STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal No. 2014AP001575 CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

CLIFTON ROBINSON,
Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION AND ORDER DENYING POST CONVICTION RELIEF ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT BRANCH 20, THE HONORABLE DENNIS P. MORONOEY PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

JON ALFONSO LAMENDOLA
STATE BAR NUMBER 1030744

ATTORNEY FOR DEFENDANT-APPELLANT

LAMENDOLA LAW OFFICE
375 E. ARBOR CIRCLE W.
OAK CREEK, WI 53154
(414)-762-6028

attyjonlamendola@gmail.com

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VI) Is the defendant entitled to a new trial for the reason that trial counsel was ineffective due to a failure to act as follows?: A) file a motion to sever the charges; B) object to unduly prejudicial testimonial evidence admitted at trial; C) present Detective Elisabeth Wallich as a witness at trial; D) object to the State's request for Exhibit #10 to be moved into evidence; E) motion the court for an instruction, at the close of evidence to the juror's for the lesser included offenses; F) object to exhibits 3 and 4 (crime scene photos) being moved into evidence.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

There is no need for oral argument. The arguments of each party will be sufficiently presented in the briefs. This decision will clarify existing law. Therefore, the defendant-appellant requests publication.

STATEMENT OF THE CASE

On September 1, 2012 the State filed a felony criminal complaint in Milwaukee County Circuit Court charging the defendant. The defendant exercised his right to a preliminary hearing on September 10, 2012 whereby the court found that probable cause existed that the defendant committed a felony and bound him over for trial. On April 9, 2013 a jury unanimously found the defendant guilty of count 2, Criminal Damage to Property in violation of Wis. Stats. Sec. §943.01(1) and count 3, Armed Robbery with Use of Force as a Party to a crime in violation of Wis. Stats. Sec. §943.32(2), §939.05. The Honorable Dennis P. Moroney sentenced the defendant in both matters on May 6, 2013. The court ordered six (6) month jail on count 2 concurrent to count 3 and five (5) years initial confinement and five (5) years extended supervision on count 3. The defendant was found not eligible for the Challenge Incarceration or Substance Abuse early release programs. Sentence credit was modified to represent 143 days credit on both counts. The defendant appealed by filing a timely Notice of Intent.

On March 17, 2014 the defendant, by his appellate counsel, filed a post-conviction motion requesting relief. The court ordered a briefing schedule on the issues. The

State filed its response to the defendant's post-conviction motion on May 14, 2014 and the defendant filed its reply on June 11, 2014. On June 19, 2014 the Honorable Dennis P. Moroney issued a Decision and Order denying the defendant's motion for post-conviction relief. The defendant filed a Notice of Appeal on July 8, 2014. The defendant now appeals directly to the Court of Appeals seeking relief from the Judgment of Conviction and denial of his post-conviction motion.

STATEMENT OF THE FACTS

In count 2 the defendant allegedly "did intentionally cause damage to the physical property of Deborah E. Sims" and that in count 3, and that the defendant committed Armed Robbery (Use of Force) as a party to the crime, alleging he "took property from the presence of Deborah E. Sims, the owner, by use of force."

During the jury trial, the State called several witnesses; namely: 1) Walter Hines (Ms. Sims fiancé); 2) Officer Thomas Marcus; 3) Officer Anthony Wilson; and 4) Officer Jason Darova. The defendant exercised his right to remain silent and called no witnesses at trial.

Based upon the testimony at trial, the evidence revealed that on August 26, 2012 in the County and City of Milwaukee, the apartment manager Walter Hines, who lives in apartment 101, indicated that his fiancé called the police after hearing someone kicking at the door in an apartment across the hall and hearing someone discharge a firearm in the hallway. Mr. Hines stated that after informing the suspect individuals that there was a camera recording the

activities in the complex, and that the police had been called, the defendant and three other individuals entered Mr. Hines' apartment. While in the apartment, demands were made to obtain the video recording and Mr. Hines gave "the male with the white shirt with braids the tape."

After giving the individual the tape, Mr. Hines saw the police outside, let them in and as they were coming back to the apartment, he saw the male in the white t-shirt with braids standing in front of his door with his video games and the tape; Mr. Hines testified, "the one I gave him, and my wife's purse." He clarified that "the pouch he was holding belonged to his fiancé."

Mr. Hines also testified that he was told by police "to put the stuff back out there, leave all the stuff where it was, so I put it back on the floor." Mr. Hines clarified that the photo of the items taken did reflect the way Hines placed the items but not the way the male in the white t-shirt and braids had dropped them, "but in the same area."

Officer Thomas Marcus testified that he did not see a gun on Mr. Robinson, and that when he got inside the door is when the defendant started running. He testified that he hadn't seen the defendant drop anything.

Officer Anthony Wilson testified that he had shown Mr. Hines pictures and that Mr. Hines had picked a photo filler of a different individual.

Officer Darova testified that by the time he had arrived on scene, the alleged items taken were not on scene. He further testified that he did not see "a white bag" that was in the photograph." Officer Darova mentioned that Mr. Hines was instructed by an officer to leave the items in the hallway, but that prior to his arrival, those items that had been in the hallway were on the kitchen

table as they were not in the same area where they should have originally been. Officer Darova "considered these items to be contaminated." He also testified that the items "would have been taken back a second time."

ARGUMENT

I. The defendant is entitled to a new trial under *Batson v. Kentucky*, 476 U.S. 79 (1986) because the State did not present adequate reasons for striking the only remaining potential African-American juror.

Under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the State denies a black defendant equal protection when it puts him on trial before a jury from which members of his race have been purposely excluded and the Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors.

The record indicates that defense counsel challenged the State's striking of the last African-American juror pursuant to *Batson vs. Kentucky*. The defendant is African-American. Trial counsel raised the challenge before the jury was sworn via the Court's reserving his right to challenge same. (64:36-37). Trial counsel stated that, "we objected to the fact that Juror Number 26 was the last remaining African American that was left on the jury after the Court's administrative picks." (64:61:15-18). The

record reflects that the court accepted the State's explanation stating that, "it only happened once, Judge, but you were making a comment about something about lunch or about what they were supposed to do, and she just, she didn't seem to be following what you were saying and she was laughing and gesturing to the juror next to her, and it struck me at the time that she wasn't following what you were saying or that it was inappropriate what her response was; and I made a note on my card about it that she just didn't seem to be with it about what was happening in the courtroom." (64:62-63).

Given the State's unclear and varying reasons stated on the record for its strike, the defendant maintains that under the circumstances, without further inquiry by the court or further voir dire of the juror, the State had not satisfied the minimal standard in *Batson v. Kentucky*; that is that it exercised race-neutrality in its peremptory challenge.

The defendant preserved in his post-conviction motion and noted in his reply to the State's brief, that additional question of the State were necessary and that the State's response inherently does not constitute an adequate reason to strike juror number 26 on a race-neutral basis. The defendant asserts that the record remains unclear as to how the "inappropriate" behavior of juror number 26 relates to her ability to perform as a "fair and impartial" juror. Additional inquiry is necessary for the court to formulate a proper decision regarding whether the reaction of juror number 26, as noted by the State, was in reaction to the judge's comment about lunch or what she was supposed to be doing. Furthermore, clarification is needed to determine whether the State considered striking (or not

striking), and for what rationale, the juror she was communicating with at the time. Was she communicating with juror 25 or 27? Juror 27 ultimately remained on the panel. (50:2-3).

In its Decision and Order denying the motion without hearing, the court maintained that it "stands by the record on the afternoon of April 8, 2013 and finds that the State provided a race neutral reason for striking the juror." (51:2).

II. The defendant is entitled to a new trial based upon insufficiency of the evidence.

In *State v. Poellinger,* 153 Wis. 2d 493, 451 N.W.2d 752 (1990). "In reviewing the sufficiency of the evidence to support a conviction, an 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. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it." *Poellinger, at 507.*

Based upon the record, the evidence was insufficient to find the defendant guilty of either count. As to the criminal damage to property, the criminal complaint indicates that the victim, Deborah M. Sims was the owner of

said property and did not consent to the defendant damaging her property. The record is simply devoid of sufficient evidence from which a reasonable jury could conclude that Deborah M. Sims was the owner of said property and that she did not consent to any physical damage. The argument that this can be inferred or implied does not create an adequate record.

As to the armed robbery count, the complaint states that the defendant "took property from the presence of Deborah M. Sims, the owner." However, the evidence of record is insufficient to prove beyond a reasonable doubt that victim Sims had property taken from her presence and that she was, most importantly, the owner of said property.

During the trial, the State presented only one witness, Mr. Walter Hines, whose testimony was indeterminate regarding which individual took the property; i.e., he was unable to identify the individual via photo array with police, he never identified the defendant in court, and there was a discrepancy regarding whether the person wore a black hoodie or a white t-shirt. It was also indeterminate from his testimony as to what property was taken from whom during the incident; i.e., the white purse versus the black purse.

To further muddy the evidentiary waters, Walter Hines further testified that he had removed the items taken from the apartment and then returned them to where they were dropped. These contaminated items (as coined by Detective Darova) were later photographed by the police – establishing a reasonable doubt regarding what items were in fact originally taken. Ultimately, there was insufficient evidence that the items taken were in fact those from the person of Ms. Deborah Sims.

In reference to and in support of this claim, the defendant offers the following relevant trial testimony:

A. Walter Hines:

On direct examination:

- He "was the apartment manager" and that he "lives in apartment 101." (64:68:12-16);
- Initially, there was one male on scene and he "was wearing the white T-shirt and braids." (64:71:5-15);
- "My fiancé had went into the apartment, she called the police." (64:72:6-7);
- A second male was wearing a black sweatshirt with a hoodie, (64:75:12-15);
- I gave him (the male white shirt with braids) the tape. (64:80:7-11);
- Then after giving the tape, stuff started going on in the house, so I had a chance to see the police outside . . . I had a chance to run out my apartment door to let the police in and we were coming back into my apartment, he was standing in front of my door with my video games and the tape, the one I gave him, and my wife purse. And when he saw the police, he dropped everything on the floor. (64:81:2-13);
- So when the police came in and he saw him with my stuff in his hand, and he started took off running out the back door. (64:82:19-21);
- And the pouch that he was holding belonged to his fiancé. (64:83:21-24);

On cross-examination and redirect:

- He was told by police "to put the stuff back out there, leave all the stuff where it was, so I put it back on the floor." (65:28:18-20);
- In reference to Exhibit #9, Hines testified that, it reflected the way that Hines placed the items not the way he (male in white t-shirt and braids) dropped it. "But it's in the same area." (65:39:3-7);

On re-cross-examination:

- Hines testified that it was "five to ten minutes" after the incident occurred before he put the items back out into the hallway. (65:41:3-6);

B. Officer Thomas Marcus:

- He did not see a gun on Mr. Robinson. (65:57:8-12);
- "When I got inside the door, that's when he started running." (65:57:21-22);
- He did not recall the defendant dropping anything at the door before he started running. (65:58:11-18);

C. Officer Anthony Wilson:

- He had shown Mr. Hines pictures from exhibits #11 and #12. And said that Mr. Hines picked the photo of a filler, #2, a Garrett Clark. (65:75-76);

D. Officer Jason Darova:

- That by the time he arrived on scene, the items in exhibit #9 were not at the scene. (65:88:18-24);
- That Mr. Hines mentioned a white bag being taken. . . .And further testified that, he did not see a white bag in the photograph. (66:8:5-14);
- When asked whether he "ever had a fingerprint technician attempt to take fingerprints of - from off of the items that were supposedly taken by Mr. Robinson?" he replied, "no." (66:8:15-19);
- "I learned that the items were gathered - that Mr. Hines was instructed by an officer to leave the items in the hallway, but prior to my arrival, those items that had been in the hallway were now on the kitchen table. Because they weren't in the same area where they would have - where they should have been originally. I considered those items to be contaminated. So, no I did not have them processed for fingerprints." (66:8-9);
- And that, the items "would have been taken back a second time because when I arrived on the scene, the items were on the kitchen table." (66:10:9-12).

It is noteworthy that evidence was never introduced by trial counsel that detective Elisabeth Wallich, who testified under oath at the preliminary hearing, that no property was taken from Deborah Sims. (15:9:8-9).

The Court summarily concluded that any property taken from the apartment could be inferred as property owned by or taken from the presence of Ms. Deborah M. Sims, under the party to a crime statute. The defendant contends that the record is incomplete to the extent that any reasonable jury could determine that the State met the elements of armed robbery beyond a reasonable doubt. Moreover, more than a reasonable doubt exists suggesting that the defendant did not take property of or from the presence of Ms. Sims as stated in the criminal complaint.

In response to the defendant's post-conviction motion on this issue and having raised the fact that Detective Wallich's testimony was lacking at trial, the circuit court concluded in its Decision and Order without a hearing, that "there was more than sufficient evidence to convict the defendant on both counts." (51:2)

III. The defendant entitled to a new trial because Counts 2 and 3 were not severed.

In this case, joinder of the offenses in this action were not compliant with Sec 971.12(1) and (3) which state:

> "(1) Joinder of crimes. Two or more crimes may be charged in the same complaint, information or indictment in a separate count for each crime if the crimes charged, whether felonies or misdemeanors, or both, are of the same or similar character or are

based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan. When a misdemeanor is joined with a felony, the trial shall be in the court with jurisdiction to try the felony. And; (3) Relief from prejudicial joinder. If it appears that a defendant or the state is prejudiced by a joinder of crimes or of defendants in a complaint, information or indictment or by such joinder for trial together, the court may order separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. The district attorney shall advise the court prior to trial if the district attorney intends to use the statement of a codefendant which implicates another defendant in the crime charged. Thereupon, the judge shall grant a severance as to any such defendant; *Bailey v. State,* 65 Wis. 2d at 346; *State v. Kramer,* 45 Wis.2d 20, 36, 171 N.W. 2d 919 (1969).

Furthermore in *State v. Bettinger*, 100 Wis.2d 691 (1981), the Wisconsin Supreme Court acknowledged that,

[t]he risk of prejudice arising under these circumstances is related to the prejudice which arises when evidence of other crimes or wrongful acts is admitted improperly at trial. *See* sec. 904.04(2), Stats. When a jury is informed of the accused's previous wrongful conduct, it is likely that it will consider that the defendant is a "bad person" prone to criminal conduct. It is also possible that the jury will confuse the issues and will be incapable of separating the evidence. Therefore there is a serious risk that a conviction will result without regard to the facts proven relative to the crime charged. Similarly, when some evidence is introduced to prove the commission of multiple criminal acts joined in one information, there is a risk that the defendant will be convicted not because the facts demonstrate guilt beyond a reasonable doubt but because the jury may conclude that the accused is predisposed to committing crimes and that "some" evidence is "enough" evidence to return a conviction. In a trial on joint charges, there is also the possibility that the *697 jury will cumulate the evidence of the crimes charged and find

> guilt when it otherwise would not if the crimes were separately tried. *See Bailey v. State, supra,* 65 Wis. 2d at 346; *State v. Kramer,* 45 Wis.2d 20, 36, 171 N.W. 2d 919 (1969). *Bettinger* at p. 696.

The two counts in this action should have been severed as the defendant's alleged prior act of criminal damage to property constitutes a "prior bad act" in relationship to the armed robbery with use of force, as party to a crime. The introduction of that evidence was unduly prejudicial and the evidence of Criminal Damage to Property was inadmissible to prove commission of the Armed Robbery.

The issue in this case is the same as in *Bettinger*. That is, "whether or not . . . evidence of the commission of one of the charges would be admissible to prove the commission of the second charge. In Wisconsin, "other crimes" evidence "is not admissible to prove the character of a person in order to show that he acted in conformity therewith." Sec. 904.04(2), Stats. See. *Bettinger* at pp. 697-698.

Trial counsel, in his motions in limine, petitioned that, "the prosecution be prohibited from introducing alleged acts of criminal or other misconduct by the defendant either prior to or following the date of the alleged offense charged in the complaint." In part, that request was based upon the defendant's motions in limine sec (1)(b) which states, "The probative value of such other crimes evidence, if any is outweighed by its prejudicial effect and by the likelihood that the jury would infer that the defendant is predisposed to commit the crime charged in the complaint." (6:1-2).

The court reviewed the issue related to defense counsel's concern regarding the State's intention to call

Montrell Tanner who "made the call regarding the other co-defendants banging on his door trying to gain entry to get at the boy, to get at a child that was allegedly the boy of Angelica Robinson." Defense counsel further stated, "I don't know if his testimony is really necessary or relevant in regards to the alleged crime that my client is committed of armed robbery. I think he had nothing to do or had any knowledge in regards to the armed robbery, and I think he's just being called to show a bad act to get in." (59:3-4).

Based upon further argument, the Court analyzed the issue exclusively from the standpoint of a prior bad act derived from a witness's testimony, rather than from a motion to sever charges. The Court concluded, "it's not intended as prior bad acts. It puts him on scene. I mean there's a nexus there as to the next step." (59:4:19-21).

Ultimately, the trial court concluded by saying, "all I'm trying to do is if the guy was shown to be there and had an interest in the residence, that may be enough to have him there. It doesn't show prior bad acts, it shows him trying to gain entry earlier by knocking on the door . . . . pounding on the door so they showed he was in the building . . . I'll allow it for that reason, okay, I mean let's be honest, it shows he was allowed in the building and he was in the building so he had accessibility at least inside the building and whatever happened next it happened." (59:6-7).

The defendant respectfully disagreed with the Court's rationale and requested in his post-conviction motion that it review the previous conclusions from the standpoint that evidence of the criminal damage to property presents cumulative evidence; that evidence presented from the criminal damage was inadmissible to prove the commission of

the offense of armed robbery; and that the jury should have been advised with a curative instruction which was never submitted nor requested by trial counsel.

In response to the defendant's motion for post-conviction relief the trial court in its Decision and Order concluded without a hearing that, "[t]here was a nexus between the two incidents, and it was basically one continuous event with the first event providing context for the second event in Ms. Sims' and Mr. Hines apartment. The court declines to revisit its analysis pertaining to prior bad acts set forth on the record at the final pretrial." (51:2-3). The defendant asserts that the trial court did not adequately address the issue under B*ettinger*'s, nor the effect that a curative instruction would have had, if any, nor the cumulative nature in introducing such evidence.

IV. The defendant is entitled to a new trial because the jury was not presented with alternative jury instructions including lesser included offenses.

A trial court has wide discretion in issuing jury instructions. *State v. Pruitt*, 95 Wis.2d 69, 80-81, 289 N.W.2d 343 (Ct. App. 1980) (no error to refuse special instructions even when they are not erroneous); *State v. Lenarchick*, 74 Wis.2d 425, 455, 247 N.W.2d 80 (1976) (dealing with a refusal to give defendant's requested instruction); *Ingalls v. State*, 48 Wis. 647, 653, 4 N.W. 785 (1880) (it is a matter in the discretion of the trial judge whether he will instruct the jury to acquit the prisoner when there is no evidence of his guilt except the uncorroborated testimony of an accomplice). Furthermore,

"[u]ltimate resolution of the issue of the appropriateness of giving particular instruction turns on a case-by-case review of the evidence, with each case necessarily standing on its own factual ground." *Johnson v. State*, 85 Wis.2d 22, 28, 270 N.W.2d 153 (1978) (review of trial court's refusal to give a requested specific instruction on the identification of the defendant and refusal to instruct jury on lesser included offense of second-degree murder). Accord, *State v. Dix*, 86 Wis.2d 474, 486-87, 273 N.W.2d 250 (1979); *Kink v. Combs*, 28 Wis.2d 65, 76, 135 N.W.2d 789 (1965). In viewing the facts and circumstances before it, a trial court may supplement jury instructions as needed. *State v. Asfoor*, 75 Wis.2d 411, 432-33, 249 N.W.2d 529 (1977) (trial court could modify jury instruction to prevent jury from being misled by counsel's closing argument).

The record does not reflect that the jury was advised of any lesser included relevant offenses including "Theft," "Attempted Theft," "Unarmed Robbery," nor "Attempted Armed / Robbery." The defendant asserts that the jury should have been presented with instructions of such lesser included offenses.

The elements of Theft are: a) The defendant intentionally took and carried away the moveable property of another; b) that the owner of the property did not consent to taking and carrying away the property; c) The defendant knew the owner did no consent; and, d) the defendant intended to deprive the owner permanently of the possession of the property.

The elements of Attempt are: a) The defendant intended to commit the crime of Robbery; b) that the defendant acted toward the commission of the crime of robbery which

demonstrates unequivocally, under all of the circumstances, the defendant intended to and would have committed the crime of robbery except for the intervention of another person or some other extraneous factor.

While the defendant does not concede that the State proved its case for the reasons stated in the insufficiency of evidence section of this brief, the defendant does assert that in the event that this Court determines that the defendant is not entitled to a new trial, for all of the reasons stated in this brief, the defendant would have derived a potential benefit from lesser included offenses available for the juror's consideration. The evidence considered by the jury in finding the defendant guilty of Armed Robbery inherently supports conclusions that could have reasonably been drawn in its deliberations to these alternative lesser included offenses.

The taking and carrying away of the property of another are facts available from the totality of the facts set-forth at trial. Namely, that the defendant took or "attempted" to take the property of another.

In terms of a factual basis supporting the "attempt" of either offense, if the evidence supports that the fact that property was taken from another, there was a factual basis supporting there existed an extraneous and intervening factor (here the police arriving on scene) which prevented the property from being taken and carried away.

In response to the defendant's motion for post-conviction relief on this issue, the court in its Decision and Order issued without a hearing, concluded that "there is not a reasonable probability that the jury would have acquitted the defendant of armed robbery as party to a

crime based upon the totality of the evidence." (51:3). The defendant was not offered an opportunity to inquire of trial counsel whether lesser included offenses were considered and, if so, why they were not requested.

V. The defendant is entitled to a new trial for the reason that the court admitted Exhibit #10 (a photo of the defendant raising his middle finger to officers) which was unduly prejudicial and constituted cumulative evidence.

Exhibit #10 was published over trial counsel's objections (65:61:16-19), which illustrates the defendant "flipping the bird" to the police. Such evidence was patently unduly prejudicial and cumulative. The court should not have allowed publication of the photo due to its prejudicial effect which substantially outweighed its probative value.

Wis. Stats. Sec §904.03 states: Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time, states that, "although relevant, evidence 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.

The court stated that, "For the record briefly, I just wanted to make note that the Court did allow for basically a redaction on Exhibit # 10 by covering what appeared to be a flip-off to the world in that picture which Mr. Batt felt was prejudicial. It is prejudicial, no question about it. It certainly doesn't speak well for you, sir. I allowed for

it to be covered. I'm going to make a photocopy of that document. Well, we'll see what happens to that. I mean they saw it now, it's been published with the covered finger gesture and I guess maybe we'll just let that stand as and for the record. But I wanted to make record of what I did on it based upon my reasoning that it potentially was prejudicial; whether or not it was appropriate or not is not the issue." (65:62-63).

The Defendant maintains that Exhibit #10 as admitted is cumulative because several other forms of identification were available for the jury's consideration for identification purposes (its intention for being admitted). Namely, publication of the DVD video surveillance as referenced via witnesses Hines and Marcus, as well as Exhibits 11, 12 and 13 referenced via Officer Anthony Wilson. The publication of exhibit 10, although relevant, . . . was outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . and served only as the *needless presentation of cumulative evidence*.

In response to the defendant's motion for post-conviction relief on this issue, the court in its Decision and Order without a hearing, concluded that the "contention is completely without merit." (51:3).

VI. The defendant is entitled to a new trial for the reason that trial counsel was ineffective.

Trial counsel was "ineffective" pursuant to *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), which states that a hearing may be held when a criminal

defendant's trial counsel is challenged for allegedly providing ineffective assistance. [And] [a]t the hearing, trial counsel testifies as to his or her reasoning on [the] challenged action or inaction." *State v. Thiel*, 2003 WI 111, ¶2 n.3, 264 Wis. 2d 571, 665 N.W.2d 305. Trial counsel was ineffective because his actions and inactions in failing to perform the following prejudiced the defendant and, but for, counsel's lack of effective representation, considering the record in its entirety. Moreover, due to each of the following and by way of their collective nature, the defendant was prejudiced by trial counsel's inaction and asserts that but for these errors, a different outcome would have been rendered:

A) **Trial counsel failed to file a motion to sever the charges?**

Trial counsel failed to motion the court for severance of the charges for the reason that the misdemeanor criminal damage to property was unduly prejudicial and constituted a prior bad act, but more importantly, under the basis that evidence of the commission of the criminal damage charge was not admissible to prove the commission of the Armed Robbery. While defense counsel did argue that the admissibility of the evidence of the criminal damage was unduly prejudicial, he did not pursue motion to sever charges and proceed with an analysis under *State v. Bettinger*.

B) **Trial counsel failed to object to unduly prejudicial testimonial evidence admitted at trial.**

Trial counsel failed to object to the State's lines of questioning on several occasions during the testimony of

Walter Hines and Officer Thomas Marcus. Specifically, trial counsel failed to object per the following:

As to Witness Hines:

(i) The defendant's and other's kicking the apartment door across the hall, that the he heard a gunshot. (64:72:15-17);

(ii) "Now the male with the white shirt, just to sum it up, and the braids was the same guy you saw in the beginning he was down with the three females while they were kicking at the apartment door of 107?" (65:17:18-25);

(iii) "And that's the same male with the white shirt and braids that ripped the camera off the wall?"

(iv) And that's the same male with white shirt and braids that came into your apartment while the female had the gun to your head?"

(v) "And again that's the same male with the white shirt and braids that you saw standing outside of your apartment holding all of your fiancé's purse when the police came in?"

(vi) "And of course then the same male with the white shirt and braids that the officer chased down the hallway?" (65:18:1-17).

The above referenced questions regarding a gunshot, kicking of the door and ripping the camera off the wall was leading, unduly prejudicial and / or not admissible to prove commission of the armed robbery. Moreover, without objection of counsel as to all of the above noted questions, the State presented evidence of the defendant's identity and essentially read the witnesses testimony into the record via leading questions, rather than compelling

the witness to rely on his own recollection and demonstrating a level of credibility as a witness.

As to witness Marcus:

(i) That he was dispatched to the location for a "subject with a gun call." And that he met the victim . . . who stated there was a couple people inside that apartment hallway first floor and one of them had a gun." (65:44:8-19). And Officer Marcus stated that "Mr. Hines stated that someone was inside with a gun. (65:44-45);

(ii) And you're essentially going to be clearing the area…? Answer Yes, … Basically to find and neutralize any threat. (65:45-56);

(iii) "Your focus as you came in was possibly trying to neutralize a threat of somebody with a gun? Answer yes. (65:58-59).

The leading questions of witness Marcus without objection of counsel allowed for hearsay evidence and references to a gun, which was unduly prejudicial and / or not admissible to prove commission of the armed robbery. In addition, the State's leading questions not only lacked a proper foundation, they were misleading, suggestive and prejudicial. Most importantly, the defendant was further prejudiced because the leading questions by themselves establish that a "threat" in fact existed, which is a required elements of robbery.

Most concerning is that that officer Marcus could be have been perceived as an expert witness by inference as to whether a "threat exists" which was demonstrated via leading questioning which would be speculative on the part of this witness. This only served to confuse the jury

regarding whether a threat existed rather than that determination being made based upon reliable and credible evidence as presented by the witnesses' recollections and respective credibility.

C) **Trial Counsel failed to present witness Detective Elisabeth Wallich who testified at the preliminary hearing that no property was taken from Deborah Sims.**

Trial counsel failed to call Detective Elisabeth Wallich, or alternatively, introduce her sworn testimony from the September 10, 2012 preliminary hearing. Detective Wallich testified that no property was taken from Ms. Deborah Sims. (15:9:8-9). The defendant was prejudiced because officer Wallich's sworn testimony would demonstrate that Ms. Deborah Sims' property (as alleged in the complaint) was not taken from her or her presence as required in the elements of robbery.

D) **Trial counsel failed to object to the State's request for Exhibit #10 to be moved into evidence; which was unduly prejudicial and cumulative evidence.** (65:52:20-24).

Furthermore, trial counsel did not move the court for mistrial based upon the exhibit having been published and seen by the jury.

E) **Trial counsel failed to motion the court for an instruction, at the close of evidence to the juror's for the lesser included offenses.**

Based upon the totality of the evidence, it was appropriate to request lesser included offenses of:

"Theft," "Attempted Theft," "Unarmed Robbery," nor "Attempted Armed / Robbery." The defendant was prejudiced in that the defendant, having been convicted of Armed Robbery, could very likely been found guilty of lesser included offenses based upon the similarly supportive evidence resulting in reduced exposure and available incarceration time. Without having had an opportunity to inquire of trial counsel at a post-conviction hearing, whether there was a reason for not requesting these lesser included offenses is unknown. In this case, a felony Armed Robbery reduced to a misdemeanor would result in only a nine (9) month offense or a guilty finding of attempted Robbery would further reduce the defendant's exposure under Wis. Stats. Sec. §939.32.

F) **Trial counsel failed to object to exhibits 3 and 4 (crime scene photos) being moved into evidence.**

Introduction of these photos cumulative, that they were unduly prejudicial as their prejudicial effect substantially outweighed their probative value. The defendant asserts that they were furthermore irrelevant. (65:86:2-23).

In response to the defendant's motion for post-conviction relief on each of the above related issues alleging ineffective assistance of counsel, the court in its Decision and Order without a hearing concluded that "there is nothing counsel did or did not do that prejudiced the outcome of the trial in this case." (51:3)

CONCLUSION

Based upon the foregoing, it is hereby respectfully requested that this Court reverse the jury's guilty findings and vacate the judgments of conviction, directing the trial court to enter judgments of acquittal. It is further requested that this Court reverse the trial court's Decision and Order denying the defendant's motion for post-conviction motion without a hearing and vacate the judgments of conviction; or alternatively, remand this matter for further proceedings with directives on which issues the defendant is entitled to a post-conviction hearing.

Dated: September 15, 2014

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Attorney Jon A. LaMendola
State Bar Number 1030744

LAMENDOLA LAW OFFICE
375 E. ARBOR CIRCLE W.
OAK CREEK, WI 53154
414-762-6028

attyjonlamendola@gmail.com

CERTIFICATION

I certify that this Brief meets the form and length requirements of Appellate Procedure for a document printed in monospaced format. This Brief is twenty-six pages in length.

Dated: September 15, 2014.

LAMENDOLA LAW OFFICE

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JON ALFONSO LAMENDOLA
State Bar No. 1030744

Attorney for Defendant-Appellant

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with 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 rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.
I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials 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: September 15, 2014

LAMENDOLA LAW OFFICE

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JON ALFONSO LAMENDOLA
State Bar No. 1030744

Attorney for Defendant-Appellant

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this Brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all parties.

Dated: September 15, 2014

LAMENDOLA LAW OFFICE

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JON ALFONSO LAMENDOLA
State Bar No. 1030744

Attorney for Defendant-Appellant

INDEX TO APPENDIX

Pursuant to Rule 809.19 (2), Stats, the defendant-appellant includes the following: