible, but the admission of the search warrant evidence was likely error.

Because Melssen conceded that Mary's rebuttal testimony was admissible (R. 131:82–83), the only question is whether the State could introduce Detective Klang's testimony about the search of Melssen's residence to impeach his credibility. The prosecutor believed she could. (R. 131:83–85, 104–05.) Wisconsin Stat. § 906.08(2) allowed the prosecutor to attack Melssen's character for truthfulness by cross-examining him about specific instances of conduct. But it did not allow the prosecutor to prove Melssen's untruthfulness through extrinsic evidence. *Id.*; *State v. Rognrud*, 156 Wis. 2d 783, 787, 457 N.W.2d 573 (Ct. App. 1990). Detective Klang's rebuttal testimony about the seizure of packaging material and drugs from Melssen's residence after his fight with Bobby was inadmissible. But because his testimony was limited and brief, its admission was harmless.

D. Any error was harmless.

The erroneous admission of other acts evidence is subject to harmless error analysis. *Sullivan*, 216 Wis. 2d at 792. Any error in the admission of Mary's statement that Melssen was her dealer in the State's case-in-chief and the admission of evidence about the seizure of drugs from Melssen's residence in its rebuttal case was harmless.

First, the court gave a cautionary instruction that admonished the jury from considering this evidence for an improper purpose like Melssen's character and limited the jury's consideration for purposes of motive, background, and context. (R. 131:153–54.) Juries are presumed to comply with cautionary instructions. *Marinez*, 331 Wis. 2d 568, ¶ 41.

Second, in her closing argument, the prosecutor did not ask the jury to draw an improper inference from the drug evidence. Rather, consistent with the cautionary instruction, the prosecutor reminded the jury that it was not "to convict him about the drugs" and that the case was "not about the drugs"—a point Melssen's counsel reiterated in his argument. (R. 131:167, 169, 176–77.)

Third, evidence about dealing aside, the jury was going to hear about drugs during Melssen's trial. Melssen recognized "that drugs [were] a part of this case." (R. 130:140.) Indeed, the court granted his request to introduce evidence of Bobby's drug usage, Melssen questioned Mary about her drug usage, and Melssen admitted using methamphetamine and weed, which he claimed Mary supplied him. (R. 130:7, 14, 175, 230–32; 131:37.) What testimony that was admitted about dealing focused on who supplied the other with drugs in Mary's and Melssen's relationship. The court excluded evidence, including text messages, that Melssen was dealing with others. (R. 131:102.)

Fourth, Detective Klang's rebuttal testimony about the evidence seized during the warrant was brief. He discussed the recovery of packaging material in the house and suspected methamphetamine from the car and offered no opinion about the weight or street value of the seized drugs. (R. 131:113–14.) The court did not allow him to testify about text messages suggesting distribution to others. (R. 131:100–02.) Also, Detective Klang's testimony was not nearly as powerful as Mary's rebuttal testimony that Melssen agreed was "fair game" if Mary testified "to things he testified to." (R. 131:82.)

Without objection, Mary later testified that Melssen was her dealer, denied paying him with drugs to fix her car, and used methamphetamine with Melssen at his home, which Melssen provided and which officers apparently missed when they searched his residence. (R. 131:123–25, 128–29.)

Fifth, and most importantly, the challenged evidence about drugs did not detract from the primary focus of the evidence at Melssen's trial, i.e., whether Melssen was the aggressor or acted in self-defense. *See supra* Statement of the Case, Sections C2.–4. Because Mary did not see how the fight started (R. 130:152–53), the jury had to reach its verdict based on its assessment of Melssen's and Bobby's testimony. And much of the trial testimony focused on Bobby's and Melssen's recollection about the sequence of events that resulted in Melssen punching Bobby in the face and Bobby stabbing Melssen in the arm. (R. 130:112–36; 131:9–28, 49–80.) And in their closing arguments, the parties focused on the sequence of events leading to the altercation and Melssen's self-defense claim. (R. 131:156–63, 170–88.)

Any error in admitting evidence about drugs, either in the State's case-in-chief or in rebuttal, was harmless.

IV. Sufficient evidence supported Melssen's convictions for drug offenses related to the seizure of methamphetamine from his property.

A. Standard of Review and Legal Standards

The State previously discussed the applicable standard of review and legal standards guiding sufficiency challenges. *See supra* Sections II.A. and B.

B. Sufficient evidence supported Melssen's drug-related convictions.

Melssen argues that the State failed to present sufficient evidence to prove that he was guilty of possession

with intent to deliver more than ten grams of methamphetamine and maintaining a drug trafficking place. (Melssen's Br. 23–24.) He contends that most of the methamphetamine (11.7 grams) seized at Melssen's property was found in a gray Audi, which belonged to Melssen's friend Casey Radke and for which officers could find no keys at Melssen's residence. (Melssen's Br. 23.)

Melssen made a similar argument when he moved to dismiss at the close of the State's case, and the circuit court rejected it. (R2. 132:248–51.) Evidence seized from inside Melssen's residence, from the Audi outside the residence, Mary's testimony about Melssen's drug activities, and text messages between Melssen and others support both the possession with intent to deliver charge and keeping a drug trafficking place charge.[4]

Melssen asked the jury to infer from the evidence that the methamphetamine found inside the house was consistent with personal use and that Radke, not Melssen, had access to the Audi where officers found a large quantity of methamphetamine. (R2. 132:336–38.) But the jury was free to reject inferences consistent with Melssen's innocence and draw the inferences consistent with his guilt. *Smith*, 342 Wis. 2d 710, ¶ 30.

While the jury could certainly infer from the evidence that Melssen used methamphetamine, it could also infer that Melssen distributed methamphetamine from his residence and that he intended to deliver the methamphetamine at his residence, including the methamphetamine found in the Audi. That evidence included the recovery of evidence inside

[4] Melssen reasonably does not challenge the sufficiency of the evidence for his possession of drug paraphernalia conviction. (Melssen's Br. 23–24.) Based on the officers' recovery of a methamphetamine smoking bong under Melssen's bathroom sink, the evidence was sufficient. (R2. 132:153–54.)

the residence including a scale, a revolver next to the scale, a bag with approximately 100 clear plastic capsules which are used to package methamphetamine for resale, and over $2,000 in currency. *See supra* Statement of the Case, Sections D.1. and 2. Other evidence included Mary's testimony about obtaining methamphetamine from Melssen, the note she wrote about a quarter pound, and the text messages between Melssen and others from which a jury could reasonably infer that Melssen sold methamphetamine. *See supra* Statement of the Case, Section D.3. and 4.

Even if officers could not find the keys for the Audi at Melssen's residence, the jury could still infer that Melssen possessed the methamphetamine in the Audi because: (1) the Audi was parked at Melssen's property; (2) that, according to Mary, Melssen and Radke were "best friends"; (3) Melssen's mother's testimony and Radke's text messages with Melssen that demonstrate Radke visited the residence even when Melssen was not there; and (4) the seizure of a capsule containing methamphetamine from the floor of the Audi that was consistent with the clear capsules found in Melssen's kitchen. (R2. 132:158, 187, 210–11, 230, 272–75.)

Importantly, an inference that Radke possessed the methamphetamine found in the Audi parked outside Melssen's residence did not foreclose the jury from concluding that Melssen shared its possession. Consistent with Wisconsin law, *see* Wis. JI—Criminal 920 (2000), the court instructed the jury that it could find Melssen possessed the substance if he had "actual physical control" over it and "if it [was] in an area over which the person has control and the person intends to exercise control." (R2. 132:311.) Thus, because the Audi was on Melssen's property, the jury could reasonably infer that he could exercise control over it, even if the officers did not find the key. Moreover, the jury could find that he possessed the methamphetamine in the Audi even if the jury believed that Radke owned it or if it believed that

Melssen and Radke jointly shared possession over it. (R2. 132:311–12.)

Melssen's case is not one where the inferences that the jury drew from the evidence to find him guilty were "incredible as a matter of law." *Poellinger*, 153 Wis. 2d at 506–07. As such, Melssen did not meet his burden of proving that the evidence, as a matter of law, "could not reasonably have supported" the jury's guilty verdicts. *Beamon*, 347 Wis. 2d 559, ¶ 21. Therefore, this Court must affirm the verdict based on the reasonable inferences that the jury drew from the evidence. *Smith*, 342 Wis. 2d 710, ¶ 33.

CONCLUSION

This Court should affirm the judgments in both cases.

Dated this 5th day of June 2025.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,521 words.

Dated this 5th day of June 2025.

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 5th day of June 2025.

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