STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case Nos. 2015AP657-CR & 2015AP658-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARIO MARTINEZ REDMOND,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE REBECCA F. DALLET, PRESIDING

# RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Page

Page

Page

Page

STATUTES



OTHER AUTHORITY

STATE OF WISCONSIN

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## ISSUES PRESENTED

1. Did the circuit court properly deny Mario Martinez Redmond's ineffective assistance of counsel claims without a *Machner* hearing?

2. Did the circuit court erroneously exercise its discretion when it admitted the content of a text message that a police

officer testified that he had seen in plain view on Redmond's cell phone during Redmond's arrest?

3. Was the evidence sufficient to convict Redmond of three of the four intimidation of a witness counts?

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication because the issues in this case can be resolved by applying established legal principles to the facts.

## ARGUMENT

### I. The circuit court properly denied Redmond's ineffective assistance of counsel claims without a hearing.

In consolidated cases, a jury convicted Redmond of single counts of battery and disorderly conduct, and four counts of intimidation of a witness ([657]19; [658]39).[1] The battery and disorderly conduct counts were based on a December 10, 2012 incident in which T.P. told police that Redmond, her ex-boyfriend, had kicked open her patio door, entered her home with an unidentified man, punched T.P. in the eye, broke her phone, and threatened to pistol-whip her with a gun ([657]3:3).[2] The intimidation-of-a-witness counts were based on phone calls that Redmond made to T.P. (counts 1 and 3) days after T.P. reported the December 10 incident to police, that Redmond made to "Pops" around that time seemingly urging Pops to

[1] For simplicity's sake, the State generally cites to the record in case number 2015AP658-CR. When necessary to distinguish between the two records, the State uses the prefixes [657] to designate record 2015AP657-CR and [658] for 2015AP658-CR.

[2] The jury found Redmond not guilty of single counts of criminal damage to property and endangering safety with the use of a dangerous weapon during the December 10 incident ([657]14, 16).

contact T.P. (count 2), and a call that Redmond made to T.P. in October 2013 days before his trial (count 4) (55:2-5; A-AP. 1:2-5).

Redmond sought postconviction relief alleging ineffective assistance of counsel and other claims (49). The circuit court denied his ineffective assistance claims without a *Machner* hearing and denied the remaining claims (55; A-Ap. 1).

On appeal, Redmond argues both the merits of his ineffective assistance of counsel claims as grounds for relief, in addition to arguing that the circuit court improperly denied the ineffective assistance claims without a hearing (Redmond's br. at 14-30). Because "it is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel" in a *Machner* hearing, *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979), the only possible relief that Redmond could obtain on these claims is a remand for a *Machner* hearing. Accordingly, the State addresses these claims in the context of whether the circuit court erroneously exercised its discretion in denying the claims without a hearing.

### A. A circuit court may deny a motion without a *Machner* hearing if the defendant fails to sufficiently allege supporting facts or if the record conclusively demonstrates that the defendant is not entitled to relief.

When a defendant alleges ineffective assistance of trial counsel, the defendant has the burden to show that counsel's performance was both deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

A circuit court must conduct a hearing on a claim of ineffective assistance only when the defendant alleges sufficient material facts that, if true, entitle him or her to relief. *State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W. 50 (1996); *Nelson v. State*, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). Thus, "the

motion must include facts that 'allow the reviewing court to meaningfully assess [the defendant's] claim.'" *State v. Allen*, 2004 WI 106, ¶21, 274 Wis. 2d 568, 682 N.W.2d 433 (quoting *Bentley*, 201 Wis. 2d at 314) (brackets in *Allen*). A postconviction motion sufficient to meet this standard should "allege the five 'w's' and one 'h'; that is, who, what, where, when, why, and how." *Allen*, 274 Wis. 2d 568, ¶23. If the motion raises such facts, and the record does not otherwise conclusively demonstrate that the defendant is not entitled to relief, the circuit court must hold an evidentiary hearing. *Id.*

If the defendant raises insufficient facts or conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court may grant or deny a hearing in its discretion. *Bentley*, 201 Wis. 2d at 310-11; *Nelson*, 54 Wis. 2d at 497-98. The circuit court should "form its independent judgment after a review of the record and pleadings and . . . support its decision by written opinion." *Nelson*, 54 Wis. 2d at 498; *see Bentley*, 201 Wis. 2d at 318-19.

Whether the motion is sufficient to entitle a defendant to a hearing is a question of law subject to de novo review. *State v. Balliette,* 2011 WI 79, ¶18, 336 Wis. 2d 358, 805 N.W.2d 334. If the motion is insufficient or the record conclusively shows that the defendant is not entitled to relief, this court deferentially reviews the circuit court's discretionary decision whether to grant a hearing. *Allen*, 274 Wis. 2d 568, ¶9.

### B. Redmond failed to show that he was entitled to a hearing on his failure-to-investigate claims.

In his postconviction motion, Redmond alleged that his trial counsel, Attorney William Kerner, was ineffective for failing to investigate and present potential witnesses to support his defense. Redmond claimed that Staci Randle and Steven Arnold could have supported his defense against the battery and disorderly conduct charges, and that Redmond's father,

Mario Redmond, Sr. ("Senior"), would have supported the defense against one of the intimidation-of-a-witness charges (49:10-12). The circuit court disagreed, determining that the record demonstrated that Redmond was not entitled to relief (55:3-5; A-Ap. 1:3-5). The circuit court was correct.

### 1. There was nothing to suggest that Redmond identified Arnold to Attorney Kerner.

Redmond asserted that counsel should have investigated Steven Arnold, claiming that Arnold was the unidentified male accompanying Redmond in T.P.'s apartment on December 10 (49:11). Redmond claimed that the reference to the unknown man in the police report and references to a "Steven Miles" and Miles' contact information in a previous attorney's notes should have directed Attorney Kerner to Arnold as a potential witness (*id.*).

Redmond included a statement from Arnold in which Arnold stated that he was T.P.'s cousin by marriage and that he had known Redmond since childhood (49:28; A-Ap. 6). In the statement, Arnold said that he accompanied Redmond to T.P.'s apartment, where T.P. let them in. Arnold said that T.P. seemed to be intoxicated and instigated a verbal argument with Redmond over Redmond's alleged involvement with other women (49:28-29; A-Ap. 6:1-2). Arnold claimed that Redmond never struck T.P. during the argument and that neither he nor Redmond had a gun (*id.*).

The circuit court doubted the veracity of Arnold's unsworn statement, but in any event concluded that even if Arnold was the second man in T.P.'s apartment that day, Redmond could not succeed on the claim because he made no showing that he identified Arnold to Kerner as the man accompanying him (55:4; A-Ap. 1:4).

The circuit court was correct. Redmond obviously knew who the second man was. Redmond made no claim that he identified Arnold to Attorney Kerner; rather, he faults Kerner for not closely reading a prior attorney's notes. Counsel cannot be deemed ineffective for failing to investigate potential witnesses that the defendant fails to identify. *See Strickland*, 466 U.S. at 691 ("Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant."); *State v. Hubanks*, 173 Wis. 2d 1, 27, 496 N.W.2d 96 (Ct. App. 1992) (counsel is not ineffective for failing to investigate potential witnesses that the defendant did not identify). Hence, Redmond cannot show that counsel was ineffective with respect to Arnold, and is not entitled to a hearing on that claim.

**2. Randle would have offered irrelevant testimony; thus, any failure to investigate her was not prejudicial.**

Similarly, Redmond faulted Attorney Kerner for not investigating Randle, Redmond's girlfriend, as a potential witness. He attached an affidavit from Randle stating that she had driven with Arnold and Redmond in her car on the morning of December 10 and that they dropped her off at her work (49:30; A-Ap. 7). Randle further stated that she received text messages from Redmond on the morning he was arrested, but that she and Redmond never discussed the incident between Redmond and T.P. (49:31; A-Ap. 7:2).

Again, Redmond was in the best position to identify Randle as a potential witness to Attorney Kerner, but Redmond does not claim that he did so. In any event, Randle's potential testimony that she had seen Redmond and Arnold at some point before they went to T.P.'s apartment was irrelevant, given that she did not witness anything that happened inside T.P.'s apartment. Redmond fails to explain how Randle's testimony would have bolstered his defense. Because Redmond failed to

show that Randle's testimony reasonably could have affected the jury's verdict, he could not demonstrate prejudice, and he was likewise not entitled to a *Machner* hearing on this claim.

### 3. Counsel was not ineffective based on a failure to investigate Redmond, Sr.

Redmond also argued that Kerner did not investigate "Pops," the person that Redmond called from jail on December 14, and had the conversation forming the basis for the second intimidation-of-a-witness count (49:13). Redmond asserted that "Pops" was actually his father, Mario Redmond, Sr. ("Senior") (*id.*). He included an affidavit from Senior stating that Senior spoke to Redmond several times when Redmond was in the county jail and that Senior never told T.P. not to come to court (49:34; A-Ap. 10:2). Senior also stated that he had met with Kerner about a month before the trial, that they talked about Redmond's arrest, but that they did not talk about the December 14 call (49:34-35; A-Ap. 10:2-3).

As with the other claims, Redmond was not entitled to a hearing on this allegation. As an initial matter, Redmond's pleading was insufficient. As the circuit court noted, Senior did not clearly identify himself as the recipient of the December 14 call, which he could have done simply by confirming that Redmond had called his phone number (55:5; A-Ap. 1:5). And according to the affidavit, Senior's potential testimony would have been that Senior never told T.P. not to come to court (49:34; A-Ap. 10:2). But even if that were true, it would not have necessarily supported an inference that Redmond never told Senior to call T.P.

More pertinently, however, there was nothing to indicate that Redmond told Attorney Kerner that Senior was "Pops" in the December 14 call, nor did Senior tell that to Kerner when he had an opportunity to do so. Although counsel has a duty to investigate potential witnesses, the reasonableness of counsel's performance depends upon a defendant providing information

available to him to assist in his defense. *See Strickland*, 466 U.S. at 691; *Hubanks*, 173 Wis. 2d at 27. Accordingly, Attorney Kerner cannot be deemed ineffective for not investigating a witness that Redmond could have, but did not, identify.

### C. Counsel was not ineffective for failing to object differently to the amended information.

Redmond next argues that Attorney Kerner did not adequately object to the amended information, in which the State added count 4 of intimidation of a witness based on Redmond's call to T.P. on October 24, 2013, just before trial (Redmond's br. at 21). The circuit court denied Redmond relief on that claim, writing that it stood by its ruling allowing the State to amend the information (55:5; A-Ap. 1:5).

Just before trial, the State sought to file an amended information adding count four, felony intimidation of witness, based on Redmond's apparent call to T.P. on October 24, 2013, hours after she was subpoenaed to testify at trial, in which he urged her to avoid her home and stay at her grandmother's house (23). The call had come from a different inmate number than Redmond's, and went to a different phone number than T.P.'s known number (23:4).

But in the complaint, the State noted that a female officer had served T.P. with a subpoena at 3:30 p.m. on October 24 to show up at Redmond's trial the following Monday, and had asked T.P. if she needed a ride to the courthouse, which T.P. declined (23:4). The call from the House of Corrections came less than two hours later, during which a female recipient told the male caller that "they" had come to her house and asked if she needed a ride that Monday (*id.*). The male caller asked her if she was "'ducking and diving'" and repeatedly told her to avoid her home (*id.*) The male advised her to stay at her grandmother's residence, told her to "'promise me your ass ain't gonna be there,'" and to "'stay off over there,'" to which the female responded, "'Alright'" (*id.*). The caller identification

number used by the male caller was associated with another inmate in Redmond's dorm, but had been used several times to make calls to Redmond's mother's telephone (*id.*).

In objecting to the amendment, Attorney Kerner argued that the State did not adequately prove that either Redmond or T.P. were participants in the call (71:8-10).

The circuit court allowed the amendment. It listened to the October 24 call, and noted that the male voice sounded like Redmond based on the other calls, and that the context of the conversation with law enforcement's delivering the subpoena to T.P. was sufficient to permit the State to proceed on the charge (71:15-17). The court further determined that the call was "connected integrally" with the case in several ways: it related to the other charges of intimidation, it went to an explanation for why T.P. would not appear, and it potentially supported an argument by the State that Redmond has a consciousness of guilt (71:16-17; A-Ap. 2:16-17). The court believed that the call was "part and parcel of his continuing course of conduct" alleged in the original information and that it would be a waste of resources to have to try Redmond separately based on the October 24 call (71:17; A-Ap. 2:17).

The court then offered Redmond the opportunity to request an adjournment to allow for additional time to prepare for trial on that additional count. Redmond declined an adjournment and elected to go to trial on all of the charges (71:18-19; A-Ap. 2:18-19).

The circuit court soundly exercised its discretion in allowing the amendment. Under Wis. Stat. § 971.29, the State may amend the information after the defendant's arraignment but before trial "where such amendment is not prejudicial to the defendant." After allowing the amendment, the court "may proceed with or postpone the trial." Wis. Stat. § 971.29(3).

The decision to allow or preclude an amendment to an information is "within the discretion of the trial court and will not be reversed absent an erroneous exercise of discretion." *See State v. Malcom*, 2001 WI App 291, ¶23, 249 Wis. 2d 403, 638 N.W.2d 918 (citation omitted). The State may add additional counts to an information so long as "the additional counts are not wholly unrelated to the transactions or facts considered or testified to at the preliminary hearing." *Id.*, ¶26 (citation omitted). The defendant must also have adequate notice of additional charges being added. *See id.*

The addition of a count to an information exposing a defendant to greater potential penalties does not, by itself, prejudice the defendant. *See State v. Wickstrom*, 118 Wis. 2d 339, 348, 348 N.W.2d 183 (Ct. App. 1984).

Given those standards, the court's consideration of the new charge, and Redmond's failure to demonstrate any resulting prejudice, Redmond cannot demonstrate ineffectiveness because there was no alternative argument that Kerner could have raised that would have changed the court's decision. Redmond simply argues that the court wrongly applied the joinder "same or similar character" standard as opposed to the "not wholly unrelated" standard of § 971.29 (Redmond's br. at 24). He then argues that the October 24 call was "wholly unrelated" to the other charges in the information, because Redmond's earlier calls formed the basis for misdemeanor charges, whereas the State charged the October 24 call as a felony, and because many months separated the original calls from the October 24 call (Redmond's br. at 24).

Redmond's argument is weak. Even if the court had considered the added charge under the "same or similar character" standard—and the State disagrees that it did—it is not apparent how that standard is a lesser one than "not wholly unrelated." The October call supported a felony charge, but that doesn't make Redmond's October effort to dissuade T.P.

from coming to court "wholly unrelated" to his December efforts doing the same thing. What's more, Redmond remains silent on how the amended information prejudiced him, particularly given that he declined the opportunity for an adjournment.

Thus, Redmond cannot demonstrate that Attorney Kerner was ineffective based a failure to raise a different argument opposing the amended information. *State v. Toliver*, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (stating that counsel is not ineffective for failing to make meritless arguments). He is not entitled to a *Machner* hearing on this claim.

### D. Counsel was not ineffective for failing to seek dismissal of the second intimidation-of-a-witness count.

In a single paragraph in his postconviction motion, Redmond argued that his counsel was also ineffective for failing to move to dismiss the second intimidation-of-a-witness count (49:15). Without record citations or legal analysis, he stated that the criminal complaint was defective because it omitted facts that would have undercut the court's probable cause determination (49:15). The circuit court summarily dismissed this claim, stating that it would have denied any motion to dismiss (55:5; A-Ap. 1:5).

In his motion, Redmond admitted that he did not allege sufficient facts to entitle him to a hearing on that claim, but rather sought to have it swept in to the *Machner* hearing he sought on his other grounds (49:15). Hence, his motion was facially insufficient as to that claim, and the circuit court could have denied it on that ground alone.

On appeal, Redmond does not expand that argument, include record cites, or invoke any facts that are included in the

record.[3] Thus, the claim is inadequately briefed. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (this court may decline to address issues inadequately briefed). Moreover, the record conclusively demonstrates that Redmond cannot obtain relief based on a challenge to the court's preliminary probable cause determination on count 2, because the jury's finding of guilt on that count mooted any error at the preliminary stage. *State v. Webb*, 160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991) ("[A] [c]onviction resulting from a fair and errorless trial in effect cures any error at the preliminary hearing."). Thus, the circuit court did not erroneously exercise its discretion in declining to grant a *Machner* hearing on this claim.

In sum, Redmond could not demonstrate entitlement to a *Machner* hearing on any of his ineffective assistance claims. This court should affirm the circuit court's proper exercise of discretion.

## II. The circuit court properly allowed the State to admit the text message that police saw in plain view; alternatively, any error was harmless.

Redmond next claims that the circuit court improperly allowed the State to admit a screen shot of a text message as evidence after the court concluded that an officer saw it in plain

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[3] Redmond references "the recording of the [December 14] phone call" and "the transcript," but neither of those things appears in the records in these cases. Redmond does include a purported transcript of the December 14 call in his appendix (A-Ap. 9), but neither that transcript nor the recording it is based on appears in the appellate records. Hence, this court cannot consider it. *See South Carolina Equip., Inc. v. Sheedy*, 120 Wis. 2d 119, 125-26, 353 N.W.2d 63 (Ct. App. 1984) (stating that this court will not consider matters outside the appellate record); *see also State v. Marks*, 2010 WI App 172, ¶20, 330 Wis. 2d 693, 794 N.W.2d 547 (stating that it is the appellant's responsibility to ensure that the appellate record is complete).

view on Redmond's phone when he arrested Redmond, and that any error was not harmless (Redmond's br. at 30-35).

Redmond is wrong. The circuit court properly exercised its discretion in allowing the State to admit the text message based on its findings that the arresting officer saw the message on Redmond's phone without manipulating it. In any event, the message, in which Redmond told another person "I'm finna have to go on da run smh," and which the State used to infer that Redmond intended to avoid arrest because he knew he was guilty of the crimes against T.P., was harmless, given that the jury heard other evidence supporting the consciousness-of-guilt theory, including testimony that Redmond actually ran from police during his arrest.

### A. The circuit court exercises its discretion in deciding whether to admit or exclude evidence.

Whether to admit or exclude evidence is within the circuit court's sound exercise of discretion. *See State v. Pepin*, 110 Wis. 2d 431, 435, 328 N.W.2d 898 (Ct. App. 1982). Accordingly, this court will sustain the circuit court's evidentiary decision if the record demonstrates that the circuit court "logically interpreted the facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach." *State v. Wanta*, 224 Wis. 2d 679, 689, 592 N.W.2d 645 (Ct. App. 1999).

Redmond adequately sets forth the relevant law as to warrantless searches and the plain view exception in his brief (Redmond's br. at 30-32). As he notes, the plain view exception requires that (1) the officer have a prior justification for being in the position from which he made the plain view discovery; (2) the evidence was in plain view; and (3) there is probable cause to believe that the item that the officer viewed is connected to criminal activity. *State v. Edgeberg*, 188 Wis. 2d 339, 345, 524 N.W.2d 911 (Ct. App. 1994) (citation omitted). Here, the only

point that Redmond disputes is the second step of the plain-view test, that is, that the text message was in plain view to the arresting officer in this case.

### B. The circuit court's findings were not clearly erroneous and supported its conclusion that the text message was in plain view.

#### 1. The circuit court soundly determined that the arresting officer saw the first message in plain view.

Shortly after T.P. reported the December 10 incident to police, police arrested Redmond. During the arrest, Redmond had in his hand or pocket his cell phone, which showed a text conversation between Redmond and "Staci" (presumably his girlfriend, Staci Randle). The State sought to admit a series of four pages depicting the text-message conversation, which included statements from Redmond that (1) "I'm finna have to go on da run smh,"[4] and (2) "I beat up [T.P.] n had my heat n da olive [police] found out"[5] (49:21-24). Redmond sought suppression of the text messages as products of an illegal warrantless search (25).

At a hearing on the motion, the court found that the arresting officer was justified in taking Redmond's phone from his pocket and looking at it, that the screen was on and displaying the first message ("I'm finna have to go on da run smh"), and that the officer saw that message in plain view (49:21; 74:26-27; A-Ap. 5:26-27). But it further found that the remainder of the messages—including Redmond's admission

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[4] The acronym smh generally means "shake my head" or "shaking my head." *See* http://www.urbandictionary.com/define.php?term=smh.

[5] Redmond's next text in the conversation clarified that he meant "police" when he wrote "olive" (49:22).

that he "beat up" T.P.—could not have been viewable to police without the officers scrolling through the conversation, that such scrolling was an illegal search, and that there were no applicable exceptions to the exclusionary rule (74:27-28; A-Ap. 5:27-28). Accordingly, it permitted the State to admit the first page depicting the first statement but suppressed the remainder of the pages, which included the second statement (74:28; A-Ap. 5:28).

The court grounded those findings and conclusions on the following testimony:

- Officer Scott Davis testified that he arrested Redmond on December 11, 2012 (73:6). During the arrest, Davis handcuffed Redmond, patted him down, and felt something in his pocket (73:8-9). He reached in and removed a touch-screen cell phone, which was lit and displaying text messages (73:9). Davis remembered reading the message indicating that he was "fit'na have to go on the run," which he took to mean that Redmond was planning on absconding (73:9-10). Davis said that he could only see the messages appearing on page one of the four-page conversation and that someone would "probably" have to scroll to see the messages after page one (73:17). Davis returned the phone to Redmond and began to lead him out of the house (73:9-11).

- Once outside, Redmond got away from Davis and ran (73:10-11). Officers chased Redmond and caught him less than a block away, at which point Redmond's phone was no longer on him (73:11-14).

- Agent Renee Rogers Adams was at the arrest, and retrieved Redmond's phone, which had fallen from Redmond's pocket when he ran from the police (71:43). She said that the phone was displaying text messages without any manipulation or movement by her (71:45-46). She said that she could see all of the messages from

all four pages when she looked at the phone (71:46, 48-49).[6]

- Sergeant Pamela Holmes testified that she arrived at the scene of the arrest after officers had caught Redmond (74:4-5). She said that one of the officers and Rogers approached her squad with the phone and asked her to take pictures of the text messages, which she did (74: 5). Holmes said that she could see the message referencing beating up T.P. on the screen when the phone was given to her (74:19). She then had to scroll up to get to the first page of messages, and then began taking photos of the messages from there (74:19). She said that the phone stayed lit and that the screen did not lock or time out while she had it and was taking pictures (74:20).

In all, that testimony supported the court's findings: Officer Davis saw the phone, he remembered seeing the message about planning to run but not the others; Sergeant Holmes stated that she had to scroll to capture the whole conversation in the photos. Holmes also stated that the phone's screen did not lock out, dim, or turn off while she was taking photos, which supported the finding that the phone's screen was on when Officer Davis first looked at the phone.

And based on those findings, the court reasonably allowed only the first page (and the first message) to be admitted under the plain view doctrine. In *State v. Carroll*, the supreme court held that an a officer's seizure of an open cell phone during an arrest was justified. 2010 WI 8, ¶22, 322 Wis. 2d 299, 778 N.W.2d 1. It also held that the officer's immediate viewing of an image displayed on the screen of Carroll smoking a

[6] Adams said that she then turned the phone over to Christina Riggs, who was the agent of record (71:47-48). Riggs testified that she eventually received the phone from Rogers but was not at the arrest and had no firsthand knowledge of what officers viewed and how (73:24, 26).

marijuana blunt was permissible under the plain view doctrine, *id.* ¶25, though the court explained that the officer's later browsing through the images in the cell phone's image gallery was improper. *Id.* ¶33

Here, the circuit court's decision was consistent with *Carroll*: the first page, which the court found that Officer Davis saw without manipulating the phone, was in plain view like the image in *Carroll*, but any subsequent "scrolling" was improper, just as the officer's browsing through the phone's images was improper in *Carroll*.

Redmond argues that (1) it was very unlikely that the screen was activated, given language in *Riley v. California*, 134 S. Ct. 2473, 2487 (2014), that "most phones lock at the touch of a button or, as a default, after some very short period of inactivity"; (2) text messages cannot, by their nature, be in "plain view" because the viewer must read and interpret the text, unlike viewing an image; and (3) the State handled the cell phone messages in a "troubling" manner (Redmond's br. at 33-34).

None of those arguments assists Redmond. First, the Court's language in *Riley* was an observation that *most* phones lock out as a default, not a statement that as a matter of law, *all* phones lock out. Here, the court heard and believed testimony from the people who viewed the phone stating that Redmond's phone screen remained on without their manipulation and that Redmond did not appear to have default lock-out mechanism activated (74:20).

Second, there is nothing in law or logic distinguishing between a person's ability to comprehend the content of a photograph and a text message. Indeed, other courts have not made such a distinction. *See, e.g., United States v. Nyuon*, No. CR 12-40017-01-KES, 2013 WL 1338192, at *4 (D.S.D. Mar. 29, 2013) (text messages were in plain view), *aff'd*, 587 F. App'x 346 (8th Cir. 2014); *United States v. Gomez*, 807 F. Supp. 2d 1134, 1141

(S.D. Fla. 2011) (appearance of caller ID name on phone, without any manipulation by agents, was in plain view); *State v. Holland*, 865 N.W.2d 666, 672 (Minn. 2015) (text messages visible on cell phone screen that officers did not otherwise manipulate were in plain view). Nor does it logically follow that the plain-view doctrine requires officers in a legal position to view a text message to somehow avoid reading or comprehending the text.

Third, Redmond seems to suggest that the State violated discovery rules or did not permit him a fair opportunity to investigate the text messages (Redmond's br. at 34). But that undeveloped argument is unrelated to whether officers saw the message in plain view or whether the message should have been suppressed under the Fourth Amendment. *See Pettit*, 171 Wis. 2d at 646 (this court may decline to address undeveloped issues). Hence, he is not entitled to suppression on that ground.

In sum, the circuit court properly allowed the State to introduce Redmond's "I'm finna have to go on da run smh" text message based on its conclusion that officers saw it in plain view from a legal vantage point without manipulating the phone. This court may affirm on that ground.

**2. Alternatively, any error was harmless given the other evidence that Redmond knew he was guilty of the incident in T.P.'s apartment and direct evidence of her claims to police.**

Admission at trial of evidence obtained in violation of the Fourth Amendment is subject to harmless-error analysis. *See, e.g., Chambers v. Maroney*, 399 U.S. 42, 52-53 (1970).

For an error to be harmless, the party benefitting from the error must demonstrate that "'it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *State v. Martin*, 2012 WI 96, ¶45, 343

Wis. 2d 278, 816 N.W.2d 270 (quoting *Neder v. United States*, 527 U.S. 1, 18 (1999)); *see also State v. Mayo*, 2007 WI 78, ¶47, 301 Wis. 2d 642, 734 N.W.2d 115 (stating that "error is harmless if the beneficiary of the error . . . 'complained of did not contribute to the verdict obtained'") (citation omitted). In other words, this court must be satisfied beyond a reasonable doubt that the jury would have—not simply could have—arrived at the same verdict absent the error. *Martin*, 343 Wis. 2d 278, ¶45.

When considering whether the erroneous admission of evidence is harmless, the following seven factors, among others, assist the court's analysis: the frequency of the error; the importance of the erroneously admitted evidence; the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence; whether the erroneously admitted evidence duplicates untainted evidence; the nature of the defense; the nature of the State's case; and and the overall strength of the State's case. *Martin*, 343 Wis. 2d 278, ¶46 (citing *Mayo*, 301 Wis. 2d 642, ¶48).

Here, the State admitted the text message to support the inference that Redmond was planning to run and therefore had a consciousness of guilt as to the battery and disorderly conduct counts. It admitted a printout with the content of that text with Officer Davis's testimony as to how Davis had seen Redmond's cell phone during the arrest (77:50-53). But the text message was only a minor part of the State's assertion that Redmond knew he was guilty. The jury heard other evidence supporting the inference that Redmond knew he was guilty of those counts:

- Police officers testified that Redmond ran from them when they attempted to arrest him (77:54-57; 78:14-15);

- When Redmond talked to T.P. shortly after December 10, T.P. told him that she had to go to the hospital to get care for her eye, and he told her not to talk about it and warned her that their call was recorded (76:55); and

- The jury heard and found that recordings of the four calls supported the intimidation-of-a-witness charges (78:36-44); the content of those recordings also supported the inference that Redmond went to great lengths to dissuade T.P. from testifying because he knew he was guilty.

Moreover, the jury heard other evidence of Redmond's guilt:

- Officer Young testified that T.P. had told him immediately after the incident that Redmond had kicked in her patio door, had punched her in the eye, had threatened her with a gun, had broken her cell phone, and had left with a set of keys to her apartment (77:14-17, 22-27, 29);[7]

- The jury saw photographs of the damaged patio door (77:19) and the broken phone (77:27-28);

- T.P. told police that she did not feel safe in her apartment, so went to her best friend's house immediately after the incident with Redmond (77:29-30), which was consistent with her report that Redmond had punched and threatened her, had broken her patio door, and had taken her keys;

- The jury saw photos of T.P.'s eye immediately after the incident, which according to police appeared to be red and swollen (77:17-18); and

- Police found a gun and magazines in a room in which Redmond had been staying consistent with the gun that

[7] T.P. was a hostile witness at trial. Thus, evidence of the December 10 incident primarily came in through Officer Young, who had interviewed T.P. immediately after the incident.

T.P. had told police Redmond had during the incident (78:16-21).

In all, the State had plenty of evidence indicating that T.P. had told the truth to police immediately after the incident. The State's argument that Redmond acted with consciousness of guilt was only a minor part of its case. And the text message was only a minor part of the State's consciousness-of-guilt argument, given other evidence that Redmond actually ran from the police and that he repeatedly tried to dissuade T.P. from showing up in court. Thus, even if the court erroneously allowed the State to introduce the text message, it is clear beyond a reasonable doubt that the jury would have reached the same verdict on the battery and disorderly conduct charges without it.

## III. The evidence was sufficient to convict Redmond of the first three counts of intimidation of a witness.

Finally, Redmond argues that the evidence was insufficient to convict him of the first three intimidation-of-a-witness charges for his December phone calls to T.P. and to "Pops" (Redmond's br. at 35-38). He argues that he made his calls to T.P. before he was charged with a crime and that the jury should have believed that he was more concerned with compelling T.P. to talk to his probation agent (Redmond's br. at 36-37). He argues that he likewise made the call to "Pops" before he was charged and that the jury should have believed that he was trying to prevent someone from visiting Redmond at the jail (Redmond's br. at 37-38).

This court's review of a challenge to the sufficiency of the evidence is highly deferential to the judgment of the fact finder:

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact,

> acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

*State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (citations omitted).

Redmond's arguments suffer from numerous fundamental problems. First, Redmond cites no legal authority supporting his interpretation of Wis. Stat. § 940.43 as requiring charges to have been filed before the intimidated individual is considered a "witness." This court may disregard this undeveloped argument. *See Industrial Risk Insurers v. American Eng'g Testing, Inc.*, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 ("Arguments unsupported by legal authority will not be considered[.]"). Further, his argument defies common sense. It was reasonable for the jury to find that Redmond, having been arrested for his acts against T.P., was trying to dissuade T.P. from appearing as a witness in any legal proceeding that might follow from her report to police. Hence, to the extent that Redmond is arguing that the evidence was insufficient because charges had not yet been filed, he cannot succeed on that point.

Second, to the extent that Redmond argues that the jury made unreasonable findings based on the evidence presented, this court cannot grant Redmond relief on this record. The State's proof of the charges of intimidation of a witness came solely through recorded phone calls and transcripts of those calls, none of which Redmond included in the appellate records. "'It is the appellant's responsibility to ensure completion of the appellate record and when an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the [circuit] court's ruling.'" *State v. Bush*, 2005 WI 103, ¶5 n.2,

283 Wis. 2d 90, 699 N.W.2d 80 (citation omitted); *see also State v. Huff*, 2009 WI App 92, ¶17, 319 Wis. 2d 258, 769 N.W.2d 154 (general rule is applicable to challenges to sufficiency of the evidence). Application of that rule is warranted here because the evidence supporting these counts were the calls themselves through the recordings and transcripts.

That said, Redmond raised this claim to the circuit court in his postconviction motion. The circuit court, which presided over the trial and which had an opportunity to hear the recorded calls, determined that the evidence was sufficient to support the guilty verdicts on the first three intimidation-of-a-witness counts:

> Investigator Anna Linden with the district attorney's office testified that she located six calls made by [Redmond] in the jail that involved possible witness intimidation and that she had the calls transcribed and downloaded onto a CD ([78:30]). Three calls were made to [T.P.], who identified the caller as Mario Redmond when the investigator met with her ([78:31]). Redmond's probation agent, Christine Riggs, also identified Redmond as the caller ([78:31]). The calls were played for the jurors. The State argued in closing that the December 14, 2012 call could be interpreted as [Redmond] telling the recipient of the call to contact Shorty [T.P.] to tell her not to come [to court] and referenced the abbreviated version of [T.P.]'s phone number ([79]:56). It is undisputed based on [T.P.]'s trial testimony that she received phone calls from the defendant after his arrest, and there is no question in the court's mind that she was pressured to back off and retreat from her original statement to police[,] which she made immediately after the incident occurred. The court finds that sufficient evidence exists to support the verdicts on the first three intimidation of a witness charges . . . .

(55:6; A-Ap. 1:6) (footnote omitted).

In summary, the evidence was sufficient where two of the charges involved calls from Redmond to T.P. in which there was no dispute that they were the participants; where the court found, based on the evidence it heard, that Redmond undoubtedly pressured T.P. to back off from the case; and

where the court found that Redmond's call to Pops could reasonably be interpreted to be an additional effort by Redmond to intimidate T.P. Thus, even absent the recordings and transcripts in the record, the evidence appeared to be sufficient to convict Redmond on those intimidation-of-a-witness counts. Redmond is not entitled to relief on this claim.

## CONCLUSION

For the foregoing reasons, the State respectfully asks that this court affirm the judgment of conviction and circuit court's order denying postconviction relief.

Dated this 3rd day of November, 2015.

Respectfully submitted,

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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6807 words.

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Sarah L. Burgundy
Assistant Attorney General

## CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

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

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 3rd day of November, 2015.

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