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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Nos. 2015AP000657-CR & 2015AP00658-CR
(Milwaukee County Case Nos. 2012CM005295 & 2013CF001581)

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

MARIO MARTINEZ REDMOND,

Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

Appeal from the Judgment of Conviction and the
Final Orders Entered in the Milwaukee County Circuit Court,
The Honorable Rebecca Dallet, Presiding

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ISSUES PRESENTED FOR REVIEW

1. Whether trial counsel provided ineffective assistance of counsel for failing to properly investigate potential witnesses and call those witnesses to testify for the defense?

   The trial court denied relief on this ground. R 55,[1] App. 1.

2. Whether trial counsel provided ineffective assistance of counsel for failing to properly object to the amendment of the information?

   The trial court denied relief on this ground. R 55, App. 1.

3. Whether trial counsel provided ineffective assistance of counsel for failing to move to dismiss Count Two of the Amended Complaint in Case No. 2013CF001581?

   The trial court denied relief on this ground. R 55, App. 1.

4. Whether Mr. Redmond was entitled to an evidentiary hearing on his ineffective assistance of counsel claims?

   The trial court denied the defendant an evidentiary hearing. R 55, App. 1

5. Whether text message evidence should have been suppressed because it was obtained without a warrant in violation of his constitutional rights and no exception to the warrant requirement existed to justify the search?

   The trial court denied relief on this ground. R 55, App. 1.

6. Whether there was insufficient evidence to convict the Mr. Redmond of three intimidation of a witness charges?

   The trial court denied relief on this ground. R 55, App. 1.

[1] Unless otherwise indicated, references to the Record refer to that filed for Case No. 2015AP000658CR).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Though the briefs may adequately address the issues presented on this appeal, Mr. Redmond would welcome oral argument and believes it would not be of "marginal value." WIS. STAT. (RULE) 809.22(2)(b).

Publication may be warranted because this case involves the search and seizure of cell phone data, and may clarify the existing rules guiding law enforcement and the courts in this area. WIS. STAT. (RULE) 809.23(a)(1).

STATEMENT OF THE CASE

Mr. Redmond was charged, by criminal complaint (Milwaukee County Case No. 2012CM005295) filed December 15, 2012, with four misdemeanors: endangering safety by use of a dangerous weapon under WIS. STAT. § 941.20(1)(a); battery under WIS. STAT. § 940.19(1); criminal damage to property under WIS. STAT. § 943.01(1); and disorderly conduct, use of a dangerous weapon under WIS. STAT. § 947.01(1) and 939.63(1)(a). R 3.[2] In addition, the State invoked the repeater penalty enhancer provisions of WIS. STAT. § 939.62(1)(a) and the domestic abuse assessment provisions of WIS. STAT. § 968.075(1)(a) on all four counts.

A speedy trial demand was entered on January 4, 2013, and trial was scheduled for February 25, 2013. R 27:2.[3] The State moved to adjourn the trial, on February 6, 2013, at the final pretrial, on the grounds that new evidence, text messages found on a cell phone seized during Mr. Redmond's arrest[4], was "relatively recently" brought to the State's attention, and it needed time to evaluate its admissibility. R 28:2.[5] Mr. Redmond was serving a sentence after revocation and his attorney at that time, Elizabeth Carlson, did not object.

The State was unable to proceed to trial on April 10, 2013, because the complainant did not appear. R 12:2-3.[6] It requested another adjournment, citing phone calls Mr. Redmond made to the complainant and the State's need for "a

[2] Record for 2015AP000657CR.
[3] Record for 2015AP000657CR.
[4] Other items seized after Mr. Redmond's arrest and police searched his bedroom where two .40 caliber magazines and 10 .40 caliber bullets, later introduced into evidence at trial.
[5] Record for 2015AP000657CR.
[6] Record for 2015AP000657CR.

couple of weeks to look into this," which was granted over defense counsel's objection. R 12:4[7] Jury trial was scheduled for June 17, 2013.

Mr. Redmond was charged, by criminal complaint filed May 6, 2013, with two counts of misdemeanor intimidation of a witness under WIS. STAT. § 940.42; and one count of felony intimidation of a witness in furtherance of a conspiracy under WIS. STAT. § 940.43(4); all counts carried the domestic abuse and domestic abuse repeater penalty enhancers. R 2. At the preliminary hearing on June 3, 2013, Attorney James Toran, retained by Mr. Redmond, was allowed to assume representation for both the new felony charges and the existing misdemeanor charges, which were consolidated for trial on June 17, 2013. R 62:2, 12.

The State filed pretrial motions to admit testimonial statements under forfeiture by wrongdoing and the defendant's escape from custody as evidence of consciousness of guilt on June 14, 2013. R 7, 8, 9. On June 17, 2013 defense counsel's request for an adjournment to hire an investigator to find the complainant and review recently acquired discovery was granted over the State's objection. R 63:4, 8. Jury trial was rescheduled for July 29, 2013. R 63:9.

Trial was again adjourned on July 29, 2013 when defense counsel was allowed to withdraw. R 65:9. Attorney Dianne Erickson was appointed to represent Mr. Redmond and jury trial was scheduled for October 28, 2013. R 66:4. A stipulation and order for substitution of counsel was filed on September 27, 2013 and Attorney William Kerner became Mr. Redmond's lawyer. R 18.

On the morning of Monday, October 28, 2013 the complainant did not appear and the State asked for a ruling on its forfeiture by wrongdoing motion. R

[7] Record for 2015AP000657CR.

68:3. It was denied, a body attachment was issued, and several evidentiary issues arose. R 68:19, 25, 28. The defense did not have a copy of a videotaped interview of Mr. Redmond conducted the day of his arrest (December 11, 2012). R 68:25. The State also sought to introduce text messages from a cell phone, seized at the time of Mr. Redmond's arrest, into evidence. R 68:25. The State attested that it had "just discovered" the text messages in its file, though it had made the same claim regarding the same text messages eight months earlier. R 68:25-26, R 28:2-3.[8] The Court passed the case until the afternoon to give the State time to execute the warrant, find the video CD of the interview requested by the defense, and determine if it could properly introduce the text message evidence. R 68:29. In the afternoon, the Court adjourned the trial until the following Monday, November 4, 2013, to allow defense counsel an opportunity to examine the interview and text message evidence, and the State time to execute the body attachment on the complainant. R 69:5-8.

On October 31, 2013 the State filed an Amended Criminal Complaint, adding a fourth count, felony intimidation of a witness by a person charged with a felony under WIS. STAT. § 940.43(7), to Case No. 2013CF001581. R 23. The new charge was based on two phone calls made from jail on October 24 and October 26, 2013. Defense counsel filed a motion to suppress the text messages and a motion to suppress the magazines and bullets on November 1, 2013. R 25, 26. In light of the "new" evidence and the State's desire to add charges for a trial scheduled to begin in three days, trial counsel also filed a motion to adjourn the trial and modify bail. R 24, 70. The Court adjourned the matter until Monday to

[8] Record for 2015AP000657CR.

hear the suppression motions and decide whether it would allow the amended criminal complaint to be used. R 70.

On November 4, 2013, the Court ruled that the State could amend the Information and advised the defense that it would grant an adjournment but would not modify bail, saying "[i]f we're going to trial, it's on everything." R 71:19, App. 2. Mr. Redmond chose to proceed to trial and the Court granted the State's forfeiture by wrongdoing motion to allow the complainant's testimonial statements into evidence. Defense counsel withdrew the motion to suppress the magazines and bullets because he did not know if Mr. Redmond had standing and to accommodate the efficient prosecution of the case. R 71:5 The motion to suppress the text messages began with the State calling probation agent Renee Rodgers-Adams. It was adjourned in light of her unexpected testimony to allow defense counsel to subpoena witnesses. R 722-3.

The suppression hearing continued a week later; at the close of which the Court allowed for use as evidence the first of four pages photographically depicting various text messages. R 74:28, R 49, Ex. 1, App. 3. Jury selection was completed the following morning, opening statements were made, and the trial proceeded with the State calling the complainant, who appeared in custody, and five other witnesses. R 75, 76.

The jury found Mr. Redmond guilty of battery and disorderly conduct and all of the intimidation charges. R 80. He was sentenced on December 20, 2013 as follows. For the battery and disorderly conduct convictions in Case No. 2012CM005295, he received 5 months each, concurrent with each other but

consecutive to any other sentence, with credit for 152 days time served. R 80. In Case No. 2013CF001581, for the misdemeanor intimidation of a witness and the intimidation of a witness in furtherance of a conspiracy convictions he was sentenced on each count to nine months, and on the last felony intimidation of a witness charge he was sentenced to 3 years initial confinement and 3 years extended supervision, concurrent with each other but consecutive to any other sentence. R 81. Trial counsel timely filed a Notice of Intent to Pursue Postconviction Relief for both cases on January 6, 2014. R 41; R21.[9]

On November 28, 2014, Mr. Redmond filed a postconviction motion alleging he was denied his constitutional right to effective assistance of counsel when his trial attorney failed to investigate and call to testify any defense witnesses and made other errors, the cumulative effect of which were prejudicial. R. 48. An evidentiary hearing was requested to address these claims. In the postconviction motion, Mr. Redmond also asked the trial court to reconsider its ruling on his pretrial motion to suppress the text messages. In addition, challenges to the sufficiency of the evidence, and a request to correct an error in calculating pretrial incarceration credit were raised. On March 13, 2015, the trial court issued a written decision denying, without an evidentiary hearing, Mr. Redmond's ineffective assistance of counsel claims. R. 55, App. 1. The trial court, in the same written decision, declined to alter its ruling regarding the text messages and found that sufficient evidence was presented to sustain the charges

[9] Record for 2015AP000657CR.

alleging intimidation of a witness. The court did grant Mr. Redmond's request for an additional three days of sentence credit.

STATEMENT OF FACTS

Mr. Redmond was arrested at his grandmother's residence on December 11, 2012 for a probation violation based on allegations that in the early morning hours of December 10, 2012, he broke into T.P's residence, entered without her consent and assaulted her while brandishing a firearm. When he was taken into custody, police seized a cell phone. In addition, two .40 caliber magazine clips and a black digital scale were seized from a suitcase police found in an upstairs bedroom.

The suppression motion hearing, begun on November 4, 2013 and concluded on November 11, 2013, produced various, often contradictory, accounts of Mr. Redmond's arrest and the seizure of the cell phone. R. 71, 74. Probation agent Renee Rodgers-Adams accompanied Milwaukee Police Department officers, Scott Davis and Andrew Farina to effectuate Mr. Redmond's arrest. R 71:42. Agent Rodgers-Adams testified that Mr. Redmond's father answered the door and called his son downstairs, Officer Farina took Mr. Redmond into custody, and Mr. Redmond fled while handcuffed. R 71:43-44. She said a cell phone fell out of Mr. Redmond's jacket pocket when he started to run and when she picked it up she saw text messages on the screen without opening or otherwise manipulating the phone. R 71:44-45. She further testified she was able to see all the messages represented in the four page exhibit the State offered. R 71:46. After she looked at the phone, she testified that a sergeant

looked at it, and then she turned it over to the agent of record, Christine Riggs. R 71:47.

On cross-examination, Attorney Kerner offered a Violation Investigation Report written by Agent Riggs that contradicted Agent Rodgers-Adams testimony and the Court reviewed the portion he indicated on the second page of the report. R 49, Ex. 2, App. 4.[10] This led to the aforementioned adjournment to allow trial counsel to arrange for witnesses. When the suppression hearing continued, the State called Officer Scott Davis. He testified that a family member called upstairs for Mr. Redmond and that when he came downstairs, he, Officer Davis, "immediately placed [Mr. Redmond's] hands behind his back, put him in handcuffs, and conducted a search incident to arrest." R 73:7-8. Officer Farina, though he did not testify at the suppression hearing, told the jury at trial, "I looked up [the stairs] and I saw Mario Redmond exit a bedroom, and when I observed him, because there were allegations of a gun, I drew my firearm and told him to put his hands up. He complied. I told him to come down the steps slowly, turn around, and I placed handcuffs on him, without incident." R 78:13. Officer Davis said he found a cell phone in "a jacket or a hooded sweathshirt," noticed there were text messages on the screen "to the effect that he was gonna go on the run," and put it back in Mr. Redmond's pocket. R 73:9.

[10] The proffered text of the report reads: "It should be noted when Mr. Redmond was being pat-searched to be taken into custody, police removed a cell phone from his person and received a message while in the officer's hand. The officers noted the message seemed to be related to the incident with [redacted]. An MPD sergeant proceeded to look through the phone and found several messages where Mr. Redmond admitted to "beating" his girlfriend and having a firearm. The cell phone was given to Agent Rodgers-Adams by the police to five to this agent on December 12, 2012. On December 12, 2012, Assistant Regional Chief Mike Williams approved a search of the cell phone. Mr. Redmond text messaged two different people he had "beat up" his girlfriend, he had a gun, and was going on the run because the police knew." App. 4.

Trial counsel called three witnesses. Mr. Redmond's probation agent, Christine Riggs, testified that she learned that a MPD sergeant looked through the phone and then gave the phone to Agent Rodgers-Adams during an "on-scene phone call with Agent Rodgers-Adams after she returned to the office as well." R 73:22-23. Agent Riggs also said that the phone was brought to her in a sealed bag and that they "were not approved to look at the phone at that time by our management." R 73:24

Sergeant Pamela Holmes testified that she took the photographs of the text messages after Officer Farina or Agent Rodgers-Adams gave it to her and that she did not "get any information from them as to how they got the phone." R 74:4-5. Erma Johnson, Mr. Redmond's grandmother, described her observations of the incident. The police initially handcuffed her son, Mr. Redmond's father, Mario Redmond, Sr. when he answered the door. R 74:9. She testified that her son, the officer, and the agent then went upstairs; when they came down one of the officers was carrying a cell phone that she had previously seen in her grandson's possession. R. 74:10. Ms. Johnson recalled the probation agent saying "we're gonna need that," and that the cell phone was not put back in her grandson's pocket. R. 74:10-11.

After hearing argument from both parties, the trial court recalled Sergeant Holmes to ask "whether she had to scroll through to take" the photographs of the text messages – she did. R 74:18-19. The court ruled that the first page of Exhibit 1 was admissible, because it believed that was what Officer Davis saw when he glanced at the phone during his search incident to arrest, but not the other

pages of the exhibit because "scrolling through someone's phone is a search." R. 74:24-28, App. 5.

The underlying incident, that precipitated Mr. Redmond's arrest, occurred on December 10, 2012. Milwaukee Police Officer Larin Young was called to 8115 W. Hampton Ave. to investigate a battery alleged to have occurred at 8938 N. 97th St. R. 77:11. T.P. told Officer Young that at 5:00 a.m. she heard knocking on a window and Mr. Redmond demanding to be let in; she ignored it; he left but returned 15 minutes later, broke the patio door and entered her residence. R. 77:14-16. Officer Young testified that Mr. Redmond punched T.P in the face and back. R.77:16. T.P. told Officer Young that when she went to the bedroom to check on her three month old son, Mr. Redmond let an unknown black male into her apartment, acquired a handgun from him and, upon entering the bedroom, asked about other men while pointing the firearm at her person. R. 77:22-24. Officer Young testified that T.P. told him that Mr. Redmond broke her cell phone, took her keys, and left in a grey Nissan. R. 77:27, 29.

This account is at odds, however, with statements by Steven Arnold and Staci Randle. R 49, Ex. 4 and 5, App. 6 and 7. Ms. Randle recalls driving with Mr. Redmond in her gray Nissan to pick up Mr. Arnold, who then drove her to work. Mr. Arnold, a cousin by marriage of T.P., states that Mr. Redmond and Ms. Randle picked him up at approximately 4:30 a.m. on December 10, 2013, drove Ms. Randle to work and then went to T.P.'s residence. Once there, he heard T.P. and Mr. Redmond arguing in her bedroom and witnessed them arguing

in the living room. He did not see Mr. Redmond strike T.P. or brandish a firearm. At some point T.P. called her brother Parnell; when he arrived he pounded on the patio door. At this point, Mr. Arnold said to Mr. Redmond, "this ain't worth it – let's go. You came with me, you leaving with me." Mr. Redmond agreed and they left the apartment.

T.P. admitted she was a reluctant witness and did not want to testify. R 76:6. When the State directed her attention to December 10, 2012, she said, "I remember some but not a lot." R 76:10. Asked what she did remember, T.P. described fighting at a bar but telling her friend, who called 911 to report the incident, that Mr. Redmond had caused her injuries in the hopes that her friend would drop the matter. R 76:11, 18. When confronted with the statements Officer Young reported she made to him, T.P. almost invariably said that she could not remember or could not remember saying those things, testifying at one point, "I really wasn't talking to him. It was Danai [the friend who called 911] who was really answering him. I was in the other room." R 76:28.

On cross-examination, T.P. said that she did not want to tell her friend, Danai Hudson, who she had fought with because T.P.'s older daughter is related to her friend, that she had lied to the police in the past by providing a false name and that, realizing that what had been reported to the police could get Mr. Redmond in trouble, she lied about his name and birth date. R 76:67, 69-71. She also testified that she called Mr. Redmond later that day, and that he advised her that her attempt to deceive law enforcement would not work, and that she needed to contact his probation agent and tell her the truth – that is the "main point" of

the telephone calls from jail. R 76:71-72. Trial counsel admitted into evidence, and published to the jury, an affidavit T.P. executed in March 2013 recanting her statements to Officer Young, which indicated that she lied because she was angry with Mr. Redmond when she heard he was unfaithful to her. R 76:73-74, R 49, Ex. 6, App. 8.

Before Mr. Redmond was charged in Case No. 2012CM005295, he made various phone calls to his family and T.P. that formed the basis for the first three intimidation charges. The State introduced portions of these conversations through Investigator Anna Linden, who works for the Witness Protection Unit. Selected snippets were played for the jury. The first two calls were made on December, 12, 2012, to T.P. R 78:36, 38.

The next call played in court was recorded on December 14, 2012 at 9:46 a.m. R. 78:39. In it Mr. Redmond is speaking with his father, Mario Redmond, Sr., though the latter was never formally identified by either party during the course of the trial, and is referred to only as "Pops." At one point, in the conversation, the following exchange was played:

> Pops: Let her know not to come and let her know what to do.
>
> Redmond:Tomorrow, mom's coming.

App. 9. It is unclear where this portion of the call is stopped,[11] but before it was begun "Pops" says "I'm a call and let them people Lydia know." The State played another portion where it appears "Pops," using another phone while

[11] The State generally indicated for the record when it started and stopped the recordings of the phone calls with the exception of the phone call with "Pops," where the State said when it started the recording but failed on each occasion to indicate the stop time.

staying on the line with Mr. Redmond, called someone else. The ensuing conversation is unintelligible or inaudible in the main:

> Pops: Hey my phone just died for a minute, my phone was dead, I I'm calling on another phone. I ain't tryin to get nobody
>
> Redmond: Quick, quick, quick, quick.
>
> Pops: (inaudible) gotta really (inaudible) if she call you, (inaudible) I even wanna make sure I'm not just (inaudible) locked up for nothing, they ain't gotta be. But I'm a . . . I'll be about 15 minutes. Hold on, hold on.

The State then played portions of a phone call from December 15, 2012 at 7:14 p.m. R. 78:42. The next day, December 16, 2012, Mr. Redmond appeared in court for the first time for his initial appearance. R. 59.

None of the participants in the phone calls, other than T.P., were called to testify at trial. Mario Redmond Sr., however, remembers talking with his son in jail. R 40, Ex. 7, App. 10. He recalls that Lydia Latiker, one of his son's girlfriends, wanted to visit him. His son instructed him to tell Ms. Latiker not to visit, but to contact his probation officer if she wanted to get a cell phone she had bought for him back. In his affidavit, Mr. Redmond states he never told T.P. not to come to court.

Additional facts will be set forth as necessary.

ARGUMENT

Mr. Redmond raises three challenges in his appeal. First, he asserts that he is entitled to a new trial because he was denied his right under the Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Section 7

of the Wisconsin Constitution to effective assistance of counsel because of various deficiencies in his trial attorney's performance that were prejudicial to his case. Particularly, he claims that the failure to properly investigate his case or call any witnesses in his defense undermines confidence in its outcome. The other errors trial counsel made, in their cumulative effect, similarly undermine confidence in the fairness of the proceedings. Mr. Redmond contends a *Machner*[12] hearing should have been held to address his ineffective assistance of counsel claims, and challenges the trial court's ruling in this regard.

Second, Mr. Redmond maintains that the trial court's evidentiary decision to admit text messages, photographed from a cell phone seized and searched without a warrant, was clearly erroneous, and should be reversed. Not only were the protections afforded individuals by the Fourth Amendment flagrantly disregarded, but the photographs of the cell phone messages were not properly authenticated, there was no established chain of custody, the defense was never provided an opportunity of performing its own inspection or data extraction (the State did not bother to perform its own), and the cell phone itself was nowhere to be seen at the trial itself, having been returned to its rightful owner months before.

Finally, Mr. Redmond maintains that his convictions for intimidation of a witness, purportedly established by calls he made from jail before he was ever charged with a crime, are improperly based on mere speculation. He lacked the requisite knowledge that T.P. was a witness in any case against him because there was no case against him. In addition, the call to "Pops" that the State used to charge Mr. Redmond with intimidation of a witness in furtherance of a

[12] *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979).

conspiracy, fails to prove an explicit agreement was reached between father and son, or that any overt act was performed with a purpose to intimidate. The verdict was the product of guesswork on the part of the jury and, as such, fails to meet the standard of reasonable doubt.

I. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS.

The trial in this case was a one-sided affair; the defendant did not testify and the defense called no witnesses to challenge the State's case as a whole or rebut it in particulars. Denying trial counsel's motion to dismiss at the close of its case, the Court referred to the "credibility determination" the jury was tasked with resolving. R. 79:16. Trial counsel's failure to call witnesses to undermine the credibility of the complainant and other State's witnesses undermines confidence in the result of the proceedings. Trial counsel was ineffective for failing to investigate and call to testify witnesses that would have directly challenged the State's case and corroborated Mr. Redmond's version of events. The cumulative effect of trial counsel's other errors also undermines confidence in the outcome in this case.

A. Legal Principles.

A defendant has the right under the Sixth and Fourteenth Amendments of the United States Constitution and Article 1 section 7 of the Wisconsin Constitution to the effective assistance of counsel. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State ex rel Seibert v. Macht,* 2001 WI 67, 244 Wis. 2d 378, 389, 627 N.W.2d 881, 886; *State v. Felton*, 110 Wis. 2d 485, 499, 329 N.W.2d 161, 167 (1983).

A defendant asserting ineffective assistance of counsel bears the burden of establishing that their "attorney's performance was deficient and the deficient performance was prejudicial." *State v. Allen*, 2004 WI 106, ¶ 25, 274 Wis. 2d 568, 682 N.W.2d 433 citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Counsel's performance is deficient when it falls below an objection standard of reasonableness. *Strickland*, 466 U.S. at 687. Prejudice exists when the cumulative effect of counsel's errors undermines confidence in the outcome of the trial. *State v. Thiel*, 2003 WI 111 ¶ 58, 264 Wis. 2d 571, 602-603, 665 N.W.2d 305 citing *Strickland*, 466 U.S. at 694; *Johnson*, 153 Wis. 2d at 129.

B. Trial counsel provided ineffective assistance of counsel for failing to investigate potential witnesses and call those witnesses to testify for the defense.

Trial counsel's performance was deficient when he failed investigate certain witnesses and call them to testify on Mr. Redmond's behalf. This deficient performance prejudiced the defense because it prevented Mr. Redmond from effectively challenging the State's case by, among other things, undermining the complaining witness' credibility. Thus, Mr. Redmond was denied his constitutional right to effective assistance of counsel and he should be awarded a new trial.

1. Trial counsel's performance was deficient for failing to investigate potential witnesses for the defense and call them to testify at trial.

Failure to adequately investigate potential witnesses can constitute deficient performance. *See Thiel* at ¶¶ 46, 50; *State v. Jeannie MP*, 2005 WI App 183 ¶ 12, 286 Wis. 2d 721, 733, 703 N.W.2d 694 (Wis. App. 2005). In *Jeannie*

MP, the court found trial counsel's performance deficient when he neglected "to investigate facts that were readily available to him" that could have been used at trial to impeach the complaining witness and an eyewitness. *Jeannie MP* at ¶ 25. In *Thiel*, the court asked whether it was "unreasonable," and therefore deficient performance, when trial counsel failed "to perform certain investigations," including an independent investigation regarding the complaining witness's credibility and the observations of third parties, and concluded that it was. *Thiel* at ¶¶ 39, 44, 57.

Failure to call witnesses can be unreasonable and constitute deficient performance. *State v. Jenkins*, 2014 WI 59 ¶ 41, 355 Wis. 2d 180, 848 N.W.2d 786. The *Jenkins* court cited *Toliver v. Pollard*, 685 F.3d 853, 862 (7th Cir. 2012), for the proposition that failure to call useful, corroborating witnesses may amount to deficient performance. *Id*. In *Jenkins*, trial counsel's performance was deficient when he did not call an eyewitness with exculpatory information or two inmates incarcerated with the defendant prior to trial, one of whom admitted to committing the offense. *Jenkins* at ¶¶ 15, 16. In *State v. White*, trial counsel failed to call a co-worker of the alleged victim, a clerk at a 7-Eleven, who would have testified that the alleged victim "was stealing from the store," thus putting in doubt the victim's story that he had been robbed. *State v. White*, 2004 WI App 78 ¶ 7, 271 Wis. 2d 742, 749, 680 N.W.2d 362 (Wis. Ct. App. 2004).

Trial counsel's failure to investigate three witnesses, Steven Arnold, Mario Redmond Sr. and Staci Randle, constitutes deficient performance. There is independent evidence that Mr. Arnold was a witness to the events on December

10, 2012. A police report written by Officer Young indicates that there was "another unknown black male in the apartment." R 49, Ex. 3, App. 11. Locating and interviewing this person was of paramount importance to the defense and, besides potential testimony from Mr. Redmond, was the only way to present evidence from someone with personal knowledge of the events in question, which was consistent with the theory of defense that T.P.'s statements to police were simply not true. According to Mr. Arnold, he was not "unknown" to T.P.; though Mr. Redmond and T.P. argued, Mr. Redmond did not assault her; and he did not possess a firearm nor did he see Mr. Redmond with one.

In the trial court's decision on Mr. Redmond's postconviction motion, it notes that Mr. Arnold's letter is neither sworn, nor notarized, and implies that, even if it was, it is hard to believe that T.P. would describe a cousin by marriage as "unknown black male." R. 55:4, App. 1. T.P., however, had been shown to be a rather unreliable witness at trial. It would certainly be in keeping with a theory of the defense that T.P. was trying to conceal or minimize as much as possible her, and everyone else's, involvement in the incident.

The trial court also wrote that, since there was no showing that Mr. Redmond told trial counsel about Mr. Arnold, he "cannot be deemed ineffective for failing to investigate an unidentified witness." R 55:4, App. 1. Trial counsel was, or should have been, aware of Mr. Arnold as a potential witness. When trial counsel received Mr. Redmond's file from Attorney Dianne Erickson, who immediately preceded him as Mr. Redmond's attorney, there were within multiple notes that referenced "Steven Miles." (Mr. Arnold's mother's maiden name is

Miles.) One indicates that Mr. Redmond went to T.P.'s with "Steven Miles" and lists the latter's address and phone number. R 49, Ex. 8, App. 12. Another, again referencing the witness's address and phone number, indicates that he drove Mr. Redmond to T.P.'s apartment and that "her bro showed up at the house." R 40 Ex. 9, App. 13.

Staci Randle, though not an eyewitness to the events of December 10, 2012, had knowledge that Mr. Arnold was present just prior to the incident. Her account also supports the theory of defense that T.P. was jealous of Mr. Redmond's involvement with another woman, and lied about him because of that jealousy, by establishing that he and Mr. Arnold had the use of Ms. Randle's silver Nissan. Trial counsel's failure to investigate her involvement was deficient performance given that he had contact with her. Ms. Randle helped retain trial counsel and dropped payments off at his office.

The trial court found that Ms. Randle's affidavit only supported the claim that Mr. Redmond and Mr. Arnold were together the morning of December 10, 2012, but that it had no relevance "as to what occurred in [T.P.'s] apartment. R 55:4-5, App. 1. However, Ms. Randle's testimony would have corroborated both Mr. Redmond's timeline of events, and established that the only other eyewitness, besides Mr. Redmond and T.P., to those events, was present immediately before their occurrence. Had Ms. Randle's testimony been offered, it likely would have been error to exclude it. *See State v. Hunt*, 2014 WI 102, ¶ 3, 360 Wis. 2d 576, 584, 851 N.W.2d 434, 438 (circuit court erred in excluding evidence of defendant's friend that corroborated defendant's "version of events.") Ms.

Randle's testimony would have provided the jury with the necessary background and context to formulate a plausible alternative to the State's case. It is incumbent on criminal defense attorneys to encourage the jury to "reconcile the evidence upon any reasonable hypothesis consistent with the defendant's innocence."[13] Ms. Randle, though lacking personal knowledge regarding what happened in T.P.'s apartment, nonetheless was a vital link in the chain of events, and her corroborative evidence would have supplied the jury with information useful to the jury in reconciling the evidence in his favor.

Mario Redmond Sr. witnessed his son's arrest and was a party to the telephone conversations that formed the basis for the intimidation of a witness in furtherance of a conspiracy charge. Trial counsel knew or should have known that Mr. Redmond Sr. was "Pops." He accompanied Ms. Randle to trial counsel's office on at least one occasion; furthermore, "Pops" is a common nickname for one's father.

The trial court faulted Mr. Redmond Sr.'s affidavit for not referencing his phone number, or providing details of his conversation with his son to trial counsel when they met before trial. R55:5, App. 1. This is like faulting a patient's father for not telling his son's doctor of a family history of disease. What is of obvious import to the professional may be obscure to the layman. It is counsel's responsibility to investigate the facts with his or her specialized knowledge of what is relevant given the charged offense(s), and failure to investigate a potential alibi witness is deficient performance. *State v. Cooks,* 2006 WI App. 262, ¶ 54, 297 Wis. 2d 633, 658, 726 N.W.2d 322, 334, *citing*

[13] Wisconsin Criminal Jury Instruction 140, Burden of Proof and Presumption of Innocence.

Washington v. Smith, 219 F.3d 620, 631-32 (7th Cir. 2000). It was trial counsel's responsibility, not Mr. Redmond's father's, to explore and probe the facts of his client's case. Abandoning this principle renders an attorney's services superfluous to a significant degree.

2. Trial counsel's deficient performance in failing to investigate and call witnesses to testify at trial was prejudicial to Mr. Redmond's defense.

To establish prejudice, under *Strickland*, a defendant must show that there is a "reasonable probability" that, but for trial counsel's errors, the outcome of the trial would have been different." *Strickland*, 466 U.S. at 694. It is not necessary for the defendant to show that the deficient performance "more likely than not altered the outcome of the case." *State v. Moffet*, 147 Wis. 2d 343, 354, 433 N.W.2d 572, 576 (1989). Rather, the reasonable probability standard asks whether confidence in the trial's outcome is undermined. *Strickland*, 466 U.S. at 694.

Testimony from Mr. Arnold was essential to Mr. Redmond's defense because, in its absence, the jury was left with little reason to doubt the statements Officer Young attributed to T.P. on the day of the initial incident. Like the uncalled witness in *Jenkins*, Mr. Arnold was an eyewitness to much of what occurred on December 10, 2012. His testimony was necessary to "expose vulnerabilities at the center of the State's case." See *Jenkins* at ¶ 53. Though T.P. testified that she lied about Mr. Redmond's involvement in the injury to her eye, so much of her testimony was uncertain and the professed gaps in her memory so pronounced, that a reasonable jury might disbelieve everything she said on the witness stand. Mr. Arnold needed to be called as a witness because he was at the

T.P.'s apartment at the time of the incident, his recollection of events was consistent with the theory of defense, and he was a third-party sufficiently neutral to be credible. He was a friend of Mr. Redmond but also related to T.P.

As previously noted, testimony from Ms. Randle would have supported the theory of defense by corroborating Mr. Arnold's timeline. It would have established that Mr. Redmond and Mr. Arnold were together and had the use of her car at the time and on the date of the initial incident. Furthermore, her testimony would have been consistent with T.P.'s reason for lying about Mr. Redmond, that T.P. attested to in her own affidavit, that she was jealous and angry about another woman.

Mr. Redmond Sr., "Pops" of the phone calls, was a participant in the conversation that formed the basis of the intimidation of a witness in furtherance of a conspiracy charge. Failing to call him as a witness was prejudicial to Mr. Redmond because, as the purported co-conspirator, he would have testified that he did not tell T.P. not to come court proceedings, much less did he threaten her. The jury would then have had grounds for doubting there was an agreement with his son to persuade T.P. not to testify in court, or perform any act toward the commission of that crime. Mr. Redmond Sr. could also have helped the jury understand the thrust of their conversation and decipher the often unintelligible content of the calls.

C. Trial counsel provided ineffective assistance of counsel for failing to object to the amendment of the information.

A prosecutor may include charges in the information if they are not "wholly unrelated" to the facts or transactions adduced at the preliminary hearing.

State v. Burke, 153 Wis. 2d 445, 453, 451 N.W.2d 739, 742 (1990). Factors to consider in determining whether added charges are wholly unrelated include "the parties involved, witnesses involved, geographical proximity, time, physical evidence, motive and intent." *Id*. This test is distinct from that for the rule of joinder, which balances judicial economy against the danger of unfair prejudice to the defendant, and considers the type of crimes, whether they occurred over a relatively short period of time, and whether there is overlapping evidence. *State v. Richer*, 174 Wis. 2d 231, 248, 496 N.W.2d 66, 72 (1992) (internal citation omitted). The *Richer* court noted that the reasons to allow joinder do not apply to amending an information because the counts in an information "must flow from the same transaction for which evidence has been introduced at the preliminary hearing." *Id*. at 247, 248. In *State v. Williams*, the court held that "any charge may be included in [a subsequent] information as long as it is transactionally related to a count on which bind over was ordered. 198 Wis. 2d 516, 522, 544 N.W.2d 406 (1996). Transactionally related counts are those that arise "from a common nucleus of facts [i.e. those] 'related in terms of parties involved, witnesses involved, geopgraphical proximity, time, physical evidence, motive and intent.'" *Id*. at 535 *quoting Bailey v. State*, 65 Wis. 2d 331, 341, 222 N.W.2d 871 (1974).

The defendant in *Richer* was bound over for trial on a charge that he delivered LSD after a preliminary hearing where evidence of the sale, transfer of the drug to the crime lab and the crime lab's analysis were heard. *Id*. at 249. No evidence was heard regarding the charge subsequently added to the information,

which was alleged to have taken place nine days later. The added charge was "similar in many respects" to the initial charge in that it involved the same participants, the same kind and quantity of drug, and the same price. *Id*. at 238, 249-250. The court concluded that there was no basis "within the confines of the evidence" presented at the preliminary hearing to support a second count and "that mere congruency of crimes, i.e., that they are factual replications in their elements and the persons involved, does not satisfy either the evidential or transactional test." *Id*. at 237, 253.

The preliminary hearing for Case No. 2013CF001581 was held on June 3, 2013. Investigator Linden testified that she was assigned to search for phone calls from jail by Mr. Redmond to T.P. R. 62:4. She went on to describe what she heard in four phone calls made between December 12, 2012 and December 15, 2012, three of which were made to T.P. and the fourth being the call with "Pops." R. 62:5, 7-8. No evidence was presented, of course, of calls made on October 24 or 28, 2013. Trial counsel objected to amending the information on the grounds that the State failed to establish the identity of the callers. R. 71:8-9.

The trial court, after listening to the recording of the October calls and reviewing the transcript, allowed the State to amend the information. R 71:15, App. 2. It noted "obvious connections" in the Amended Complaint's allegations and the court's schedule. R 71:16, App. 2. The trial court said "it is integrally connected with the rest of the case in many ways" and "it's part and parcel with [Mr. Redmond's] continuing course of conduct." R 71:16-17, App. 2. The trial court concluded that it would allow the recordings into evidence in any event, as

other acts, and "it would be a waste of resources" to have a separate trial on the fourth charge. R 71:17, App. 2. Addressing Mr. Redmond's argument in his postconviction motion that trial counsel was ineffective for failing to properly object to the amended information, the trial court wrote any objection would have been denied, and that it stood by its ruling. R. 55:5, App. 2.

Mr. Redmond contends that the trial court applied the wrong test in deciding to allow the information to be amended and trial counsel was ineffective for failing to make the proper objection. If the issue were whether to *join* the new charge under WIS. STAT. § 971.12(1), the "same or similar character" of the crimes may have been dispositive. As it is, the evidence at the preliminary hearing was "wholly unrelated" to the charge of intimidation of a witness by a person charged with a felony. The underlying charges at the time of the preliminary hearing were all misdemeanors. Approximately five months had elapsed between the date of the preliminary hearing and the amendment; over ten months had passed between the phone calls in December 2012 and those in October 2013. The physical evidence, recordings of phone calls, is entirely separate and distinct. Though the calls may demonstrate similar intent in terms of an attempt to dissuade a witness from testifying in a court proceeding, the "mere congruency of crimes" does not warrant amendment.

D. Trial counsel provided ineffective assistance of counsel for failing to move to dismiss Count Two of the Amended Complaint in Case No. 2013CF001581.

Trial counsel was ineffective for failing to move to dismiss Count Two of the Amended Complaint in Case No. 2013CF001581. A criminal complaint is

defective if the State recklessly omits "an undisputed fact that is critical to an impartial judge's fair determination of probable cause." *State v. Mann*, 123 Wis. 2d 375, 367 N.W.2d 209 (1985). Here, the Complaint alleges that, "The defendant asks Pops to call an individual he calls "Shawty P." The recording of the phone call, as well as the transcript, do not bear this out; it is an unwarranted inference masquerading as fact. The Amended Complaint also omits a key, contextualizing, statement by Mr. Redmond, "Tomorrow, mom's coming," leaving the impression that the conversation is about court dates rather than jail visits.

The trial court, in its written decision denying postconviction relief, simply states that a motion to dismiss Count Two of the Amended Complaint would have been denied. R 55:5, App. 1. It does not address the argument that the State omitted relevant information – that Mr. Redmond's mother was visiting him in jail and that other potential visitors should not come because he would not have time to see them – that casts his conversation in the telephone calls in a quite different light.

II. THE TRIAL COURT ERRED WHEN IT DENIED MR. REDMOND'S REQUEST FOR AN EVIDENTIARY HEARING ON HIS CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Redmond contends that the facts alleged in the ineffective assistance of counsel claims made above are sufficient to entitle him to an evidentiary hearing. There were witnesses available to testify on his behalf, but none were called at trial. It was essential to hear from trial counsel about his decisions in this regard, as well as his failure to object to the amendment of the information

and other matters. For instance, why withdraw the motion to suppress the magazine and bullets to "save the court a little bit of time and hopefully the state's efforts." R. 71:5. Though it would be improper for defense counsel to use dilatory tactics for the purpose of unreasonably delaying legal proceedings, a trial attorney is under no obligation to forgo his client's rights upon considerations of the court's calendar, and has an affirmative duty to challenge the state's case. The cumulative effect of trial counsel's errors, as outlined in Mr. Redmond's postconviction motion, should have prompted the trial court to hold a hearing, even if as a matter of law the facts pled were insufficient.

A. Legal Principles.

When a postconviction motion contains factual allegations that, if true, would entitle the defendant to relief, the trial court must grant an evidentiary hearing. *Bentley*, 201 Wis. 2d at 309, citing *State v. Nelson*, 54 Wis. 2d 489, 497, 195 N.W.2d 629, 633 (1972); *State v. Allen*, 2004 WI 106, ¶9, 274 Wis.2d 568, 682 N.W.2d 433 (citations omitted). Whether a postconviction motion meets this standard is a question of law that this Court reviews de novo. *Bentley*, 201 Wis. 2d at 310.

The trial court must accept the factual allegations in the postconviction motion as true when determining whether an evidentiary hearing is warranted, and then decide whether those factual assertions are sufficient to entitle the defendant to relief. See *State v. Love*, 2005 WI 116, ¶37, 284 Wis.2d 111, 700 N.W.2d 62. Speculation or theorizing about trial counsel's acts or omissions is insufficient, and cannot substitute for testimony from trial counsel pertaining to his or her

decisions at a *Machner* hearing. See *State v. Dengsavang*, 2014 WI App 63, ¶ 17, 354 Wis. 2d 325, 847 N.W.2d 426.

The trial court may, in its discretion, deny a motion without a hearing if the motion does not allege sufficient facts, "or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief," it is within the trial court's discretion to grant or deny the request for a hearing. *Id*. at ¶ 14, quoting *Allen*, 274 Wis. 2d 568, ¶ 9. The trial court's discretionary decision is subject to deferential review under the erroneous exercise of discretion standard. *Allen*, 274 Wis. 2d 568, ¶9.

B. The trial court's analysis of whether to hold an evidentiary hearing on Mr. Redmond's ineffective assistance of counsel claims was in error.

The trial court neglected to accept the factual allegations in the postconviction motion as true for purposes of determining whether Mr. Redmond was entitled to a hearing. First, it concluded that trial counsel could not "be deemed ineffective for failing to investigate an unidentified witness," with regard to Steven Arnold. R. 55:4. It seems to suggest that it is unbelievable that Mr. Arnold would be described by T.P. as an unidentified black male. The trial court should not be engaged in making credibility determinations *before* holding a hearing under these circumstances.

The posctonviction motion provided the trial court with documents that supported the contention that Mr. Arnold was a eyewitness, and provide a basis for considering the allegations contained therein as not merely conclusory. Officer Young's report places another black male at the T.P.'s residence at the time of the incident. Trial counsel should have investigated who that was. In

addition, trial counsel was supplied with discovery from Mr. Redmond's previous attorney, with notes containing the address and phone number of Mr. Arnold. Without a hearing, it is impossible to know whether trial counsel followed up on that lead. Mr. Arnold's own statement, though not properly notarized, contains information that, if true, would have been important testimony at trial.

The trial court did not address the prejudice prong of *Strickland* with regard to the failure to call Mr. Arnold to testify at trial, presumably because it concluded that trial counsel's performance was not deficient. Had the trial court accepted the information provided regarding Mr. Arnold as true, and the supporting documents provide evidence not merely conclusory, it is difficult to imagine how trial counsel's failure to call him would not be prejudicial. The absence of eyewitness testimony that refutes the State's case undermines confidence in the outcome.

Second, though apparently accepting the veracity of Ms. Randle's affidavit, the trial court found that it was irrelevant. It found that even if trial counsel knew of her identity (seeming again not to accept the factual allegations in the motion as true), any failure to call her as a witness was not prejudicial. As noted above, however, Ms. Randle's account would have corroborated Mr. Arnold's timeline. This corroborative function was material to Mr. Redmond's case. In *Allen*, the court describe how a witness could be "crucial to the defense because that witness would have provided testimony supporting the defendant's whereabouts on the night of the crime." *Allen*, 274 Wis. 2d 568, ¶ 22. Similarly, Ms. Randle's testimony was crucial to Mr. Redmond's case because, not only

would it have confirmed the timeline and Mr. Redmond's whereabouts, but would have been consistent the theory of defense that T.P. was jealous of Mr. Redmond being with another woman. It was a piece of the narrative puzzle that would provide context to a jury, and an alternative to the one-sided story it was given. It therefore undermines confidence in the outcome of the proceedings.

Third, the trial court found that "trial counsel cannot be deemed ineffective for failing to call [Mr. Randle, Sr.] as a witness with respect to the December 14, 2012 phone call." R. 55:5, App. 1. The trial court mentions that Mr. Redmond, Sr. did not reference his phone number in the affidavit, or tell trial counsel about the phone call. However, in his affidavit, Mr. Redmond, Sr., recounts meeting briefly with trial counsel about a month before his son's trial to make a payment for his son's representation. The claim is that counsel was ineffective for failing to adequately investigate the facts and circumstances surrounding the phone calls made from jail to "Pops." The question is not whether the witnesses identified in the postconviction motion were themselves deficient in some regard.

The trial court does not address the prejudice prong regarding the failure to call Mr. Redmond Sr. as a witness. Mr. Redmond, Sr. stated in his affidavit that he never told T.P. not to come to court. Had trial counsel examined Mr. Redmond, Sr. more closely, and had him testify at trial about his personal knowledge of his phone call with his son, describing for the jury what was being discussed, there is a reasonable probability of a different outcome regarding Mr.

Redmond's conviction for intimidation of a witness in furtherance of a conspiracy.

III. THE TEXT MESSAGES WERE IMPROPERLY ADMITTED INTO EVIDENCE.

The text message evidence should have been suppressed because it was obtained without a warrant in violation of his constitutional rights and no exception to the warrant requirement then existed. The United States Supreme Court decided that the search of a cell phone without a warrant cannot be predicated solely on a lawful arrest. Mr. Redmond asserts the rationale for admitting the first page of the text message exhibit, that those messages were in plain view, is an improper application of the exception to the warrant requirement. Furthermore, the State's failure to establish a reliable chain of custody for the phone is troubling – the phone itself was not produced at the hearing, having been released to its owner some time before. R 49, Ex. 11, App. 14. While the State's examination of the cell phone was cursory and limited (it found what was useful and released it), defense counsel was never given the opportunity to examine the cell phone, perform its own data extraction or familiarize itself with its functions and capabilities.

A. Legal Principles.

The Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect the people from "unreasonable searches and seizures." U.S Const. amend. IV; Wis. Const. art. I, sec. 11. In *Riley v. California*, the Supreme Court held that the warrantless search of digital information on a cell phone incident to arrest was unlawful. *Riley v. California*,

134 S. Ct. 2473, 2495 (2014). After the defendant in *Riley* was legally stopped for a registration violation, the arresting officer "accessed information" on the latter's cell phone that he believed was gang-related. *Id*. at 2480. The cell phone was further examined at the police station and more digital information, used at trial to help convict Riley, was obtained. *Id*. at 2480-81. The Court opined that the reason underlying the doctrine allowing searches incident to arrest – to protect law enforcement and prevent destruction of evidence – does not extend to cell phones given the vast amount of private information cell phones store and the fact that digital data itself poses no threat of harm to an officer. *Id*. at 2485-88. Concerns about digital wiping and encryption, offered by the government to justify searching cell phones incident to arrest in order to preserve evidence, were not deemed compelling. *Id*. at 2486.

Deciding whether evidence should have been suppressed presents a question of constitutional fact. *State v. Johnson*, 2007 WI 32, ¶ 13, 299 Wis. 2d 675, 729 N.W.2d 182 citing *State v. Knapp*, 2005 WI 127 ¶ 19, 285 Wis. 2d 86, 700 N.W.2d 899. A trial court's dindings of historical fact will not be overturned unless they are "clearly erroneous." *Id*. citing *State v. Turner*, 236 Wis. 2d 333, 343-44, 401 N.W.2d 827 (1987). The application of historical facts to constitutional principles are reviewed independently. *Id*.

There are several established exceptions to the warrant requirement. Exigent circumstances may allow law enforcement to forego the warrant requirement when there is concern that the evidence may "be destroyed or lost in the time it would take for law enforcement agents to obtain a warrant." *State v.*

Carroll, 2010 WI 8, ¶ 21, 322 Wis. 2d 299, 778 N.W.2d 1 (Wis. 2010). Evidence may also be seized without a warrant when (1) the officer is lawfully in a position to see the evidence, (2) it is in plain view, (3) its discovery is inadvertent and (4) the evidence, in itself or in conjunction with facts known to the officer, provides probable cause that it is connected to criminal activity. *State v. Sanders*, 2008 WI 85, ¶ 37, 311 Wis. 2d 257, 752 N.W.2d 713 (Wis. 2008); *State v. McGill*, 2000 WI 38, ¶ 40, 234 Wis. 2d 560, 609 N.W.2d 795 (Wis. 2000).

B. No exceptions to the warrant requirement existed to justify the warrantless search of the cell phone, and the text messages obtained thereby should have been suppressed.

At the suppression hearing, there were many different accounts of Mr. Redmond's arrest, the seizure of the cell phone, and its search. Mr. Redmond, in an affidavit he submitted with his postconviction motion, stated that the phone times itself out in ten seconds and that the arresting officer activated the phone by sliding his finger across the screen. R 49, Ex. 10, App. 15. Agent Rodgers-Adams said that Officer Farina took Mr. Redmond into custody and that she picked the cell phone up off the ground when it fell from Mr. Redmond's person. Officer Davis testified that he took Mr. Redmond into custody, found the cell phone in "jacket or hooded sweatshirt," noticed messages on the screen and put the phone back in Mr. Redmond's pocket. Ms. Johnson testified that the agent and one of the officers went upstairs to effectuate Mr. Redmond's arrest and when they came back down one was carrying the cell phone, which was not returned to Mr. Redmond. Regardless of which, if any, of these accounts are accurate, exigent circumstances did not exist once Mr. Redmond was in handcuffs and

could not access the cell phone. As the *Riley* court indicated, the possibility that a third party might somehow erase digital data remotely is not likely and, what is more, does not justify the search.

The trial court, relying on Officer Davis's account, ruled that the first page of the Exhibit was admissible because he was able to see it when he glanced at the phone, but that the rest of the messages were inadmissible because Sergeant Holmes conducted a search when she scrolled through the phone. It is Mr. Redmond's contention, however, that the plain view doctrine cannot be used to justify the introduction of this evidence for a number of reasons. First, assuming Officer Davis was lawfully in position to view the phone, it is "very unlikely" that the phone was on. As the *Riley* Court noted, "most phones lock at the touch of a button or, as a default, after some very short period of inactivity." *Riley* at 2487.

Second, Mr. Redmond contends that text messages, by their nature, cannot be in "plain view," nor their discovery "inadvertent." In *Carroll*, the court held that a police officer was justified in seizing a "flip-style cell phone" when it was discovered open after it had been dropped and displayed an image of the defendant "smoking a long, thin, brown cigarlike object," which the officer reasonably believed to be a marijuana blunt. *Carroll* at ¶¶ 6, 25. This scenario is quite different, however, then the present case. Not only is it more likely that the phone was actually on in *Carroll*, because flip-style phones generally activate when they are opened, but there are significant differences in the data observed. An image admits of immediate recognition in ways that words do not. There are iconic words that may be akin to images, but text messages of greater length, with

nonstandard spelling and punctuation, require parsing. The process of reading is a search because it requires an act of conscious interpretation. The digital representation of the words may be in plain view but their meaning is not. Similarly, the active decoding of that meaning cannot logically be described as inadvertent. An observation is not inadvertent when it requires focused attention and cognitive effort.

Third, the manner in which the cell phone messages were handled by the State is troubling. On February 6, 2013, it asked to adjourn the trial scheduled for that day because it had "relatively recently" become aware of the existence of these text messages. Then, on October 28, more than eight months later, the State said that it had just discovered these same messages, and would like to introduce them at Mr. Redmond's trial. The phone itself had been released. The defense never had an opportunity to inspect it, or familiarize itself with its functions. The State's handling of the evidence was negligent at best. If one considers the ramifications of the State giving away other types of evidence, so that it was not available at trial, the magnitude of the State's various gaffes in handling the cell phone and text message evidence, becomes apparent. For this reason alone, the text message evidence should have been suppress.

Furthermore, the error in allowing the text message into evidence was not harmless. The party that benefitted by the error – here, the State – bears the burden of showing the error was harmless. See *State v. Martin*, 2012 WI 96 ¶ 45, 343 Wis. 2d 278 816 N.W.2d 270 citing *State v. La Count*, 2008 WI 59 ¶ 85, 310 Wis. 2d 85, 750 N.W.2d 780. "An error is harmless is harmless if the beneficiary

proves beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Martin* at ¶ 45 (internal quotations omitted).

The text message shows one of the party's to the messaging asking the other if they have money, and then stating "I'm finna have to go on the run smh." R 49, Ex. 1, App. 3. Had the jury not been privy to this messages, the original misdemeanors that Mr. Redmond was convicted of, are considerably less provable. The text messages, with their suggestion of consciousness of guilt, provide a crucial corroborating link to the State's case. Without them, the State was left with T.P.'s testimony, which was not particularly compelling, and Officer Young's testimony, who lacked personal knowledge of the incident.

Mr. Redmond asks this Court to reverse the trial court's decision admitting the cell phone message into evidence and, because the trial court's error was not harmless, order a new trial.

IV. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. REDMOND OF THE FIRST THREE INTIMIDATION OF A WITNESS CHARGES.

Mr. Redmond next claims that the evidence the State presented at trial, consisting of the phone calls made from jail before he was charged with any crime, was insufficient to convict him of the initial intimidation of a witness charges. He has maintained throughout that his concern in those phone calls was not to persuade or otherwise prevent T.P. from giving testimony at any court proceeding but, rather, to encourage her to contact his probation agent. \

A. Legal Standards.

If a verdict is lacks such "probative value that no reasonable fact-finder could have found guilt beyond a reasonable doubt," it must be overturned. *State v. Routon*, 2007 WI App 178, ¶ 17, 304 Wis. 2d 480, 736 N.W.2d 530 (Wis. App. 2007) citing *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). A jury is allowed to draw logical inferences from the evidence, *State v. Sarnowski*, 2005 WI App 48, ¶ 12, 280 Wis. 2d 243, 694 N.W.2d 498, but "cannot base its findings on conjecture and speculation." *Foseid v. State Bank of Cross Plains*, 197 Wis. 2d 772, 791, 541 N.W.2d 203,(Ct. App. 1995). Though the standard of review is highly deferential to the jury's verdict, whether the evidence satisfies the legal elements of the crime is reviewed *de novo*. *Routon* at ¶ 17.

B. A reasonable jury could not have found Mr. Redmond guilty beyond a reasonable doubt of intimidating T.P. before he was charged with a crime.

The legal elements that needed to be satisfied to convict Mr. Redmond of intimidation of a witness require that (1) T.P. was a witness, (2) Mr. Redmond prevented or dissuaded, or attempted to prevent or dissuade, T.P. from testifying at a proceeding authorized by law, and (3) that Mr. Redmond did so knowingly or maliciously.[14] T.P. was not a witness because she had not been called to testify nor was she expected to be called because Mr. Redmond had not yet been charged with a crime. The State justified its issuance of intimidation charges based on calls made before he was scheduled to appear in any court proceeding on his prior history and experience with the criminal justice system; while conceding that Mr.

[14] See Standard Jury Instruction 1292, Intimidation of a Witness.

Redmond was concerned about his probationary status, the State insisted that "he had his eye on the bigger picture, the charges that he knew were inevitably coming." R 68:5-6, Perhaps the State, with its more intimate knowledge of its charging practices, can be confident that the initial charges were inevitable, but for the jury to attribute that knowledge to Mr. Redmond is mere conjecture.

C. A reasonable jury could not have found Mr. Redmond guilty beyond a reasonable doubt of intimidation of a witness in furtherance of a conspiracy.

The evidence the State presented to the jury in its effort to prove intimidation of a witness in furtherance of a conspiracy consisted of excerpts from the phone call with "Pops." A conspiracy, in this case, has three elements: (1) The defendant intended to intimidate a witness, (2) The defendant was a member of a conspiracy in that he agreed of joined with another to commit the named crime, and (3) One or more of the conspirators performed an act toward the commission of the intended crime that went beyond mere planning and agreement.[15] There are three reasons why the phone call fails to provide sufficient evidence of a conspiracy.

First, as above, the call occurred two days before Mr. Redmond was charged with a crime. The call does not establish intent on the part of Mr. Redmond to intimidate a witness. Second, the statement that "motherfucker shouldn't even be coming here period though," when considered in context of what he says immediately thereafter, "Tomorrow mom's coming," indicates that he was merely instructing someone not to visit him at the County Jail. Any agreement this exchange represents cannot reasonably be construed as one aimed

[15] See Standard Jury Instruction 570, Conspiracy as a Crime.

at a criminal enterprise or purpose. Moreover, there is no evidence that this statement was directed to T.P. Rather, it appears the parties to the phone call were referring to "Lydia." In addition, "Pops's" statements to a third party do not reference any court proceeding. Lastly, the State failed to establish the identity of the third party to any degree of certainty, much less beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons Mario Martinez Redmond respectfully requests this Court for the following relief. First, for a finding that the trial court erred when denying his request for a new trial based on his claims of ineffective assistance of counsel. Alternatively, Mr. Redmond asks this court to remand this case back to the trial court for an evidentiary hearing on these claims.

Second, Mr. Redmond respectfully requests that this Court reverse his judgment of convictions and enter an order suppressing the text message evidence.

Third, Mr. Redmond respectfully requests that this court vacate the judgment of convictions for the first three intimidation of a witness charges because there was insufficient evidence to convict him of those crimes.

Dated this 19th day of August, 2015.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in WIS. STAT. (RULE) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 10,834 words.

Dated this 19th day of August, 2015.

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Gabriel Houghton

ELECTRONIC FILING CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief, in compliance with WIS. STAT. (RULE) 809.19(12)(f).

Dated this 19th day of August, 2015.

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Gabriel Houghton

CERTIFICATE OF MAILING

Pursuant to WIS. STAT. (RULE) 809.80(4), I hereby certify that on the 18th day of August, 2015, I caused 10 copies of the Brief and Appendix of Defendant-Appellant Mario Martinez Redmond to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, WI 53701-1688.

Dated this 19th day of August, 2015.

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Gabriel Houghton

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, is an appendix that complies with Wis. Stat. (Rule) 809.19(2)(a) and that contains (1) a table of contents, (2) relevant trial court records, (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 19th day of August, 2015.

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Gabriel Houghton

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