STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT 1

STATE OF WISCONSIN,

Plaintiff- Respondent,

v. Appeal No. 2014AP001623-CR

RAYMOND L. NIEVES,

Defendant- Appellant.

ON APPEAL TO REVIEW THE JUDGMENT OF CONVICTION AND ORDERS DENYING THE DEFENDANT'S POSTCONVICTION MOTIONS, IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HON. RICHARD J. SANKOVITZ PRESIDING.

BRIEF OF DEFENDANT-APPELLANT

ZELL LAW OFFICE, LLC
ATTORNEY MICHAEL D. ZELL
ATTORNEYS FOR DEFENDANT-APPELLANT
STATE BAR NO. 1031931
1547 STRONGS AVE., STE. C
STEVENS POINT, WI 54481
(715) 952-5030
michaeldzell@michaeldzell.com

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES 2

ISSUES PRESENTED 3

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 3

STATEMENT OF THE FACTS AND THE CASE 3-15

ARGUMENT 15-26

CONCLUSION 27

CERTIFICATES 28

APPENDIX 29

TABLE OF AUTHORITIES

PAGE

STATE V. BENTLEY, 201 WIS.2D 303, 548 N.W.2D 50 (WIS. 1996) 17

BRUTON V. UNITED STATES, 391 U.S. 123, 88 S.CT. 1620, 20 L.ED.2D 476 ..... 6, 7, 21, 22

MARTINDALE V. RIPP, 2001 WI 113, 629 N.W.2D 698, 246 WIS.2D 67. 26

RICHARDSON V. MARSH, 481 U.S. 200, 107 S.CT. 1702, 95 L.ED.2D 176 (1987) 22, 23

STRICKLAND V. WASHINGTON, 466 U.S. 668, 104 S. CT. 2052, 80 L. ED. 2D 674 (1984) 17, 23

WIS. STAT. § 904.03 25

WIS. STAT. § 908.01(3) 24

WIS. STAT. § 908.02 25

ISSUES PRESENTED

Issue 1: Should the trial court have granted a hearing on Moldanado's postconviction motion which presented an alibi defense his trial attorney failed to adequately investigate or present at trial?

TRIAL COURT ANSWERED: NO

Issue 2: Is severance of defendant cases required when statements allegedly made by one co-defendant to a snitch are presented at trial including references to the two defendants actions together?

TRIAL COURT ANSWERED: NO

Issue 3: Did the trial court improperly admit extremely unreliable and prejudicial hearsay testimony that a person named "Boogie Man" told the alleged victim that the two co-defendants planned to kill him?

TRIAL COURT ANSWERED: NO

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The appellant believes that publication is warranted because there are issues of constitutional dimension which have not been well addressed by current published decisions. The appellant believes that the written briefs of the parties will sufficiently address the issues, and oral argument will not be necessary.

STATEMENT OF THE FACTS AND THE CASE

In a criminal complaint dated October 9, 2010, Nieves and co-defendant Johnny Moldanado were charged with 1st-Degree Intentional Homicide, with Use of

a Dangerous Weapon, and as Party to a Crime, as well as attempted 1st-Degree Intentional Homicide. According to the complaint, Nieves and a supposed fellow Maniac Latin Disciple gang member, Johnny Maldonado, allegedly brought Sergio Vargas and Spencer Buckle to the alley at the rear of 1205 W. Wind Lake Avenue, Milwaukee, on Saturday April 11, 2009, and shot both of them, killing Buckle and wounding Vargas. (3:1-4)

Nieves had an initial appearance on October 18, 2010, at which time the Court set bail in the amount of $500,000.00. No contact was ordered with Sergio Vargas. (69:6). On November 8th 2011, the date scheduled for preliminary hearing, Attorney Timothy Roelling withdrew as Nieves' attorney and the hearing was adjourned. (71:4-6)

On December 3rd 2010, Nieves appeared unrepresented. Due to the lack of counsel, the Court scheduled an indigency hearing for December 9th, 2010. (72:2-3) Nieves again appeared without counsel on December 9th 2010; Nieves had not secured private counsel and was referred to the Public Defender's office. The State's request that the Court find cause for delay of the preliminary hearing was granted. (73:2-4)

On December 20th, 2010, another status hearing was held. The Public Defender's office had not yet appointed an attorney to defend Nieves. Again the matter was delayed until after the holiday to allow more time for the Public Defender's office to appoint counsel. (74:2-4)

Attorney Anne Bowe appeared on behalf of Nieves at the preliminary hearing on February 3rd, 2011. Sergio Vargas identified Raymond Nieves and testified that both Nieves and Moldanado participated in the murder of Spencer Buckle and attempted to kill Vargas as well. The Court found probable cause and bound both Nieves and Moldonado over for trial. Nieves plead not guilty to the first degree intentional homicide charged in the information and demanded a jury trial. (75:3, 7-16, 47-48)

On February 4th, 2011, a scheduling conference was held to review the terms of a protective order regarding discovery requested by the State. (76:2-4) The parties appeared on February 9th, 2011, and March 3rd, 2011, for discussion and revision of the protective order. The Court also set dates for pretrial and jury trial. (77:1-27)

On June 6th, 2011, Attorney Hartley, representing co-defendant Moldonado, requested an adjournment of the trial date, which was rescheduled to October 3rd, 2011. The parties appeared, off the record, on September 27, 2011, and the Court adjourned the jury trial again.

On June 16, 2011, the State filed a motion to admit other acts pursuant to Wis. Stat. § 904.04. On December 20th, 2011, the parties appeared for a motion hearing regarding the State's request to use other acts evidence. The State proposed having an expert witness on gangs testify about relations between the Manic Latin Disciples and the Latin Kings. Upon inquiry by the Court, it became clear that the purpose of the State's proposed testimony was to: 1) explain that there was another previous homicide in Illinois which may have been the motive for this homicide, and 2) that

Nieves and Moldonado were concerned that Buckle and Vargas would give information to law enforcement in Illinois. The Court decided that it would allow the State to present limited information about the homicide in Illinois and the gang-related nature of the incidents. (80:16-18)

On January 20th, 2012, the parties appeared for a final pretrial. The parties noted problems with cell phone records sought by Attorney Bowe for Nieves' cell phone, as well as a motion to sever the two cases, based on testimony from a jailhouse snitch named Ramon Trinidad, who alleged that Moldonado and Nieves made statements about the homicide. (81:3-4) The court scheduled the severance motion for a hearing. The Court adjourned the trial for personal reasons, without objection from the parties.

The parties appeared on February 20th, 2012, for another final pretrial. The defense motion to sever was addressed. The State asserted severance was not necessary because it could ask questions from the snitch in a manner that would only have an effect on defendant Moldonado's case, and not Nieves' case:

> I can couch the question in both in manners in which I'm always referring to what that individual said in terms of their involvement or planning or role and the statements that inculpated themselves as opposed to the codefendant. (82:3)

Atty. Bowe disagreed, pointing out that much of the statement Moldanado allegedly made to Trinidad contained plural pronouns, and referred to the two defendants. (82:4-6) According to Bowe, this is a ***Bruton***[1] problem which requires severance. The Court disagreed:

[1] ***Bruton v. United States***, 391 U.S. 123 (1968)

> If I followed your suggestion, we would have to set a precedent that any time two co-defendants are step-by-step involved in the same crime, they could never be tried together because the coincidence of their steps, the comparison of their two steps tends to be reinforced if each were involved, because they took the same steps at the same time. (82:6)

The Court did not close the door on the issue, but denied the motion to sever. The Court specified that the defense could raise the issue again if necessary.

The parties appeared again for final pretrial on March 9th, 2012. The severance, or ***Bruton***, issue was not raised again by the defense. The only issue addressed was a motion filed by the State requesting assurance that the defense was not introducing an alibi defense. Both defense attorneys denied the intent to rely on an alibi defense. (83:2)

Jury trial began on March 26th, 2012. The Court and parties conducted voir dire and selected a jury out of a pool of 37. (84:8-56)

At the conclusion of jury selection, Nieves' attorney again raised the issue of severance. (85:75-77) The Court denied the motion, characterizing it as a "replay." (85:77) The Court noted that it relied on the State's claim that the snitch's testimony would only be used against Moldonado. The Court also indicated that it made efforts to have Nieves present for the prior hearing on the severance motion, and that it was not possible and not required. (85:77)

Nieves' counsel then raised what she characterized as a "pretty serious error." (85:77) In short, Nieves' counsel sent an investigator to determine whether there were any records of a pretrial monitoring program tracking Nieves in the State of Illinois during the time-frame of the alleged homicide. (85:78) According to Nieves' attorney, she sent her investigator to Kenosha but the records were actually in

Waukegan. (85:78) Counsel characterized this evidence as "not specifically an alibi but his whereabouts at the time." (85:78) The court did not take specific action based on this information. The court informed the parties that the issue could be addressed later in the trial, and the defense should continue to try to obtain the records.

On the morning of March 27th, 2013, substantive testimony about the case began. The evidence clearly showed a homicide by gunshot, but Nieves' and Moldanado's involvement was only established by the testimony of Vargas, a fellow gang member, and Trinidad, a jailhouse snitch. (86:6). Both of these witnesses had credibility issues, as they both had something to gain from their testimony and Vargas had given at least two different versions of the events which transpired that night.

Police officer Ruben Cordova was one of the first officers on the scene at 1205 W. Windlake Ave., in the City of Milwaukee, and encountered Vargas with a gunshot wound to his hand. (86:14-17) Officer Mark Bell also responded to the scene, and found Buckle's body, which was breathless and pulseless. (86:22-24)

Detective Timothy Koceja, the lead investigator, described the scene of the homicide in detail. (86:30-52)

Mary Jo McMahon, a neighbor residing near the scene of the incident, testified that she heard gunshots on the night in question. (86:60) Leslie Madrigal, another neighbor, was woken by "five to six gunshots." (86:69) Arnold Nash, another neighbor, provided similar testimony. (86:75-76)

Assistant Medical Examiner Christopher Poulos testified that he examined Buckle's body, and found two gunshot wounds to the head. Those injuries were the cause of death. (86:83-92)

In the afternoon session of March 27th, 2012, substantive testimony continued:

Det. Charles Schletz of Waukegan PD testified about another homicide which occurred in Waukegan. In the Waukegan homicide, a Latin King member named Jonathan Quebrado was shot and killed. Sergio Vargas and Spencer Buckle were identified as suspects in that homicide. (87:12-18) Schletz learned that Buckle had been killed in Milwaukee and Vargas had been shot. Schletz went to Milwaukee to get Vargas and bring him back to Illinois after the incident in which he was allegedly almost killed in Milwaukee. (87:13-14)

Sergio Vargas testified about the Waukegan homicide which occurred on March 22nd. According to Vargas, the Waukegan homicide was a retaliatory shooting because the Latin Kings shot at Vargas and Buckle previously. (87:39) Vargas testified that after the Waukegan shooting, he was taken to two different residences in Kenosha and kept there for at least a few days at each residence. (87:98) Vargas testified that another individual named Boogie Man came to the residence at some point and told him that Vargas and Moldonado were planning to kill him. (87:52) Vargas testified that he and Buckle were taken from Kenosha to Milwaukee where Nieves and Moldonado shot at him and Buckle, killing Buckle. Vargas testified that he originally told a false story about the shooting because he was scared of Nieves

and Moldonado. (87:71-72) During cross-examination, it became clear that this version of facts was the third or fourth given to police by Vargas following the incident. (87:94)

Aaryan Tortoriello lived at 1615 87th Place, Kenosha, WI. She Identified Raymond Nieves and Sergio Vargas and indicated that he saw them in Kenosha at the other side of the duplex she lives in. She saw them both a short time before the alleged homicide in Milwaukee and in the months before. (87:137-140)

On the morning of March 28, 2012, the parties raised two evidentiary issues before testimony commenced. First, Nieves' attorney asked to use the charging decisions in the Waukegan case as motive for Vargas to testify falsely in this case. The Court refused to allow that inquiry because it believed it would open the door to a second homicide trial within the first. The Court did allow that defense counsel could argue that the charges against Vargas in Illinois gave him a reason to fabricate in Milwaukee. (89:3-4)

Second, the assistant district attorney asked the Court to disallow defense counsel to ask Ramon Trinidad, the jailhouse snitch, about the crimes he was charged with. (89:6) The Court denied that motion, and approved the defense plan to ask Trinidad about his convictions and sentences. (89:7-8)

The Jury heard testimony in the morning of March 28, 2012 from Ramon Trinidad, John Peterson, and Charles Mueller. Trinidad, a jailhouse snitch with a substantial federal and state prison sentence, that he was housed with Maldonado at some point in the Milwaukee County Jail. According to Trinidad, Moldonado told

him he and Nieves shot Buckle and Vargas because they did not believe they would "hold water," meaning they would confess involvement in the Waukegan shooting to law enforcement. (89:15-21). Despite the efforts of the assistant district attorney to limit the testimony to statements Moldonado made about himself, without implicating Nieves, that was not successful. Trinidad repeatedly testified about what "they" did, obviously referring to both Moldonado and Nieves. (See e.g. 89:17-18, 21-line 1). Trinidad also testified about a direct conversation when Nieves told him that he "got *his* guy," an obvious reference to a second shooter and the fact that the other shooter did not. (89:23)(*emphasis added*)

Trinidad was effectively cross-examined in several ways. Trinidad hoped to get a reduction of his sentence of twenty-three years in prison, and the State agreed not to oppose a motion to modify his sentences if he testified "truthfully" in the case against Moldonado and Nieves. (89:28-30) Trinidad was also questioned about providing information about numerous other inmates, and also using threats of testifying against other inmates to extort money from them. (89:39) Trinidad is affiliated with a rival gang to the defendants and they knew it, and yet Trinidad claims that he had only been housed with Nieves for a day when Nieves talked to him about the case. (89:45-49)

Detective John Peterson also testified on the morning of March 28, 2012. According to Peterson, Nieves and Maldonado were found hiding in a bathroom and closet in a basement of 8123 235th Avenue in the Town of Salem, Wisconsin, on October 4, 2010. (89:58-60) The alleged homicide and attempted homicide happened

more than a year before they were apprehended. Detective Charles Mueller also testified. He testified that he executed a search warrant for a residence in Kenosha Nieves was believed connected with. Law enforcement recovered several different kinds of bullets and cartridges from a bag in this house. (89:71) Prints matched Nieves. (89:84)

In the afternoon of March 28th, 2012, Detective Scott Gastrow testified that Ramon Trinidad's testimony included facts that were not on the criminal complaint that he may have had access to in one of the defendant's cells, including type of weapon used, caliber of weapon used. (90:11)

Also In the afternoon of March 28th, 2012 Kyle Anderson, lead analyst from the Wisconsin State Crime Laboratory firearms and tool mark section testified. He testified to the caliber of bullet used to kill Spencer Buckle, a .38/.357 (90:32), and that the two bullets were fired from the same gun (90:34) and the weapon used was a revolver based on markings. (90:35)

Finally, on March 28th, 2012, the Court found that the state made a prima facie case against the defendants and denied a motion to dismiss dismiss charges. (90:63) Co-defendant Maldonado chose not to testify. (90:44) Nieves' attorney informed the Court that she'd been in touch with a State's attorney in Illinois regarding Nieves' pretrial monitoring records, but that she could not get the records without a court order. The records apparently indicated a phone contact from Nieves on the night of the alleged homicide. (90:65). Attorney Bowe explained the lateness was because Nieves said the records were in Kenosha when they were

actually in Waukegan. (90:69) Attorney Bowe also informed the Court that she was asked repeatedly by Nieves to investigate this alibi and that this was not a recent development of his profession of innocence. (90:70). The Court decided to proceed with the trial because it was "too far down the line." The Court decided there was insufficient information to allow testimony about monitoring in a way that would be helpful to the jury or fair to the State. (90:72-75) The Court questioned Nieves' counsel extensively about the problem. Nieves' counsel admitted several times that it was her fault the records were not uncovered sooner. (90:74)

The jury ultimately found Nieves guilty of one count of intentional homicide and one count attempted first degree intentional homicide both while using a dangerous weapon. He was sentenced to life imprisonment on Count 1, with eligibility for extended supervision after 40 years. On Count 2, Nieves was sentenced to a concurrent sentence of 20 years confinement and 10 years extended supervision. The sentences were concurrent to each other but consecutive to anything else. (93:48-49)

Nieves filed a notice of intent to appeal, and postconviction counsel was appointed. Postconviction counsel obtained trial counsel's file, sought and obtained the pretrial monitoring records from Waukegan, and consulted a cell phone expert about location information connected to Nieves' phone. Postconviction counsel also obtained affidavits from Nieves' family members who provided information in support his alibi defense. Though none of this evidence was overwhelming proof of

Nieves' innocence, together the information raised a legitimate and compelling alibi defense which was not raised by Nieves' attorney at trial.

On December 12, 2013, a motion for postconviction relief requesting a new trial was filed. (50). The motion challenged Nieves' conviction primarily on the issues of trial counsel's constitutionally ineffective failure to complete an investigation and present an alibi defense, as well as the Court's denial of Nieves' motion to sever the cases for trial. Per Order of the Presiding Judge, Felony Division, Nieves' motion was assigned to the Hon. Jeffrey A. Wagner, Branch 38, for review. On December 13, 2014, the Court signed an order creating a briefing schedule.(51).

After two extensions of the briefing schedule deadline, the State filed a responsive brief on March 28, 2014. (58). The State asserted that the defendant's postconviction motion should be denied without a hearing. (58:1). The State argued that severance was not required despite the testimony of Trinidad, because the defendant's objections were not specific enough, and because Trinidad's testimony was specific enough to not implicate Nieves. (58:12). Curiously, the State also argued that the issues were waived because there was no objection by Nieves' defense counsel during the testimony of Moldanado, despite the extensive pretrial hearings about the issue. (58:13)

The State further argued that the defendant's ineffective assistance of counsel claim related to his alibi defense should be denied without a hearing. As pointed out by the State and postconviction counsel in their written briefs, there were three primary items of evidentiary value supporting Nieves' alibi defense: (1) pretrial

monitoring records from Waukegan showing that Nieves' called from his grandmother's house in close proximity to the time of the alleged homicide, (2) records from a cell phone attributed to Nieves which showed the phone in Illinois at the time of the incident, and (3) affidavits from family members of Nieves supporting these claims by identifying the cell phone number and Nieves' participation with pretrial monitoring services. The State presented a very elaborate critique of the evidence Nieves' offered in his postconviction motion. (58: 15-23). The problem with this approach, as pointed out by Nieves reply brief, is that it fails to recognize that this evidence should have been balanced by the jury rather than by the court during postconviction proceedings, and had Nieves' counsel been effective, that would have occurred.

On June 24, 2014, a decision and order was filed denying the motion for postconviction relief without a hearing. (66). On July 11, 2014, a notice of appeal was filed and transmitted to the Court of Appeals. (67).

ARGUMENT

Nieves was convicted of homicide and attempted homicide in this case based largely on the testimony of a jailhouse snitch and the alleged victim of the attempted homicide. Both witnesses had significant credibility problems. The jailhouse snitch appears to have made a profession out of his informant capacities. The alleged victim is himself a gang-member who was a suspect in a homicide arising in Waukegan, IL. This alleged victim had reasons to testify against Nieves to assist

himself in the Waukegan matter, and told several different stories to law enforcement officers when he was found with a gunshot wound to his hand.

Nieves did not receive a fair trial because 1) Ramon Trinidad's (the snitch) testimony required severance of the cases but the Court denied Nieves' motion to sever, 2) Nieves' alibi defense was not presented despite his persistent pursuit of the defense, 3) improper admission of irrelevant and highly prejudicial hearsay statements, and 4) ineffective assistance of counsel in failing to file a notice of alibi, failing to obtain an expert witness regarding Nieves' cell phone records and location information that could be developed from those, failing to obtain the pretrial monitoring records, failing to obtain witness statements to support the alibi so that the alibi defense could be presented at trial, and failure to raise timely and appropriate objections regarding questionable evidentiary material presented by the State.

ISSUE 1: THE TRIAL COURT SHOULD HAVE GRANTED A HEARING TO DETERMINE WHEHTER NIEVES' COUNSEL WAS INEFFECTIVE FOR FAILURE TO PRESENT HIS "ALIBI" DEFENSE

The most obvious problem in the case was the omission of Nieves' alibi defense from the trial. The issue was discussed repeatedly during trial. Nieves' counsel admitted she failed to conduct an adequate investigation and obtain pretrial monitoring records from Waukegan, IL, which would provide evidence Nieves was not in Milwaukee at the time of the alleged homicide. Defense counsel also failed to have the defendant's cell phone records reviewed by an expert, though this issue was not raised until after trial. Those cell phone records show that the defendant's phone

was not located in Milwaukee during the time of the alleged homicide and attempted homicide. Further, defense counsel failed to interview family Nieves' family members, who could confirm additional facts relevant to his alibi defense. Finally, Nieves' attorney failed to file a notice of alibi to preserve Nieves right to present the defense at trial. These are all issues of ineffective assistance of counsel.

Nieves filed a postconviction motion alleging ineffective assistance of counsel, but the circuit court denied the motion without a hearing. The circuit court should have granted a hearing to allow Nieves to present evidence showing ineffective assistance of counsel at the trial in this matter, specifically related to the alibi defense.

The Standard of Review for evaluating the circuit court's decision to deny a motion without a hearing is a two-part test which necessitates a mixed standard of appellate review. ***State v. Bentley***, 201 Wis.2d 303, 310, 548 N.W.2d 50 (Wis. 1996). If the motion sets forth facts that would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing. ***Id.*** Whether a motion alleges sufficient facts to show a defendant is entitled to relief is a question of law reviewed *de novo*. ***Id***.

Claims of ineffective assistance of counsel are evaluated using a two-part procedure. First, the defendant must show counsel's performance was deficient by showing errors so serious as to fail to perform as counsel is contemplated under the sixth amendment to the U.S. Constitution. ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Second, the defendant must show that

the deficient performance prejudiced the defense, meaning that the result of the trial was unreliable. ***Id.***

Nieves' postconviction motion presented an alibi or pseudo-alibi defense not investigated or preserved by Nieves' trial attorney. Nieves' alibi defense consisted of several key pieces of evidence, which are summarized in the affidavit of Michael D. Zell and other attachments in the appendix to the postconviction motion:

> 1. Pretrial monitoring records show that Nieves was participating in pretrial monitoring services the during the time period of the a1lleged incident (April 2009) and that the night of the alleged homicide (April 10-11) he called in to pretrial monitoring services from phone number 623-2089. (A-Ap 36)
>
> 2. The affidavits of Hector Perez and Patricia Perez. Patricia Perez is Nieves' grandmother, who asserts that he was living with her at the time of the incident in Milwaukee and that her phone number is 847-623-2089. Hector Perez asserts that he and Nieves were working for the same company during that time period. (A-Ap 42-45)
>
> 3. Cell phone records for the number attributed to Nieves by his mother when they looked at her cell phone, and an analysis of those records by cell phone expert Michael O'Kelley, which show that the phone was not in the Milwaukee area the night of the incident. (A-Ap 46-47). Also a search warrant affidavit showing police believed this phone number belonged to Nieves. (A-Ap 66-70).
>
> 4. A letter from Nieves to Atty. Bowe dated April 17, 2011, almost a year before the trial, in which Nieves asked about the pretrial monitoring records from Waukegan, showing the trial attorney should have been aware of the location of the records well before the trial. (A-Ap 48-49).
>
> 5. Invoice from Investigator William Kohl showing that he was seeking the pretrial monitoring records from Kenosha rather than Waukegan. (A-Ap 50).

This evidence was never introduced because the circuit court refused to conduct a postconviction hearing.

Nieves' postconviction motion shows that he could have provided relevant, admissible and objective evidence showing he was not in Milwaukee during the time of the alleged incident. This information would have been relevant and admissible to an alibi defense at trial. Defense counsel conceded during the trial that she failed to

seek the pretrial monitoring records. She also had the cell phone records in her possession and failed to have the records analyzed by an expert witness, and failed to interview witnesses necessary to present the alibi defense.

Nieves can thus show a reasonable probability of a different result at trial. The evidence is not perfect, as pointed out by the State during briefing before the circuit court. There is no way to conclusively prove that the cell phone was in Nieves' possession on the night of the incident. It is possible, as pointed out by the State, that Nieves called the pretrial monitoring services from his home in Waukegan and then drove directly to the scene of the homicide. This hypothesis contradicts the testimony of Sergio Vargas, who said Nieves was with him in Kenosha immediately before the incident. Nieves relatives are certainly potentially biased in his favor. However, there are objective facts which should have been introduced at trial in support of an alibi defense for Nieves.

The testimony used to convict Nieves had flaws too. The testimony of Sergio Vargas was at least the third version he gave to investigators. In the first version, Nieves had nothing to do with the incident. Vargas had an incentive to cast blame on Nieves, as Vargas was himself facing homicide allegations in IL. By casting the blame on Nieves, he was trying to help himself regarding those IL problems. The testimony of Ramon Trinidad, a professional snitch, was highly suspect. Trinidad apparently made these allegations against others and may have even threatened others with the same treatment.

If the jury had Nieves' alibi defense in front of it to compare to the version of events told by Vargas and Trinidad, there is certainly a reasonable probability that the result of the trial would have been different.

Trial counsel was ineffective for failure to present the alibi defense. Counsel was deficient for failing to adequately investigate this matter and present a defense she should have been aware of well in advance of trial. Nieves' was prejudiced because he lost the right to present this evidence to the jury during the trial. As a result of the ineffective assistance of trial counsel, Nieves' was unable to present the only defense he could present to the charges.

ISSUE 2: BRUTON REQUIRES SEVERANCE OF CO-DEFENDANT CASES WHEN ONE CO-DEFENDANT STATEMENT IMPLICATES THE OTHER DEFENDANT

Nieves' defense counsel asked the court to sever Nieves' case from co-defendant Moldanado's because Ramon Trinidad, a jailhouse snitch, claims he had a conversation with Moldanado in which Moldanado admitted involvement in the incident. The State opposed the motion for severance, asserting that it could ask questions in a way which would only elicit statements from about Moldanado. The trial court denied Nieves' motion for severance, concluding:

> If I followed your suggestion, we would have to set a precedent that any time two co-defendants are step-by-step involved in the same crime, they could never be tried together because the coincidence of their steps, the comparison of their two steps tends to be reinforced if each were involved, because they took the same steps at the same time. (82:6)

But this conclusion is inaccurate. The ***Bruton*** precedent requires severance when a co-defendant makes a confession which implicates the other defendant. ***Bruton v.***

United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476. If that implication is the result of a confession which involves the use of plural pronouns, and the co-defendants are tried together, severance is required. The fact that the alleged confession of Moldanado was made to a jailhouse snitch rather than to a police officer is irrelevant. Trinidad's testimony was laced with plural pronouns which implied that he and Nieves acted together. The cases should have been severed to preserve Nieves' confrontation clause rights pursuant to ***Bruton***.

While the State is correct that the decision regarding severance is usually a discretionary decision for the Court, there are constitutional limitations. When a non-testifying co-defendant's confession implicates the defendant as a participant in the crime at a joined trial, even if the jury is instructed to consider the confession only against the defendant who made the confession, the defendant's constitutional confrontation rights are violated. ***See Bruton v. United States***, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476. The trial court's decision regarding waiver must be reviewed not as an erroneous use of discretion, but as a question of constitutional law which is reviewed *de novo* on appeal.

Contrary to the State's assertions that it "carefully crafted" questions to avoid any problem, Trinidad's testimony informed the jury that Moldonado referred to himself and another individual in the plural, clearly implicating the only other person on trial, Nieves. Trinidad referred to Nieves and Moldonado as "they" and "them" several times in his testimony. (89:17-21, A-AP 60-64).

In its brief to the trial court, the State relied on ***Richardson v. Marsh*** for the proposition that joint trials are allowed under many circumstances. (58:11, *citing* ***Richardson v. Marsh***, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987)). The defendant does not dispute that joint trials are allowed and encouraged for purposes of judicial economy. But as pointed out by Court in ***Richardson v. Marsh***:

> There is an important distinction between this case [meaning Richardson] and ***Bruton***, which causes it to fall outside the narrow exception we have created. In ***Bruton***, the codefendant's confession "expressly implicat[ed]" the defendant as his accomplice. ***Bruton*** 391 U.S. 123, at 124, n. 1, 88 S.Ct., at 1621, n. 1. Thus, at the time that confession was introduced there was not the slightest doubt that it would prove "powerfully incriminating." Id., at 135, 88 S.Ct., at 1627. By contrast, in this case the confession was not incriminating on its face, and became so only when linked with evidence introduced later at trial (the defendant's own testimony). ***Richardson v. Marsh***, 481 U.S. 200, 208 (bracketed material added).

The obvious distinction between ***Bruton*** and ***Richardson*** is between "express implication" and "evidentiary linkage." This does not resolve the issue presented by Nieves' case, which is whether severance is required when a co-defendant's statement implicates the other defendant by reference rather than explicitly by name. The reference in Nieves' case was created by the use of plural pronouns which don't explicitly name Nieves, but clearly provide a link to him due to the joint trial. So there is much more than simply evidentiary linkage between the defendants, and the ***Richardson v. Marsh*** exception to ***Bruton*** does not apply here.

The ***Richardson*** court provided some further clarification of the issue, strongly implying that Nieves' confrontation rights were violated in this case:

> We hold that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate *not only the defendant's name, but any reference to his or her existence*. ***Richardson***, 481 U.S. at 213 (emphasis added).

In this case, the testimony of Trinidad, reciting the alleged confession of Moldanado, referred to the two defendants repeatedly as "they" and "them." This is not acceptable under the ***Richardson*** decision, as the reference to Nieves in this statement was clear and obvious. The quoted passage from ***Richardson*** specifically requires the elimination of any reference to the co-defendant, something not accomplished in this case despite the State's intent to do so.

Justice Stevens' dissent in ***Richardson***, joined by Marshall and Brennan, points out that, on the scales of justice, the concerns of administrative efficiency attained through joint trials is generally outweighed by considerations of fairness. ***Richardson***, 481 U.S. 213, 217. That issue is paramount in this case, where Nieves should have received a separate trial due to the references from Moldonado's statements, heard through Trinidad, implicating both co-defendants.

ISSUE 3: THE TRIAL COURT IMPROPERLY ADMITTED EXTREMELY UNRELIABLE AND PREJUDICIAL HEARSAY TESTIMONY ON THE ULTIMATE ISSUE IN THE CASE

During the trial, the alleged victim, Sergio Vargas, was allowed to testify that another person named "Boogie Man" told Vargas that Moldonado and Nieves were planning to kill him. (87:52) Defense counsel objected to the testimony as hearsay, but the Court allowed it:

> I'm going to allow the jury to hear what this person said to Mr. Vargas not because what the person said is true, if we need to hear what the truth is, we can hear from that person, but Mr. Vargas can tell you what he said so you understand how he felt. (87:52)

This testimony should not have been allowed for both hearsay and relevance reasons.

The court of appeals generally reviews a circuit court's decision to admit evidence under an erroneous exercise of discretion standard. ***Martindale v. Ripp***, 2001 WI 113, ¶ 28, 629 N.W.2d 698, 246 Wis.2d 67. This is a deferential standard which requires review regarding whether the court examined the relevant facts, applied a proper legal standard, and used a demonstrated rational process to reach a reasonable conclusion. ***Id.,*** at ¶ 28-29. However, if the circuit court fails to provide reasoning for its evidentiary decision, this court independently reviews the record to determine whether the circuit court properly exercised its discretion. ***Id.*** The circuit court provided very limited explanation for its decision to allow the prejudicial hearsay statement.

During the trial, Sergio Vargas, the alleged victim, was allowed to testify that while he was staying at the residence in Kenosha with Moldanado, Buckle, and Nieves, an individual named "Boogie Man" came to visit the group and told Vargas that Moldanado and Nieves planned to kill them. (87:52). The circuit court allowed this testimony, explaining only that it was not for the truth of the matter, but for the purpose of how Vargas "felt" when he heard the statement.

The first problem with the admission of this statement is that is hearsay. **Wis. Stat. § 908.01(3)** defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." **Wis. Stat. § 908.02** provides that hearsay is generally not allowed in evidence unless allowed by other rule or statute.

The statement is certainly hearsay. The court attempted to exclude this from the hearsay prohibition by asserting that it was not being admitted to show the truth of the matter, but how Vargas felt. This is a common approach to allowing statements otherwise hearsay into evidence. But in order for this rationale to apply, the statement must actually have some other evidentiary value which is not the truth of the statement itself. In this case, whether Vargas felt a certain way was not in any way relevant to the proceedings, and the court's logic is seriously flawed.

In addition to being hearsay, the statement should have been excluded as more prejudicial than probative. **Wis. Stat. § 904.03** specifies that evidence which is relevant may also be excluded if it is more prejudicial than probative. Vargas' feelings about something said to him were irrelevant to the ultimate issue, or the elements, or Vargas' motivations, or the facts the State was required to prove. In fact, Vargas' feeling about this statement added nothing to the trial unless the statement was actually considered by the jury for the truth of the matter asserted. This information was so damaging that defense counsel should have objected, and the Court should have refused to admit the statement, on the grounds that it was much more prejudicial than probative.

Complicating the situation even more, the court's admonition to the jury to not consider the statement for the truth of the matter contained an implied sanction of the truth of the statement. The Court told the jury it would allow them to "hear what this person said" not because it's true, but to show how Vargas felt. This

contains an implied concession of the truth of the statement. Nieves' counsel should have objected to this instruction.

To the extent defense counsel's objection was made to hearsay rather than relevance, defense counsel was ineffective. The ***Strickland*** standard for ineffective assistance of counsel requires proof of two distinct elements. First, the defendant must show that counsel's performance fell below an objective standard of reasonableness. Second, the defendant must show that if counsel had performed adequately, the result of the proceeding may have been different. Given the extremely damaging information the jury was allowed to hear – that Boogie Man believed Nieves and Moldonado were planning to kill Vargas – defense counsel was deficient in failing to object to prejudice and relevance. The prejudice is that the jury heard a statement which put Nieves and Moldanado together in a plan to kill Vargas. This combined with the Moldanado's alleged confession to Trinidad and defense counsel's failure to present Nieves' alibi defense significantly prejudiced Nieves.

The circuit court erred by admitting hearsay, giving an improper cautionary instruction. Defense counsel was ineffective by failing to object on grounds of prejudice.

CONCLUSION

Nieves asserts a number of deficiencies in this case, the cumulative effect of which rendered this an unfair trial in which his defense was not fully tried. Whereas Nieves hereby requests the Court of Appeals vacate the judgment of conviction in this matter and order a new trial.

Dated January 12, 2015 at Stevens Point, WI.

ZELL LAW OFFICE, LLC

Michael D. Zell
State Bar No.1031931

CERTIFICATE OF FORM, LENGTH, APPENDIX, CONFIDENTIALITY, AND E-FILING REQUIREMENTS

I hereby certify that this brief conforms to the rules contained in **Wis. Stat. §809.19(8)(b) and (c)** for a brief and appendix produced with a proportional serif font. The length of this brief is6878 words, and 28 pages.

I further certify that filed with this brief is an appendix that complies with **Wis. Stat. §809.19(2)(a)** and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issue raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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 person, 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.

I further certify pursuant to **Wis. Stat. § 809.19 (12)(f)**, I have filed an electronic copy of this brief, excluding the appendix, if any, and that the text of the electronic copy and the text of the paper copy of the brief are identical.

A copy of all of these certificates is part of both the paper and electronic copies of the brief, and has been served on the court and all parties.

Dated this January 12, 2015

Michael D. Zell
Attorney At Law