

COURT OF APPEALS OF WISCONSIN
DISTRICT II

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STATE OF WISCONSIN,
Plaintiff-Respondent,

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

v.

Appeal No. 2015AP000161 - CR

WILLIAM J. THURBER,
Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF-IN-CHIEF

Appeal from the circuit court for Winnebago County, Honorable
Daniel J. Bissett, Judge.

SCZYGELSKI & PANGBURN LAW FIRM, LLC.
Ralph J. Sczygelski
State Bar No. 01001417
713 Washington Street
Manitowoc, Wisconsin 54220
Telephone: 920-682-9990
Email: Ralphwislaw@sbcglobal.net

Attorney for Defendant-Appellant

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INTRODUCTION

This case involves twelve robberies of vacation campers at a storage unit. Various items were stolen, including big screen TVs. A co-defendant, Jacob Kent, initially gave a statement to police that William Thurber had been involved. At trial, Jacob Kent ("Kent") recanted, stating that William Thurber ("Thurber") was not involved, and that he only named Thurber as a co-actor in the robberies because police told Kent that Thurber had implicated Kent in other robberies. No other evidence put Thurber at the crime scene.

A four camera security system was in place at the storage site where the twelve campers were parked. Due to some failed attempts to upgrade the system, the cameras that were pointed at the campers were not working the night of the robberies. Amazingly, Andrew Lutzow, the individual hired to upgrade the security system, was seen going into the storage area at approximately 1:00 a.m. on the night of the robberies. The cameras that were pointed at the robbery site were clearly visible, yet only Andrew Lutzow would have known that those cameras were not working that night. Andrew Lutzow was never charged with a crime, and, at the first Post-conviction Motion Hearing, requested immunity for testifying. Little of this was heard by the jury because Melissa Blank, the onsite storage manager, was not allowed to testify due to the fact that Attorney Caroline Carver neglected to disclose her as a potential witness.

STATEMENT OF ISSUES

1. Should Judge Bisset have allowed Melissa Blank to testify for the defense despite the fact that Melissa Blank was not named on a list of witnesses?

Trial court answered in the negative.

2. Should Attorney Carver be found ineffective for various reasons, including for her failure to provide notice that Melissa Blank was going to be testifying?

Trial court answered in the negative.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The appellant requests oral argument in order to help define the issues presented. Given the need for written brevity, oral argument may be a chance for needed explanation.

STATEMENT OF THE CASE

The Criminal Complaint was filed on June 7, 2011, charging Thurber with twenty-four counts of Burglary-Motor/Trailer Home on twelve separate motor homes. (C.R. 1). An Initial appearance was held on June 20, 2011 and a Prelim was set for July 14th. (C.R. 56). Jacob Kent was called as a witness, and refused to testify despite being offered immunity. (C.R. 58, pg. 3-5 line 20) Detective Jagla was then called beginning on page 7, and relayed that Kent had given a statement previously implicating Thurber in the robberies. (C.R. 58, pg. 11, lines 21-25 thru pg. 13, lines 1-6). An Information

was then filed (listing identical counts as the Complaint) on July 21, 2011. (C.R. 3) The Information was then amended several times with the Fifth Amendment being filed on May 24, 2012. (C.R. 16).

JURY TRIAL (Day 1, September 10, 2012)

The Jury Trial began on September 10, 2012. A discussion regarding other acts evidence was as follows:

As to the next motion that was filed by the State, there was a motion for other acts evidence testimony at trial, and this specifically involved allegations of a series of the burglaries in Outagamie County in the same timeframe as this case. And the State is asking that it be used to show motive, plan, identity. . . (C.R. 71, pg. 10, lines 15-22).

After argument, the Judge put off his decision until Officer Carpenter testified the next morning. (C.R. 71, pg. 16, lines 10-19).

After jury selection and the prosecution's opening statement, witnesses began on page 97. It should be pointed out that each victim testified briefly about the damage to their motor homes, the items stolen, and the lack of any permission to do so.

Officer Schramfer's began on page 146. During his cross-examination, the issue of surveillance arose for the first time:

Q: To the best of your recollection, did you see any footage from any security cameras of this area?

A: I didn't that day. I'm not sure if I saw some at some point later or not.

(C.R. 71, pg. 151, lines 22-25).

Jacob Kent began testifying on page 165, relevant portions of

which are as follows:

Q: And Mr. Kent, I'd like to call your attention to the early morning hours of July 22, 2010. Did you go to the American Mini Storage located in the City of Menasha, Winnebago County, Wisconsin?

A: No, not on that day.

Q: Were you ever at the American Mini Storage?

A: Yep.

Q: When was that?

A: Probably anywhere from the 10th through the 17th maybe.

Q: Of July?

A: July, maybe even before that.

Q: And who was with you when you went there?

A: I was by myself at the time.

(C.R. 71, pg. 165, lines 14-25 thru pg. 166, lines 1-3).

Q: And were you also acquainted with the defendant?

A: Not really. Work-wise, yes.

Q: Now, I'd like to call your attention - - Well, let's say - - You said you went to the American Mini Storage. What did you do when you got there?

A: I broke into a couple RVs, took a couple things, went home, did some drugs.

Q: And how many RVs did you break into?

A: I don't know. I couldn't tell you that.

(C.R. 71, pg. 166, lines 22-25 thru pg. 167, lines 1-3).

Q: And did you tell Detective Tauber and Deputy Carpenter that you had been at your residence when William Thurber came and got you? Do you remember telling them that?

A: No, I don't remember telling him that.

(C.R. 71, pg. 168, lines 5-9).

Q: Didn't you tell Deputy Carpenter that the defendant came and got you at your residence to help him with the removal of TVs and other items from RVs at American Mini Storage?

A: I don't remember.

. . .

Q: Do you remember telling Detective Carpenter that the defendant William Thurber had broken into all of the units and gotten the TVs and other items all set for you to come and pick up?

A: No, I don't remember that.

Q: Do you remember telling Detective Tauber and Deputy Carpenter that you went to American Mini Storage in the defendant's truck?

A: No.

Q: Do you remember telling them that you went into all of the vehicles and that you didn't do any damage to the vehicles because the defendant had done all of the damage before?

A: No, I don't.

(C.R. 71, pg. 168, lines 17-25 thru pg. 169, lines 1-13).

Kent's written statement was then entered as Exhibit 13. (C.R. 71, pg. 183, line 8 thru pg. 184, line 22). The statement was read as follows:

A: "Billy Thurber called me up to help him move some stuff. When we got there it was motor homes. I grabbed about a dozen TVs out for him. He had this plan before I got there. All the motor homes were broke into already before I got there. I only had to open the doors. The TVs were right there next to the doors." . . .

(C.R. 71, pg. 185, lines 8-20).

On cross, Kent admitted he had a motive to lie against Thurber:

Q: Do you recall ever making a statement to Officer Jagla that when you got released if you saw William Thurber on the street you would kill him?

A: I don't recall saying it but it probably was said. I'm not sure.

Q: Well, how angry were you when you made this statement?

A: I was angry.

Q: Angry enough to lie?

A: Oh, yes.

Q: Angry enough to get him in trouble?

A: Yes.

Q: Angry enough to get him charged with things that he may not have committed?

A: Yes.

(C.R. 71, pg. 188, lines 13-25 thru pg. 189, line 1).

Kent also admitted that he was threatened by the State to give cooperating testimony against Thurber:

Q: Now, you indicated you had conversations with the State before you testified here today?

A: Yes, I did.

Q: And were those conversations in relation to what you would testify here today as?

A: Yep.

Q: Were you promised or threatened in any way for your testimony here today?

A: I would say a threat, yes.

Q: Do you want to explain that, please?

A: Well, they told me, this gentleman right here in the suit -- assistant DA, whatever -- he told me that if I didn't come here today and testify against the co-defendant or the man standing trial that I would be prosecuted for these charges, and, to me, I believe that's a threat. I mean, I'm trying to tell the truth I did these burglaries on my own and he don't believe me now. He kept saying William Thurber put you in prison for your next 12 years. No, Mr. Thurber didn't put me in prison. I put myself here for the next 12 years. And he kept telling me that if I didn't get up here to testify on his behalf that I was going to be charged with these charges, not only me, some of my family members, my -- my child's mother would be charged on something, too. Tried to -- how would you say that -- tick me off in a way or something.

(C.R. 71, pg. 189, lines 14-25 thru pg. 190, lines 1-14).

Based upon Carver's cross-examination, the State brought a motion to introduce the Outagamie County issues that were the subject of other acts evidence that the Judge originally stated he would hold open the following morning. The Judge ruled that he would continue to hold that decision open until the next day. (C.R. 71, pg. 193, line 25 thru pg. 197, line 18).

Detective Jagla then began testifying on page 199. On cross-examination, he briefly testified in a vague way about inadequacies in the security system:

Q: Do you recall if during your investigation of the scene you became aware at any time that there were video cameras present on the scene?

A: Yes.

Q: And who were those cameras operated by?

A: The management of this storage unit facility.

Q: Do you recall how many cameras there were?

A: I do not. Two or three, I believe.

Q: Do you recall what areas those cameras recorded?

A: One was when you initially came in, should have gotten all traffic going by and entering the gate. Then there was another camera on a pole in the back so if you came in and turned and went towards the back you would also have been videotaped. Those two I remember for sure.

Q: The camera in the back, would it be fair to say, had a view of these motor homes and trailers?

A: Yes.

Q: Did you recover any footage or tapings from these cameras in your investigation?

A: Yes.

Q: What did you recover?

A: I was given a CD of the timeframe that this was supposed to have covered.

Q: And what timeframe was that, do you recall?

A: It would have been the night before the burglaries had been reported.

Q: And was that from both cameras or just one?

A: I believe one of them was not working. There was only one working and that was the one by the gate.

Q: So did you recover any footage then from the back camera?

A: I want to say I recovered some video from Banta's (a neighbor's business). That covers their parking lot area that could have seen into the mini storage area.

Q: That's another camera, though, on another property though, correct?

A: Yes, it would have been.

Q: As far as the back camera at the American Mini Storage place, any footage recovered from that camera?

A: No.

Q: Do you recall why?

A: Something about - - And the girl at the office (Melissa Blank) could not explain to me why it went down. That actually made me suspect the guy that was repairing it (Andrew Lutzow) as being one of the suspects in this. I looked into him because of the way that this camera system stopped working that night and then a week's worth of video footage had been erased.

Q: How did that week's worth of video footage get erased?

A: She couldn't explain it to me.

Q: To your knowledge, was that video footage ever in the hands of this I guess you indicate an individual you initially suspected as being involved?

A: No, not that I'm aware of.

Q: Who was this individual?

A: I do not recall his name. He was working on the system prior to our getting this call.

Q: So he was responsible for installing and managing that system, correct?

A: Or repairing it, yes. They had some issues with it.

Q: Now, do you recall the front camera that would show entrance and exits of individuals? Do you recall viewing footage from that camera?

A: Yes.

Q: And do you recall seeing somebody enter the premises probably the evening that these are alleged to have occurred at 1:30 in the morning, 1:30 AM?

A: I know I looked at a lot of video footage, and I recall I believe a pick-up truck and then a Ford or a Mercury vehicle, yes.

Q: Did you trace that pick-up truck in any way?

A: I don't believe so, no. I don't think it was a good enough picture.

Q: There was no follow-up done on that pick-up entering the premises?

A: Not that I recall.

Q: Well, let me ask you this: Was that the vehicle that entered the premises at 1:30 am?

A: I don't know.

Q: Is there anything that would refresh your recollection?

A: If it was in my report.

. . .

Q: You are correct and I stand corrected. I'd like to mark another exhibit at this time. I apologize. I'm going to hand you what's been marked as Defense Exhibit B. I'm going to have you look at that document in its entirety and let me know when you're done.

. . .

Q: I'm going to retrieve that document from you. And now I ask you: Do you have any recollection at this point about a black pick-up truck entering the premises on July 22nd, 2010, at 1:30 AM?

MR. BALSUS: Objection, Your Honor. Basically, what she has done is she's talking about a conversation that the officer had with another individual, so it's hearsay. Talking to a person named Melissa. So I don't think that this officer can testify as to what another individual told him unless it falls under exception for hearsay.

THE COURT: Miss Carver?

MS. CARVER: I'm not eliciting any hearsay, Judge. I'm just asking what this lead investigator found in his investigation.

THE COURT: I'd ask you to rephrase the question.

Q: Do you recall any knowledge or learning of any black vehicle that may have entered the premises on that evening

at 1:30 AM?

MR. BALSUS: Objection, Your Honor. It's hearsay, and there's no foundation.

THE COURT: I'll allow that question. You may answer.

A: I do not specifically recall viewing a black pick-up truck on the video at 1:30. She -- that's Melissa, the employee in the office where these travel trailers are stored -- advised me of that and then she's the one that gave me the name of Andy Lutzow, I believe. They called him and he was the one supposedly fixing the system. And I believe it was between there and or after that that I received a call from Ryan Carpenter who directed our attention towards Thurber and Kent, therefore making it unnecessary for me to further up or follow up further with this possible suspect here.

Q: So to your knowledge, was this pick-up truck identified as being operated by this Andy Lutzow?

MR. BALSUS: Objection, Your Honor, foundation, who identified it.

THE COURT: I'd ask you to lay some foundation.

Q: In your investigation of these robberies -- and this is before you were notified by Outagamie County of Mr. Kent and possibly Mr. Thurber -- did you ask the employee -- or I should say, right -- the employee of American Mini Storage to review their cameras for any footage that may help you in your investigation?

A: Yes.

Q: And are you aware of that person doing that?

A: Well, we had that conversation where she would have --

MR. BALSUS: Your Honor, I'm going to objection based on hearsay.

THE COURT: Sustained.

Q: Who was the employee that you asked to do this?

A: All I recall is Melissa.

Q: To the best of your knowledge, do you know if she reviewed the footage of those cameras?

MR. BALKUS: Objection.

MS. CARVER: I'm not asking for hearsay, Judge, what was or what wasn't reviewed. I'm just asking if he knows.

MR. BALKUS: And how is he going to know if she did it?

THE COURT: I'll sustain the objection.

Q: Did you ever have contact with Melissa Blank after you learned of these video cameras?

A: I could have.

Q: You were aware of the video cameras -- You were aware that some type of footage was recovered. Is that correct?

A: Yes.

Q: Did you do any follow-up based on that information?

A: Yes. That was that Mercury Marquis that we tracked down and talked to the owners and found out that they were interested in renting some storage units there.

Q: How about Andy Lutzow, did you do any follow-up with Andy Lutzow?

A: No, I did not.

Q: And, again, your knowledge of Andy Lutzow is what?

MR. BALKUS: Objection, Your Honor, relevance, and also calls for hearsay.

THE COURT: I'll allow that in. You may answer.

Q: Do you know who Andy Lutzow is?

A: She only described him as a --

Q: No. I mean, who is he? Who is he? Like, do you know personally who Andy Lutzow is?

A: No, I did not.

Q: Nobody ever in your entire investigation ever advised you of Andy Lutzow or who he may be? I just testified before
- -

A: Yes.

MR. BALSUS: Objection, Your Honor. It calls for hearsay.
(C.R. 71, pg. 211, lines 17-25 thru pg. 220, lines 1-25).

The Court then adjourned until the next day.

JURY TRIAL (Day 2, September 11, 2012)

The second day began with Sergeant Carpenter testifying outside the presence of the jury that Kent had been involved in burglaries outside of Winnebago County in the past, and that Kent provided initial information about these robberies. (C.R. 72, pg. 3-13).

After argument, Judge Bissett ruled as follows:

In looking at other acts evidence and its admissibility, the Court is to utilize a three-step framework that has been spelled out fairly clearly in the case of State vs Sullivan, 216 Wisconsin 2nd, 768. . . .

. . . .

In this case, the other acts evidence involves burglary, Outagamie County, similar timeframe, storage units; although it appears in those cases primarily the units themselves, and in the case before this jury involving RVs - - trailers - - at a storage unit facility. Involves the same - - allegedly the same two individuals. The same or similar type of plan, at least as provided to the officer through Mr. Kent.

. . . .

So I do find - - And the State vs. Sullivan case also indicates that the court must carefully articulate the reasons for the admissions, which I believe that I have in this case. And, based upon that, I believe that the other acts evidence should be admitted for the purpose of motive, opportunity, intent, preparation or plan.

. . . .

As to the officer of Mr. Kent testifying regarding statements involving the Outagamie County matters, I do think

that those are admissible as other acts, so I will allow those statements in.

(C.R. 72, pg. 18, lines 15-25 thru pg. 25, lines 1-21).

Officer Carpenter began testifying before the jury on page 28. On cross, Attorney Carver was able to ask a series of questions that substantiated Mr. Kent's motive to implicate Mr. Thurber:

Q: Now, isn't it true that when Mr. Kent was first taken into custody you attempted to talk with him and he was very uncooperative and did not want to speak to anybody?

A: Correct.

Q: And then you left for some time, and isn't it correct you had some conversations possibly with the defendant?

A: Correct.

Q: And then you went back to Mr. Kent and attempted to speak with Mr. Kent a second time and at that point you informed him that the defendant had been claiming that Mr. Kent was responsible for all of the Outagamie potential crimes that had taken place. Is that correct?

A: Correct.

Q: And did you observe whether Mr. Kent become very upset at that point?

A: Yes.

Q: He's very angry that this information was coming out. Isn't that correct?

A: He was angry by the fact that Mr. Thurber was indicating he was responsible for this - - the burglaries.

Q: And at that point Mr. Kent told you he's willing to cooperate with you, correct?

A: He at that point wanted to give us his side of the story.

(C.R. 72, pg. 34, lines 14-25 pg. 35, lines 1-15).

After the state rested Melissa Blank's testimony was addressed:

MS. CARVER: I have subpoenaed a witness, Melissa Blank, but on the subpoena she wasn't ordered to appear until noon. I wasn't anticipating the State resting this early.

THE COURT: Is there a way -- Well, I guess, Mr. Balskus, you had some objection to it?

MR. BALSKUS: Yes, Your Honor. Basically, State had filed a discovery demand. Have not received anything. There's also requirement under the discovery demand that defense provide us with a list of names and addresses of witnesses that they intend to call. So if this is a witness that they intend to call, they didn't provide us notice so --

THE COURT: And as to the purpose of this witness?

MS. CARVER: Judge, yesterday -- and this is why we didn't name her as a witness, I wasn't foreseeing we'd need her -- but yesterday in testimony pursuant to an objection by the State and the Court sustained it, they classified particular testimony from Officer Jagla as hearsay. And we need her to come in. She is -- My belief, she can testify as to the video cameras -- surveillance cameras that were at the American Mini Storage. She had conversations and assisted the officers in this investigation. She's an employee of American Mini Storage and my understanding is she still works there. In fact, she's in a management position. Significant in that testimony is the fact that there are no video surveillance footage from this and she can testify as to what she observed with those cameras and when she reviewed the footage in those.

(C.R. 72, pg. 41, lines 3-25 thru pg. 42, lines 1-9).

Ms. Carver failed to file a witness list, so the Judge decided to exclude Ms. Blank under Section 971.23(2m)(a), Stats. (C.R. 72, pg. 43, lines 7-10). Ms. Carver continued to argue as follows:

MS. CARVER: Well, and, I guess I could make the argument also. Until Officer Jagla testified, we believed that testimony would come in because he's the one who spoke to her. He's the one who did the investigation. He's the one who reported it in his reports. It was our understanding he'd be able to testify to that stuff, and he refused to do that. So I think we're allowed to bring her in to add to his testimony

or to discredit his testimony. I mean, I think, if I recall, he said he didn't have conversations with her regarding those tapes or that he never had them in his possession. I don't recall at this point exactly what his testimony was. But her's is going to not only add to his testimony but it's going to refute some of those things he testified to.

THE COURT: Well, for impeachment purposes only then it may be admissible, the portion that would be only impeaching, but what you told me was it involved video surveillance of this facility and that it would be more substantive than impeachment purposes only.

MS. CARVER: We have no video tapes in our possession to show or to present to the court, so we have no intent of providing any physical evidence of those tapes or whatever. We only want Melissa Blank's testimony as the manager at the time of these burglaries, what was on those tapes, and what she observed that was on those tapes. And she's completely available for the State to not only talk to before she testifies but also to cross-examine her regarding that information.

THE COURT: Well, at this point, I have made the decision to exclude her as a witness. The notice wasn't provided as is required under the statutes. And so at this point, I am going to exclude her as a witness based upon my previous ruling. And so at this point, do we wish to take a recess in regards to your discussions involving your client testifying, Miss Carver?

(C.R. 72, pg. 45, lines 7-25 thru pg. 46, lines 1-20).

Because Ms. Blank was not going to testify, Ms. Carver attempted to have Detective Jagla subpoenaed to come back:

THE COURT: We can do it now, I guess. At this point, there was some decisions off the record in my office here. And I believe at this point, Miss Carver, you were attempting to subpoena detective or retired Detective Jagla?

MS. CARVER: Correct. And I believe that's in process now so we can go ahead with this testimony. If nothing else, I'm think possibly for rebuttal.

(C.R. 72, pg. 51, lines 2-10).

Detective Jagla was not able to be subpoenaed, and thus never

returned to the trial. Mr. Thurber then testified on his own behalf beginning on page 53. A primary was the Outagamie County charges that involved Mr. Kent:

Q: What would you explain to the jury as far as your involvement in those (Outagamie) burglaries that you ended up pleading guilty to?

A: The best way I can explain this is I was a drug dealer and at that time I would receive a lot of stolen property from a lot of different people. Instead of cash they would bring me stolen stuff. Of course, I did know it was stolen. It don't take a rocket scientist to figure that out. These people don't have jobs, don't have anything. Whatever they brought me I would take and I would resell it on Ebay or through the pawn shops. And my involvement in that part is I knew Jacob Kent was burglarizing these storage units in Outagamie County and the Fox Valley apartments. I knew he was doing it for the simple fact I knew he didn't have anything. My involvement in that was party to the crime.

Q: Would you consider yourself having been cooperative with the authorities in Outagamie County in solving these burglaries and also implicating Mr. Kent?

A: Yes, ma'am.

(C.R. 72, pg. 55, lines 14-25 thru pg. 56, lines 1-9).

Thurber then denied any involvement in these robberies:

Q: Did you ever see or receive any stolen property that's been testified here today and yesterday in regards to the American Mini Storage RVs?

A: No. I received none of it.

Q: And did you ever have any talks with Mr. Kent regarding any of that stolen property?

A: Never.

Q: Mr. Kent never brought you any of that -- any of the flat screen TVs that were testified about or any of the other electronics?

A: Never did.

(C.R. 72, pg. 58, lines 22-25 thru pg. 59, lines 1-7).

On cross-examination, extraneous testimony came in:

Balskus: Can you explain why your DNA was found in the Outagamie County burglaries at the locations at least five times?

A: It was never found. Can you show that on paper? It was never found.

Q: Cigarettes were found.

A: Never found.

(C.R. 72, pg. 59, line 25 thru pg. 60, lines 1-5).

As to Mr. Thurber's cooperation with Outagamie County authorities, the following emotional testimony occurred:

Q: Well, you indicated that you were - - Are you saying you were always cooperative with the individuals in Outagamie County?

A: I was always cooperative with Dan Tauber, Sergeant Dan Tauber.

Q: Well, I'd like to call your attention to July 29th, 2010, at approximately 2:58 in the afternoon. Didn't you tell Sgt Tauber you don't know who the fuck you're messing with?

A: I'm pretty sure I told him that.

Q: And you also told him that Officer Tauber was fucking with the wrong person and that Officer Tauber better not fuck with you?

A: I'm pretty sure I told him that.

Q: And, in fact, you told him that you were part of the outlaws. Isn't that right?

A: Sure did.

Q: And you said you had beaten a wrap 21 years ago and that Officer Tauber better be careful?

A: I've never beat no wrap.

Q: Well but that's what you told him, right?

A: I don't think I told him that at all.

Q: Isn't it a fact that you told him that you had beaten a 21-year wrap for involuntarily manslaughter on a technicality? Didn't you tell Officer Tauber that?

A: That is the truth, but I don't remember telling him that.

(C.R. 72, pg. 60, lines 8-25 thru pg. 61, lines 1-9).

Because Detective Jagla was unable to be subpoenaed, the defense was forced to rest on page 68.

After some short rebuttal testimony from the DA's special investigator, the recitation of jury instructions and closings took place. The importance for this appeal is the closing argument of defense counsel, which began on page 110. The entirety of her closing is attached in the appendix. The only mention of any video surveillance in closing by Ms. Carver was the following:

MS. CARVER: Video tapes. Interesting. I think you heard me try to get into some information about video cameras -- surveillance cameras that were at American Storage. And Officer Jagla admitted he believes he recalls at least two cameras on the premises; one in back for the whole area that covers these RVs and these trailers. Also the video tape. I mean, wouldn't that be a great way? I mean, couldn't we have something brought by the State? Their case would be open and shut. It would be great, wouldn't it? We don't have any video tape.

(C.R. 72, pg. 129, lines 15-25 thru pg. 130, lines 1-2).

After deliberation, the jury came back with convictions on all counts. (C.R. 72, pg. 148-152).

Sentencing Hearing

Sentencing took place on November 19, 2012. Thurber received a total of eighteen years of confinement, consecutive to any other sentence. This was arrived at by one and a half years of confinement per counts one through twelve on each of the break ins. (C.R. 73).

Post-conviction Motion

A Post-conviction Motion was filed on May 23, 2014. (C.R. 45).

Post-conviction Hearings

There were two Post-conviction Motion Hearings: August 1, 2014 (C.R. 74) and August 15, 2014 (C.R. 75). The Judge's decision was rendered on December 10, 2014 (C.R. 76).

Post-conviction Testimony

Four witnesses were called over the two hearings: Melissa Blank, Caroline Carver, William Thurber, and Andrew Lutzow.

Melissa Blank was the first to testify; relevant portions of which are as follows:

Q: So of the total of four cameras that had been installed, two of them were not working?

A: Correct.

Q: The two that were working, would one or both of them have shown the robberies that occurred in July of 2010?

A: No.

(C.R. 74, pg. 8, lines 22-25 thru pg. 9, lines 1-4).

Q: So the people who did the robberies, did it appear as though they were very careful in making sure they weren't seen by the cameras that were working that night?

A: I believe so, yes.

Q: Did they come in a normal way where a camera would have picked them up or did they come in some alternate route?

A: It must have been an alternate route because I would have seen them -- that car with the camera that's going into the parking spots.

Q: Is there one entryway or more than one entryway into American Mini-Storage?

A: There is one entryway.

Q: And was that entryway monitored appropriately and accurately by a camera in July of 2010?

A: Yes.

Q: So that camera worked?

A: Yes.

Q: And that camera did not show any vehicle that presumably would have been driven by the defendant or his co-defendant, Jacob Kent. Is that right?

A: Correct.

(C.R. 74, pg. 10, line 25 thru pg. 11, lines 1-22).

Q: If a person would have driven by or walked through during the daytime to -- you've heard the term case the joint, okay -- would they have seen cameras sitting up there on those posts?

A: Yes.

Q: And those cameras would have been pointed in such a direction that any activities or robberies that did occur would have been picked up by a camera if it had been working, correct?

A: Yes.

(C.R. 74, pg. 12, lines 21-25 thru pg. 13, lines 1-5).

Q: What was your first thought as far as who might have done this when the robberies first came to light?

A: Well, the first truck I saw pull in there was Andy's (Lutzow's) truck and why is he there at 1:00, 1:30 in the morning? That was the question.

Q: Did you ever see on the video the truck leaving?

A: No.

Q: So the truck either stayed there or somehow left in a different route. Would that be a fair statement?

(C.R. 74, pg. 13, lines 10-18).

Q: Okay. And you saw Andrew's truck essentially come in that driveway about 1:00 or 1:30 in the morning?

A: Yes.

Q: And you never saw it leave?

A: Correct.

(C.R. 74, pg. 14, lines 16-20).

Andrew Lutzow was called to the witness stand on page 20, and refused to testify. Portions of the exchange are as follows:

MR. LUTZOW: Before I'm sworn in, I'd like to ask the prosecution that I be granted immunity in this case.

MR. PREKOP: I can't do anything of the sort.

THE COURT: Well, I'll have you sworn in, sir.

MR. LUTZOW: I'll exercise my 5th Amendment right then.

THE COURT: Well, let me swear you in first and I'll give you that opportunity.

MR. LUTZOW: I'm not going to. I won't - - I won't testify in this case unless I'm granted immunity.

THE COURT: We'll hold you in custody.

MR. LUTZOW: Okay.

THE COURT: Okay.

MR. SCZYGELSKI: The bailiffs are going to have to haul him to the jail then.

THE COURT: Hang on, sir.

MR. LUTZOW: Let me grab my bag then. Well, I would like to be granted immunity if I'm not going to be charged in the case. I don't see what the big deal is.

THE COURT: Step forward here. We'll take you into custody. Just so you understand, sir, you've been subpoenaed as a witness here today.

(C.R. 74, pg. 20, lines 7-25 pg. 21, lines 1-8).

Attorney Caroline Carver began testifying on page 30:

Q: Now, it appears that you also had a strategy of pointing out that Kent when he gave these statements to the police was very angry with Mr. Thurber for some reason, correct.

A: Yes, I recall that.

Q: And as part of your questioning and argument, it appeared that you were trying to point out that Mr. Kent must have been so angry he made all this up about Mr. Thurber and now he's really telling the truth today?

A: That would be my recollection, yes.

Q: And that was a core of your strategy?

A: Yes, one of them.

Q: Now, based upon that issue, you were also aware that there were cases up in Outagamie County that Mr. Kent and Mr. Thurber were both charged with and essentially convicted of from what I understand. Is that true?

A: Yes.

Q: And in looking at my motion, the first thing that's talked about is a suppression hearing on May 15 of 2012 in which essentially everything out of Outagamie County you wanted suppressed, correct?

A: Correct.

Q: And it appears as though the prosecution agreed with that?

A: Yes.

Q: And then during the course of the trial it looks as though all of that stuff ended up coming in anyway. Would that be a fair statement?

A: Yes, as I remember, a good portion, yes.

Q: Do recall why that was allowed in?

A: Since I've gotten your motion and had a chance to think about this, from what I recall, I initially, you know, of course, sat up when I heard some of this coming in, but-- Because if I remember it was on cross examination in trying to discredit both my client I think when he testified and this co-defendant -- Well, I don't know if it came up with the co-defendant. But with my client, it wasn't -- I thought about it and it didn't seem damaging to me because if I recall nothing had been found in that warrant -- that search warrant -- that incriminated Mr. Thurber in this matter. And I don't even remember if there was anything found that incriminated him in the Outagamie matter. I don't recall. But I remember stopping, at least pausing in my thought process and made a strategic decision that in this case at that time it would be more damaging in front of the jury to try to keep that out and shut the defense -- or the prosecution down rather than just let my client explain it and to find that nothing significant prejudiced him in this case regarding that warrant.

(C.R. 74, pg. 37, lines 7-25 thru pg. 39, lines 1-8).

Q: When you questioned Mr. Kent about why he was angry with Mr. Thurber, obviously that entailed Outagamie County information -- that case, correct?

A: Yes.

Q: Did you understand that that would likely open the door to the free flow of questioning on Outagamie County when you started asking those questions of Mr. Kent?

A: I don't think it opened door to a free flow, no. I mean, certainly that wasn't my, I guess -- I wasn't planning

on that or didn't wish that questioning him. I didn't know exactly how he was going to answer. If he was going to specifically, you know, he could have just as easily said, well, we had prior relations the two of us and I was mad at him. I don't know. I didn't know how he was going to respond. But I did know that he was going to respond to the extent that he had at the time he claimed Mr. Thurber was responsible an axe to grind against him.

Q: And he had to bring out that grinding axe, so-to-speak?

A: Sure.

(C.R. 74, pg. 43, lines 1-21).

Q: Okay. Let's move on then to the issue of Melissa Blank. You heard her testify today. Would your questioning of her have been on similar issues?

A: I believe so, yes.

(C.R. 74, pg. 43, lines 22-25 thru pg. 44, lines 1-4).

Q: Now, Melissa Blank was subpoenaed by you to be here (at trial) and from what I understand she was actually here in the hallway outside the courtroom during at least the second day of trial?

A: Yes. I spoke to her.

Q: And it appears the Court excluded her as a witness because there was a failure to file a notice of witnesses. Is that correct?

A: She was not listed on a list of witnesses for our case.

Q: Now, if Melissa Blank had been allowed to testify and answered questions similar to the way she did today, perhaps more pointedly and organized and a bit better, but if she had testified, what would you have done with that testimony as far as your arguments to the jury or rest of the trial?

A: If I remember, the reason I wanted her to testify is that the chief investigator in this, Officer Jagla, I wanted to get in Andrew Lutzow's and Melissa' positions through his testimony from his investigation. And if I recall when he was on the stand, Officer Jagla denied any kind

of communications with Melissa, which surprised me. I thought -- It was in the reports. I tried, if I recall, tried to bring that out and refresh his memory, however, he insisted that he hadn't talked to her. And, again, I don't know if this is exact recollection on my part. I'm just somewhat speculating here. And so therefore that's when the issue came up for me on rebuttal that I would need her but I didn't want her on my case in chief because our strategy was, again, their lack of evidence, their lack of a thorough investigation, lack of follow-up with this Andrew Lutzow, lack of follow-up with Melissa, the missing video tapes that clearly we were going to bring out conveniently didn't show this time. I don't recall from the record if Jagla talked about Andrew Lutzow being seen on the video coming through the gates at that mysterious, convenient, early morning hours and his lack of follow-up. So it wasn't our burden to put on all these witnesses and that's why I didn't put Melissa on the list of witnesses for my case in chief. But when Officer Jagla testified and then of course the prosecution conveniently made him unavailable to be recalled, I wanted to bring Melissa in and that's when I contacted her and I spoke with her and had a subpoena issued for her and she was in court the next day prepared to testify.

(C.R. 74, pg. 44, lines 8-25 thru pg. 46, lines 1-3).

Q: And amazingly, even though there's apparently two other cameras out there that at least during the daytime would be visible, those two cameras surprisingly were not working during these relatively few hours in question, correct?

A: Yes.

Q: Why would you not want to put her on to point that out in our case in chief?

A: Because it was all pointed out through Officer Jagla and I thought it was much more beneficial to come from him the fact that he didn't follow up on any of that stuff in his investigation. I thought it was much more damaging on the State's part to not have shown that and I knew they weren't planning on showing any of that.

Q: So basically when Officer Jagla testified -- Obviously he had to testify, right, for the prosecution?

A: I would guess.

Q: And he did testify, correct?

A: Yes.

Q: You cross-examined him on those issues about the amazing missing video tapes and the cameras that didn't work, right?

A: Yes.

Q: Do you recall his testimony as being relatively consistent to what Melissa Blank just testified to today?

A: I don't recall. In fact, if I had - - If you pushed me on it, my belief and that's why I wanted to call her or even recall him was that he said he didn't - - he hadn't spoken with her. I mean, it was a surprise in the sense of - - It wasn't consistent, if I recall from the reports.

Q: Now, if you had been allowed to essentially tighten up that issue or get that point across to the jury in closing had been stronger, in your opinion?

A: Yes.

Q: Would your strategy overall subsequent to that point have been different? For example, having Mr. Thurber himself testify?

. . .

A: I mean, that kind of requires a little thought I think on my part more than just a few seconds, but if I had to answer in a few seconds, I would probably say no.

Q: You still would have had him testify or would have advised him or not strongly objected to him testifying?

A: I don't know. I couldn't say that at this point.

Q: So overall, if Melissa Blank had testified and testified similarly to what she did today, how would the trial from your standpoint have gone differently?

A: I think we would have had a stronger argument that somebody else possibly was involved in this, that Mr. Thurber wasn't. Again, I guess, you know, I would have discussed

this with Mr. Thurber, but if you're asking me, you know, would I strongly have advised him not to testify and therefore he wouldn't, I don't think we can draw that conclusion because again I'd point out that he really wanted to testify, too. I may have advised him that, you know, it might have been less of a reason for him to testify, but, again, it would have been ultimately his decision. So I guess I can't speculate as to what the ultimate choice would have been.

Q: But at least at a minimum your closing arguments would have been -- your closing argument would have been stronger if you had the testimony from Melissa Blank?

A: I think so.

Q: And you have had essentially an additional point saying that, look, the State's burden hasn't been met here, we got a guy who's recanting his testimony, my client says he didn't do anything, and it's a whole big mess in the security system at American Mini Storage, correct?

A: Absolutely.

Q: And as an additional point, you could have pointed out that, look, there's four cameras there. Somebody with inside knowledge must have been the one who did this, not William Thurber?

A: Yes.

(C.R. 74, pg. 47, lines 5-25 thru pg. 50, lines 1-12).

Q: Did you ever consider calling Andrew Lutzow yourself as a witness? It's been a bit theatrical today with him showing up. But did you ever think about bringing him in?

A: I'm sure I did. I don't recall the specific thought process there, other than from early on. And you as an attorney probably understand the Plan A and the Plan B strategies and defenses. Andrew all along I think was a Plan B and so rather than disrupt that argument and that question in front of the jury by having Andrew come in and being able to explain things, I thought it best not to call him and just leave that inference in front of the jury, that they were well aware of the fact that Andrew was in charge of the security there -- those cameras -- that he maintained them, that they had spoken to him, that they

were aware they were not working properly that night, and that they failed to do any kind of follow-up with Andrew or why those cameras weren't working.

Q: So you still had that argument without him coming in and explaining why electronically things just happened not to work?

A: I thought so, yes.

(C.R. 74, pg. 51, lines 4-25 thru pg. 52, lines 1-5).

Q: Now, let's suppose that you had called him as a witness and we got a similar show as to what we got today, he comes in and says I'm not going to, I plead the Fifth, I want immunity, all of that kind of stuff going on. Do you think that would have been helpful in front of a jury?

A: Absolutely.

Q: He's almost admitting he might have committed a crime himself, right?

A: Oh, yes.

Q: And your arguments would have been much stronger that it's not my guy, it's not Mr. Kent; it's somebody else, right?

A: Yes.

Q: And if you had spoken -- Well, it's speculative, but if you had spoken to Mr. Lutzow, it's possible that he might have expressed his extreme reluctance to come in and testify. True?

A: True.

Q: Did you ever go see Mr. Thurber when he was housed at Fox Lake Correctional?

A: Directly? Personally? No.

(C.R. 74, pg. 52, lines 21-25 thru pg. 53, lines 1-17).

William Thurber began testifying on page 80. Relevant portions are as follows:

Q: Now, obviously a lot of bad baggage came in when ultimately did testify, including your prior criminal convictions, which I believe were 23, correct?

A: Right.

Q: And it looks like they even brought up some issues regarding threats that you made to an officer over the telephone up in Outagamie County. Do you recall that?

A: Right.

Q: Were you surprised that that stuff was allowed to be delved into?

A: Very surprised.

Q: Were you assuming that that would not be looked at?

A: Yes, because that was pertaining to the search of my house.

Q: When you went to take that witness stand that date of trial, which would have been September 11th, were you going up there with the understanding that your interaction with the officer in Outagamie County was going to be off limits?

A: Yes. There was no reason for it to even come up.

Q: How about the threats you made to that officer, you know, about watch your family and, I don't know, you mentioned something I believe about the outlaws gang or something. Did you know that that was going to be coming up?

A: Never.

Q: Were you aware that something about not being convicted of a manslaughter charge or manslaughter accusation was going to come up?

A: Never.

Q: If you had known that those issues were going to be presented, would you have taken the witness stand?

A: Never.

(C.R. 74, pg. 82, lines 4-25 thru pg. 83, lines 1-12).

Q: Did you and Miss Carver discuss that a lot of those issues – – those bad things such as the interactions with the police officer, your prior manslaughter charge, that type of thing, if you had been told by Miss Carver that those were going to be brought up or were likely to be brought up, would you have still testified?

A: No.

(C.R. 74, pg. 83, lines 16-23).

Q: Now, Mr. Lutzow himself was never even called as a witness, correct?

A: Again, he wasn't, and he should have been.

Q: Did you explain that to Miss Carver? Why you felt that was important?

A: Yes.

(C.R. 74, pg. 86, lines 13-18).

Q: You have a little trouble with written communications. Is that right?

A: Yes, I do.

Q: Why don't you describe very briefly why that is.

A: I'm dyslexic. I can't read or write. I got a third-grade spelling average. I have other inmates write stuff for me and I have all the letters that I've ever had an inmate write for me state that they wrote it for me, signed it and all that, just like the letter that you just got. My cellie wrote that for me.

Q: You said your cellie; your cell mate?

A: Yeah, my cell mate.

Q: So obviously given your limitations regarding written communications, when you're facing charges, is it real important to have telephone, video, or face-to-face communication with your attorney?

A: Yes.

(C.R. 74, pg. 87, lines 7-23).

Q: How many times did Miss Carver come to see you at Fox Lake?

A: None, never.

Q: How many times did she have a video conference with you at Fox Lake?

A: It was one time and it was the week before my trial and that was just to tell me who the State was calling as witnesses and, you know, and then she also asked me if I had any witnesses that needed to be added and that's when we did talk about Melissa Blank, making sure that she was one of them, as well as all the detectives and the officers that were involved in this case.

(C.R. 74, pg. 88, lines 16-25 thru pg. 89, lines 1-2).

Q: Do you believe there was adequate communication between you and Miss Carver?

A: No, there wasn't.

Q: Do you believe based upon your dyslexia that face-to-face communication would have been more vital for you than a normal inmate?

A: I think, yes. I think if we could have both sat down and went through, you know, that lengthy discovery that I had from Michael Lim who was my attorney previous before all of that, we could have discussed a lot more and I think she would have been a little bit more prepared.

(C.R. 74, pg. 90, lines 19-25 thru pg. 91, lines 1-5).

The Post-conviction Hearing resumed August 15, 2014. A great deal of quoting is not needed, but suffice it to say that Mr. Lutzow denied involvement in the robberies. The court asked for briefing. The defense filed its post-conviction brief on September 30, 2014 (C.R. 49) and the state filed its brief on October 21. (C.R. 50), followed by defendant's reply brief on November 12 (C.R. 51).

Judge Bissett issued his oral decision on December 10, 2014.
All of the defense issues were denied. (C.R. 52).

ARGUMENTS

- I. THE COURT SHOULD HAVE ALLOWED MELISSA BLANK TO TESTIFY FOR THE DEFENSE DESPITE THE FACT THAT MELISSA BLANK WAS NOT NAMED ON A LIST OF WITNESSES.**
- II. ATTORNEY CARVER SHOULD BE FOUND INEFFECTIVE.**
 - A. ATTORNEY CARVER SHOULD HAVE PROVIDED NOTICE THAT MELISSA BLANK WOULD TESTIFY.**
 - B. ATTORNEY CARVER SHOULD HAVE CALLED ANDREW LUTZOW TO TESTIFY, AND SHOULD HAVE STRESSED THAT THE INVESTIGATION STOPPED ONCE JACOB KENT PROVIDED HIS STATEMENT.**
 - C. ATTORNEY CARVER SHOULD HAVE OBTAINED AND USED THE SURVEILLANCE VIDEO AND OTHER EXHIBITS.**
 - D. ATTORNEY CARVER SHOULD HAVE CONSULTED MORE WITH THURBER.**
 - E. THE ACCUMULATION OF ERRORS JUSTIFIES A NEW TRIAL.**

Why would any robbers shatter windows, pry open doors, and steal huge electronic items with security cameras in clear sight? How would these same robbers know that they should not enter through the main driveway? And how could Andrew Lutzow drive in that very night and not notice the ongoing robberies? The mysteries surrounding the security system have never been solved, but Melissa Blank would have helped clarify these issues and pointed out that something else must have been happening.

The contrast between Detective Jagla's trial testimony and the post-conviction testimony of Melissa Blank is significant to help shed light on these unanswered questions:

ISSUE OF SUBSTANCE	DETECTIVE JAGLA'S VERSION	MELISSA BLANK'S VERSION
Number of Cameras	"Two or three I believe." (C.R. 71, pg. 211, lines 23-24)	"Four." (C.R. 74, pg. 8, lines 13-24)
Did the back camera work?	"I believe one of them was not working. There was only one working and that was the one by the gate." (C.R. 71, pg. 212, lines 18-21)	"No." (C.R. 74, pg. 9, line 2)
Was there any video recovered from the back camera?	"I want to say we recovered some video from Banta's." (C.R. 71, pg. 212, lines 21-25).	"No." (C.R. 74, pg. 9, line 2)
Was video footage erased?	"Yes." (C.R. 71, pg. 213, lines 7-14).	Not asked.
Who was in charge of the video system?	"I do not recall his name." (C.R. 71, pg. 213, lines 21-23).	"Andrew Lutzow." (C.R. 74, pg. 10, lines 3-10)
Did a pickup truck enter the premises?	"No follow up was done on the pickup entering the premises." (C.R. 71, pg. 214, lines 6-17).	Yes. Andrew Lutzow's truck. (C.R. 74, pg. 13, lines 10-19)
Was the black pickup truck linked to Andrew Lutzow?	Jagla referred to Melissa Blank, but any true answer was left out as hearsay. (C.R. 71, pg. 218-219)	"Yes, it was Lutzow's truck." (C.R. 74, pg. 13, lines 10-22).
What did Melissa Blank see in the footage?	This evidence was excluded as hearsay. (C.R. 71, pg. 219, lines 7-17).	Lutzow's truck arriving at 1:00 or 1:30 a.m. but not leaving. (C.R. 74, pg. 13, lines 10-25)
Was any follow up investigation done on Andrew Lutzow?	"No." (C.R. 71, pg. 220, lines 5-7).	Not privy to the police investigation.
Did the security cameras work prior to the robberies of July 21, 2010?	Never asked.	They worked perfectly. (C.R. 74, pg. 9, lines 8-16)
When was the first night that the cameras in the back did not work?	Never asked.	The first night they didn't work was the night of the robberies. (C.R. 74, pg. 9, lines 17-22)
Did the robbers appear to know that the cameras in the back were not working?	Never asked.	Yes. (C.R. 74, pg. 10, line 25 thru pg. 11, lines 1-4)
Is there any other way into American Mini Storage's back lot other than the	Never asked.	No. (C.R. 74, pg. 11, lines 5-18).

driveway that actually had a working security camera on it?		
Did the driveway camera show any potential robber's vehicle other than Andrew Lutzow's?	Answers were vague.	No. (C.R. 74, pg. 11, lines 19-22)
Were the security cameras in the back area clearly visible?	Never asked.	Yes. (C.R. 74, pg. 12, lines 9-25)
Whose black pickup truck was it?	Answer was vague and objected to.	Andrew Lutzow's truck. (C.R. 74, pg. 13, lines 10-14)
Was Andrew Lutzow's truck ever seen leaving?	No answer was provided.	No. (C.R. 74, pg. 13, lines 15-19)
Would a security camera normally have shown a vehicle coming or leaving in the so called grassy area?	Never asked.	Yes. (C.R. 74, pg. 16, lines 2-23)

In perusing the chart, it is clear that Melissa Blank would have provided unique testimony that the jury had not heard. It was also clear that the prosecution took whatever steps were necessary to keep this information out. Objections were raised during Carver's cross of Jagla, and Jagla disappeared before rebuttal. Although Melissa was at the courthouse, the DA asserted lack of notice to exclude her.

Of course, the issue of prejudice comes to the forefront in these situations. The prosecution never enunciated what prejudice they would suffer as a result of Melissa Blank's testimony. Melissa was an obvious witness. Although Attorney Carver failed to provide a list of witnesses, Melissa Blank was also a "victim" in that she worked at the business that suffered as a result of the robberies.

Her name was all over the discovery providing integral information about the security system. Her testimony would not have been surprising or prejudicial to the prosecution.

Had Melissa Blank testified, reasonable doubt would have followed. Overall the evidence would then have shown the following:

1. By robbing a place with obvious video surveillance, the robbers were either incredibly stupid or incredibly lucky. Or they were somehow aware that the back camera was not working.
2. There is more going on to the story than the jury knew about.
3. If Andrew Lutzow was on the scene, why was he unaware of all of these major thefts going on that night?
4. Compared to the amount of unknown questions that are being put forth in the case, the prior angry statement of Jacob Kent that implicated William Thurber would seem relatively minor.
5. Why would an experienced criminal like William Thurber take the risk of committing robberies while on video surveillance?

It is clear that Section 971.23(2m)(a), Stats., requires disclosure upon demand for a list of any witnesses:

- (a) A list of all witnesses, other than the defendant, whom the defendant intends to call at trial, together with their addresses. This paragraph does not apply to rebuttal witnesses or those called for impeachment only.

It is also understood that the defense does not have to prove anything, and it is therefore a challenge for defense attorneys to predict any and all witnesses whose testimony might be required until the state puts in its case. Attorney Carver specifically stated that she "wasn't foreseeing we'd need (Melissa Blank) - - but yesterday in testimony pursuant to an objection by the State and the Court sustained it, they classified particular testimony from Officer

Jagla as hearsay.” (C.R. 72, pg. 41, lines 20).

Based upon discovery disclosures from the State, Attorney Carver assumed Detective Jagla had reviewed the video evidence (and lack thereof), and it was anticipated by Attorney Carver that she would have been able to fully cross-examine him on it. Instead, he testified very vaguely between the State’s hearsay objections. Carver stated that she was relying on the memory and testimony of Jagla to present the details of the security system, the videos, and the lack of videos. It only then became obvious that Melissa Blank would have to testify. This was too late to provide a Sec. 971.23(2m)(a) disclosure.

The law provides that such disclosures, and the enforcement thereof, are well within the discretion of the trial court. However, the Sec. 971.23(7m) sanctions address various option when a party fails to comply, including advising the jury of the failure to disclose as well as “in appropriate cases grant the opposing party a recess or a continuance.” Indeed, there is a preference to use less drastic measure. Kutchera vs. State, 69 Wis. 2d 534, 230 N.W.2d 750 (1975), states that it’s preferable to not strike the witness but to allow a surprised or prejudiced party a continuance sufficient to interview the witness. The Kutchera holding should be even stronger for defendants in that there are no DA constitutional rights to prosecute individuals, but there are very strong constitutional rights to allow defendants to put forth their defenses.

As will be seen below, Attorney Carver should have anticipated these difficulties and disclosed Melissa Blank as a witness. But regardless of where fault lies, vital security system details were unheard by the jury. Because of that, as seen in the chart above, a large part of the defense theme was unheard by the jury.

So why would robbers feel free to undertake twelve damaging and time-consuming robberies under the lens of an obvious security camera? Why would they know that they should avoid the main driveway? And how could Andrew Lutzow have been there night but remain oblivious to it? Melissa blank would have provided some insight, but the questions remained unasked because she was excluded.

II. ATTORNEY CARVER SHOULD BE FOUND INEFFECTIVE.

Effective assistance of counsel is guaranteed by the 6th and 14th amendments of the U.S. Constitution, as defined by the cases of Strickland v. Washington, Id., and State v. Johnson, 133 Wis. 2d 207, 216-17, 395 N.W.2d 176 (1986). Attorney Carver should have listed any potential witnesses, such as Blank or Lutzow, in a Section 971.23(2m)(a) disclosure. It is equally obvious that she was ineffective in her trial preparations by viewing, editing, and presenting the surveillance video, by consulting face to face with Thurber, and by pointing out that the investigation into Lutzow stopped once Kent provided his statement. Indeed, it can be argued that a defense lawyer has to brainstorm with the client, considering who might possibly be a witness if certain testimony does or does

not come in through the State, and what video evidence should be presented. If it was predictable that Detective Jagla would only testify vaguely about the security footage, then Melissa Blank would need to be disclosed as a witness along with Lutzow and the video itself. Indeed, any investigating officer, eye witness, or electronic evidence should have been prepared for the jury.

The conviction in this case occurred because Jacob Kent, at one angry time, stated to police that Thurber masterminded these robberies. There was no corroborating evidence. No DNA at trial linked him to the robberies, and no other witnesses put Mr. Thurber at the scene. Shooting holes in Kent's testimony was Attorney Carver's primary job, but her lack of preparation handcuffed her.

A concomitant strategy would have been to focus on other individuals who would have been aware that the security system was not working. Mr. Thurber, to his dubious credit, is an experienced criminal. For him to spend hours at a storage lot, breaking into campers and stealing large electronic items, would have been unlikely given the open and obvious security camera pointing in his direction. Only a person who is incredibly stupid OR knew that the security cameras were not working would have undertaken this robbery. Andrew Lutzow had this knowledge, and he indeed was the first suspect considered by police. His truck is seen that night, and the investigation into him continued until Kent implicated Thurber. At that point, Andrew Lutzow was forgotten.

At the first Post-conviction Hearing of August 1, 2014, Lutzow was very concerned about his testimony, requesting immunity and willing to go to jail to avoid the witness stand. It was very dramatic. He then came in on August 15th, denying involvement. Even so, having Lutzow at trial would have been important for Thurber. As Ms. Carver stated, his performance on August 1st would have been "absolutely" ... "helpful in front of a jury". (Page 51, lines 4-10.) Her points would have been stronger. Not only would it have been dramatic before the jury, but his involvement makes sense.

It is also well known that electronic evidence and demonstrative exhibits are very persuasive. There were many hours of footage from the driveway security camera that actually worked that night, but none of it was shown to the jury. It would not have taken long to show a black truck entering the driveway, but not leaving. It also would have been easy to show to the jury in extreme fast forward or through Melissa Blank that no other vehicles capable of hauling a ton of stolen items was seen coming or going. Finally, a map and accompanying photos could have been used to show how obvious and visible the security cameras would have been to potential thieves.

Without this information, the following facts remain dangling:

1. Why did the prosecutor make sure that Officer Jagla was unavailable for rebuttal?
2. Why would twelve loud and time consuming robberies be attempted by experienced thieves if security cameras were visible?
3. Why was Andrew Lutzow so concerned about his testimony?

4. Was the issue of the malfunctioning security cameras made known to the jury in an adequate way?

Each of these unanswered questions would have been pointed out and partially answered if adequate prep and consultation had occurred.

The law of ineffective assistance of counsel is difficult to apply specifically in any given case. What appears reversible in one case is characterized as "harmless error" in the next. The following cases defense counsels' failure to elicit relevant evidence thus leading to reversal: State v. Jeannie M. P., 2005 WI App 183, 286 Wis.2d 721, 703 N.W.2d 694; State v. Delgado, 194 Wis. 2d 737, 535 N.W.2d 450 (Ct. App. 1995); State v. Lindh, 161 Wis.2d 324, 468 N.W.2d 168 (1991); State v. Glass, 170 Wis.2d 146, 488 N.W.2d 432 (Ct. App. 1992) and State v. Eckert, 203 Wis.2d 497, 553 N.W.2d 539 (Ct. App. 1996).

In State v. Thiel, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305, four failures of trial counsel to adequately review medical reports, and four additional areas of counsel's failure to adequately review police reports, were coupled with nine other areas in which trial counsel did not conduct sufficient independent investigations. These seventeen issues resulted in a finding of prejudicial ineffective assistance of counsel.

The case of State v. McMahon, 186 Wis. 2d 68, 85, 519 N.W.2d 621 (Ct. App. 1994), holds that deficient performance is limited to those instances in which a duty is clear such that a reasonable lawyer should have known to raise the issue.

Stepping back from the details of each isolated question and answer, one cannot help but look at this case and wonder what really happened. Clearly visible video cameras should have recorded everything, but they weren't working. Anyone capable of undertaking thefts of this magnitude would have "cased the joint" to see if video surveillance was present. Obviously businesses that have valuables onsite are likely to have security. Businesses like American Mini Storage have better security systems, including a visible video surveillance system which both records intruders AND deters potential thieves. Other than Andrew Lutzow and Melissa Blank, who else would have known that the system was not working?

This is the largest anomaly in this case. The thief (or thieves) were either extremely careless and stupid to rob a place that had an obvious video surveillance system, OR they knew that the system was not working. That's where Lutzow comes in.

The jury was only left with some vague idea, limited to what Det. Jagla testified about, regarding a sort of somewhat faulty security system that wasn't very important to the police investigation. Yet there was very little indication as to what specific areas of the American Mini Storage businesses were or were suddenly not under surveillance that night. Obviously Detective Jagla and the prosecutor worked very hard to make sure that the inadequacies of that security system were unknown by the jury.

When this information is coupled with the incredible reluctance

of Andrew Lutzow to testify at the first Post-conviction Hearing, it is obvious that something more should be inferred to have been going on. Attorney Carver admitted as much. She also then admitted that she did not really review the video that was available and never went to Fox Lake to see Thurber.

As noted above, the failure to call critically important witnesses, to present important evidence and to ask relevant questions is deemed deficient performance if the failure to do so was not a valid strategy and the sought after testimony would have been critical. State v. Glass, Id.; State v. Eckert, Id.; State v. Delgado, Id. In short, failing to elicit testimony which would help the defense can be considered ineffective assistance of counsel.

State v. Glass Id. specifically dealt with a lawyer who stipulated that a vaginal DNA test for a sexual assault victim was "inconclusive." However, the post-conviction facts pointed out that the test was not just inconclusive, it completely eliminated the defendant, and was therefore a completely "negative" test.

This slightly stronger meaning was enough to overturn the conviction. The trial court made the finding of ineffective assistance even though the defense lawyer stated that his decision to not call a crime lab witness on the inconclusive test result was based on a trial strategy that such a witness from the crime lab "might confuse the jury." Glass at 150. The court of appeals disagreed.

Glass's crime lab expert who would have testified was considered

"vital" to prove "the negative results of the test." Id at 151. The Glass decision included a reaffirmation of the case of State v. Moffett, 147 Wis. 2d 343, 347, 433 N.W.2d 572, 577 (1989) by holding, "The test is whether defense counsel's errors undermine confidence in the reliability of the results." The Glass court then concluded:

The question on review is whether there is a reasonable probability that a jury viewing the evidence untainted by counsel's errors would he have had a reasonable doubt respecting guilt. Id. We cannot say with confidence that the trial result was reliable. If the jury properly had been given the omitted information, there is a reasonable probability that they would have had a reasonable doubt respecting Glass's guilt." Glass at 154. (Emphasis added)

Similarly, in the case of State v. Delgado, Id., a favorable deal was given by the prosecutor to a cooperating witness named Magee, but Magee's cooperation was never disclosed at trial. Post-conviction, it was confirmed that this critical prosecution witness was potentially biased, and that the jury should have known it. The failure of this potential bias to be disclosed to the jury was sufficiently prejudicial to overturn Delgado's conviction. Post-conviction, Delgado's trial attorney admitted that his "theory of defense (was) that Magee was motivated to lie because the evidence pointed toward him, (and) that he want(ed) to put the spotlight on Mr. Delgado and away from him (Magee)." Delgado at 746. Delgado's trial attorney also acknowledged that he had been aware of the promise for reduced charges for Magee, and the potential of charges against Magee being utterly dismissed if he cooperated against Delgado. Id.

Finally, Delgado's trial attorney admitted reading a

preliminary hearing transcript in which vital impeachment evidence of potential bias for Magee's cooperation was admitted. Delgado's trial attorney failed to use that information at trial because "the prosecutor had assured him that no promises had been made." Id. In short, Magee's bias was made clear at the Preliminary Hearing, which Magee's own lawyer characterized as, "Mr. Magee would not have testified - there have been no finalized discussions, but, there have been discussions." The prosecutor then responded "I believe that's a correct statement." Delgado at 744.

The case law, in its essentials, holds that juries are entitled to every significant piece of evidence that fortifies the defense strategy. If bias in the Delgado case, and the subtle distinction between "inconclusive" and "negative" in the Glass case, are adequate bases for new trials, then legitimate video issues should justify overturning Thurber's convictions in the following five areas:

A. ATTORNEY CARVER SHOULD HAVE PROVIDED NOTICE THAT MELISSA BLANK WOULD TESTIFY.

As seen in Argument I above, Melissa Blank was an obvious witness. Detective Jagla became fuzzy in his knowledge and recollections, and the prosecution did everything possible to conceal the security system's failings and other details. There was no excuse for Carver's failure to provide the required notice that prevented this key witness from being heard by the jury.

B. ATTORNEY CARVER SHOULD HAVE CALLED ANDREW LUTZOW TO

TESTIFY, AND SHOULD HAVE STRESSED THAT THE INVESTIGATION STOPPED ONCE JACOB KENT PROVIDED HIS STATEMENT.

Why was Lutzow so worried about testifying? He would have been the only person who knew that the security system was not working that night. And his name is completely dropped from the investigation once Jacob Kent provided his statement. Yet Lutzow's truck was at the scene that night. These issues were never fleshed out in any way, but they should have been so that we can be assured that the jury based its decision on all the relevant facts, not just a perturbed statement from an angry co-defendant.

C. ATTORNEY CARVER SHOULD HAVE OBTAINED AND USED THE SURVEILLANCE VIDEO AND OTHER EXHIBITS.

Video evidence is very convincing to juries, yet Attorney Carver never viewed any of it. Imagine how powerful a snippet showing Andrew Lutzow's black truck going in at 1:00 a.m. would have been, especially when coupled with background testimony from Melissa Blank. And consider how Andrew Lutzow would have handled questions about that night. "When did you leave?" "Why didn't you see anyone breaking into the RVs?" Even Jacob Kent could have been asked, "How did you enter the area?" "How did you leave?" The driveway video would have tied up these loose ends, yet the jury never saw it.

In addition, a map and photographs showing precisely which clearly visible cameras were not working would have been extremely helpful to show how outrageous it was for experienced thieves to rob

a clearly secure area. None of this was done, and the jury was left in the dark about the most obvious anomalies in the case.

D. ATTORNEY CARVER SHOULD HAVE CONSULTED MORE WITH THURBER.

Thurber is dyslexic. Fox Lake is not far from Oshkosh. Only one video conference occurred. Much available evidence was never seen or heard by the jury. Thurber testified, but only had a vague idea as to how damaging his testimony was, especially with the details of his Outagamie charges erupting on his cross-examination. Adequate consultation would have been vital to firm up the missing links in the defense, and warning Thurber about the potential damage of his own testimony. Instead, Attorney Carver went to trial with no witnesses noticed up, no electronic exhibits, photos, or maps, and no clear path regarding the direction of the trial. Is it then any wonder that Thurber decided to testify without any clear understanding of how damaging his testimony was going to be?

E. THE ACCUMULATION OF ERRORS JUSTIFIES A NEW TRIAL.

All of the above errors by Attorney Carver combined to provide an inadequate picture to the jury as to the problems that occurred. No one looking at this trial can conclude that all the relevant evidence was heard by the jury, and large unknowns remain. The case of State vs. Zimmerman, 2003 WI App. 196, ¶36, 266 Wis. 2d 1003, 669 N.W.2d 762, holds that an accumulation of trial counsel's errors can justify overturning the verdict. That is what happened here.

However, it was not a panoply of various unconnected errors, it is a series of un-connections which left the entire surveillance issue unheard and unconsidered. The most forceful efforts of the State were used to keep those surveillance details out, yet noticing up Melissa Blank, calling Andrew Lutzow, arguing Andrew Lutzow's role, consulting with Mr. Thurber, and providing adequate and obvious exhibits to the jury would have clarified everything. All that the State had was a statement by Jacob Kent which was clearly chalked up to revenge. Thurber implicated Kent in Outagamie County, so Kent provided an angry retaliatory accusation against Thurber. This was recanted. This was also the sole focus of the case, yet it shouldn't have been. The trial should have contained all information showing that far more was going on than an isolated statement from Mr. Kent.

CONCLUSION

For the above reasons, the verdict, Judgment of Conviction, and sentence should be vacated, and a new Trial ordered.

Respectfully submitted this 26th day of May, 2015

SCZYGELSKI & PANGBURN LAW FIRM, LLC.

Ralph J. Sczygelski
State Bar No. 01001417
713 Washington Street
Manitowoc, WI 54220-4525
Telephone (920) 682-9990
Email: Ralphwislaw@sbcglobal.net

Attorney for Defendant-Appellant

FORM AND LENGTH CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in Sec. 809.19(8)(b) and (c), Wis. Stats., (as modified by prior order) for a brief produced with monospaced font. The length of this brief is 48 pages.

Respectfully submitted this 26th day of May, 2015.

SCZYGELSKI & PANGBURN LAW FIRM, LLC.

Ralph J. Sczygelski
State Bar No. 01001417
713 Washington Street
Manitowoc, WI 54220-4525
Telephone (920) 682-9990
Email: Ralphwislaw@sbcglobal.net

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, which complies with the requirements of s. 809.19(12).

I further certify that the electronic Brief is identical in content and format to the printed form of the Brief filed 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 opposing parties.

Respectfully submitted this 26th day of May, 2015.

SCZYGELSKI & PANGBURN LAW FIRM, LLC.

Ralph J. Sczygelski
State Bar No. 01001417
713 Washington Street
Manitowoc, Wisconsin 54220
(920) 682-9990
Email: Ralphwislaw@sbcglobal.net

Attorney for Defendant-Appellant

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; and
3. 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 Brief 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.

Respectfully submitted this 26th day of May, 2015.

SCZYGELSKI & PANGBURN LAW FIRM, LLC.

Ralph J. Sczygelski
State Bar No. 01001417
713 Washington Street
Manitowoc, Wisconsin 54220
Telephone: 920-682-9990
Email: Ralphwislaw@sbcglobal.net

Attorney for Defendant-Appellant