STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Nos. 2015AP000657-CR & 2015AP000658-CR
(Milwaukee County Case Nos. 2012CM005295 & 2013CF001581)

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

MARIO MARTINEZ REDMOND,

Defendant-Appellant.

REPLY BRIEF 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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ARGUMENT

Trial counsel called no witnesses for the defense in this case. Instead, the defense's case-in-chief was limited to trial counsel asking the trial court to take judicial notice of the date the complaining witness' recanting affidavit was filed with the trial court and the date of Mario Redmond's initial appearance in the original case (Case No. 2012CM005295). R. 79:5-6. Mario Redmond is entitled to an evidentiary hearing on his claims of ineffective assistance of trial counsel. He alleged sufficient facts in his postconviction motion such that the trial court was required to hold such a hearing, and, furthermore, one was necessary in order for trial counsel to explain his strategy, if any, for defending Mr. Redmond.

The text message evidence should have been suppressed because the search of that procured them violated Mr. Redmond's constitutional right to be free of unreasonable searches and seizures. There were many conflicting versions of the seizure of the cell phone and, given the trial court's conclusion that none of the witnesses testified untruthfully, its reliance on one officer's version of events is clearly erroneous.

Finally, there was insufficient evidence to convict Mr. Redmond of the first three intimidation of a witness charges. The jury's verdict was based on mere speculation. Mr. Redmond had not been charged with any crime at the time of his telephone calls with T.P.; therefore she was not a witness. Furthermore, the call the State used to charge Mr. Redmond with intimidation of a witness in furtherance of a conspiracy utterly fails to show that an agreement was reached between the callers, or that any act was done toward the commission of the crime.

I. INEFFECTIVE ASSISTANCE OF COUNSEL.

A circuit court has no discretion, and must hold an evidentiary hearing, if a defendant's postconviction motion alleges facts which would entitle the defendant to relief. *State v. Burton*, 2013 WI 61, ¶ 54, 349 Wis. 2d 1, 832 N.W.2d 611 *citing State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). An inquiry into the sufficiency of the facts alleged in the motion is a question of law that is reviewed *de novo*. *Bentley*, 201 Wis. 2d at 310. "The nature and specificity of the required supporting facts will necessarily differ from case to case. However, a defendant should provide facts that allow the reviewing court to meaningfully assess his or her claim." *Id*. at 313-14.

In *State v. Allen*, the court explained that a postconviction motion that provides a sufficient factual basis to require the circuit court to grant an evidentiary hearing alleges "the five 'w's' and one 'h'; that is, who, what, where, when, why, and how." *State v. Allen*, 2004 WI 106 ¶ 23, 274 Wis. 2d 568, 682 N.W.2d 433. Mr. Redmond's motion satisfies this requirement. He identified three witnesses that trial counsel failed to properly investigate and call to testify at trial, and detailed how that deficient performance prejudiced him under the *Strickland* two-pronged test for ineffective assistance of counsel. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Steve Arnold would have testified that he accompanied Mr. Redmond, in Staci Randle's car to T.P.'s apartment (where) at the time of the alleged assault to play video games. He would have completely contradicted the version of the incident contained in the police report (that was also wholly disavowed by T.P. in

a subsequent affidavit). Mr. Arnold, an eyewitness, was clearly in a position to provide valuable information to Mr. Redmond's defense.

Staci Randle stated that she was dropped off at work by Mr. Redmond and Mr. Arnold at approximately 4:15 a.m. on December 10, 2012. She would have confirmed that Mr. Arnold was with Mr. Redmond at the time of the alleged incident. The State argues that Ms. Randle's testimony is irrelevant because she did not witness anything that occurred inside T.P.'s apartment. Not only would have Ms. Randle's testimony corroborated that Mr. Arnold's statement, however, but it would also have supported T.P.'s affidavit in which the complaining witness explained that she lied about Mr. Redmond assaulting her because she was jealous of another woman.

The State alludes to the circuit court's doubts about the veracity of Mr. Arnold's statement (State's Resp. Br. 5), but, as they must, neither rely on the argument that Mr. Arnold, and the other witnesses identified by Mr. Redmond that trial counsel failed to investigate, were not credible. When contemplating whether prejudice was caused by trial counsel's deficient performance, "a circuit court may not substitute its judgment for that of a jury in assessing which testimony would be more or less credible." *State v. Jenkins*, 2014 WI 59, ¶ 64, 355 Wis. 2d 180, 848 N.W.2d 786. Rather, the State faults Mr. Redmond for not adequately informing trial counsel of the existence of these witnesses. Mr. Redmond has two responses.

First, trial counsel's duty to investigate is not limited by information obtained from a client. A defendant may be prejudiced when trial counsel fails to

"adequately investigate the facts in respect to a potential defense." *State v. Felton*, 110 Wis. 2d 485, 329 N.W.2d 161, 169 (1983). In *Allen*, the court wrote that "a defendant's assertion that trial counsel failed to adequately prepare for trial because counsel did not review all the police reports and one police report contained exculpatory information" would provide a sufficient factual basis in a postconviction motion. *Allen* at ¶ 21. Here, trial counsel was in possession of predecessor counsel's notes, which reference Mr. Arnold, by name and address. As in *Allen*, this assertion supports Mr. Redmond's contention that trial counsel failed to adequately investigate his case, in part, because he did not read all of the discovery, or follow-up on it if he did.

Second, trial counsel's duty to investigate must be informed by deliberate thought – what the Felton court described as "the prudent-lawyer standard" that counsel's decisions "must be based upon rationality founded on the facts and law." *Felton*, 110 Wis. 2d at 502. As the Court in *Strickland* put it: "[c]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. In *State v. Thiel*, the court stated that trial counsel cannot claim to have made an informed decision not to interview a particular witness if counsel failed to read the police reports related to that witness. *State v. Thiel*, 2003 WI 111, ¶ 40, 264 Wis. 2d 571, 665 N.W.2d 305. Here, a *Machner* hearing was required in order for the circuit court to "determine whether trial counsel's actions were the result of incompetence or deliberate trial strategies." *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905, 908 (1979). Without an evidentiary hearing there is simply

no way of knowing whether trial counsel's decisions regarding his investigation of the case were "based on rationality founded on the facts and law." Rather, the record here demonstrates that there were at least three witnesses willing to testify on Mr. Redmond's behalf, and no indication that trial counsel considered them, or conducted *any* independent investigation.

In *State v. Cooks*, the court held that trial counsel's failure to investigate alibi witnesses was ineffective assistance of counsel. *State v. Cooks*, 2006 WI App 262 ¶ 66, 697 Wis. 2d 633, 726 N.W.2d 322. The *Cooks* court found that even though the potential witnesses in that case were "largely friends or acquaintances and relatives," that did not "eliminate the prejudicial effect of leaving corroborative evidence *entirely* unintroduced." *Id.* at ¶ 63 (emphasis in the original). Similarly here, the fact that the defense's potential witnesses were well known to Mr. Redmond does not obviate the need to investigate them and call them to testify. In fact, the failure to do so constitutes deficient performance, and severely prejudiced Mr. Redmond because the jury was never provided an alternative version of events consistent with Mr. Redmond's innocence when one was available.

II. THE TRIAL COURT SHOULD HAVE SUPPRESSED THE TEXT MESSAGES.

A. The circuit court's findings were clearly erroneous and the text messages were not in plain view.

The State mistakenly asserts that "the only point that Redmond disputes is the second step of the plain-view test." (State's Resp. Br. 13-14.) The officers on scene may have been "lawfully in a position to see the evidence," in that they

were there pursuant to their official duties, but it is entirely unclear who arrested Mr. Redmond. As outlined in Mr. Redmond's initial brief, all of the witnesses provided markedly different versions of the arrest of Mr. Redmond. There was not even consensus on which officer actually effectuated the arrest. The trial court's ruling that it was Officer Scott Davis, given that it found all of the witnesses to be credible, and each one told a different story, was clearly erroneous. Furthermore, even if we believe Officer Davis actually performed the arrest, exigent circumstances to justify a search incident to arrest did not exist or, if they did, the object of such a search was limited to weapons or contraband, to protect the officer from harm. See *Riley v. California*, 134 S. Ct. 2485-88 (2014). Cells phones, immediately recognizable, are neither weapons nor contraband in the common course of events, and there was no reason to believe the cell phone in this case was a weapon or contraband under the circumstances as they then existed.

In any event, the warrantless search of a cell phone incident to arrest is unlawful. *Id*. at 2495. The plain view doctrine allows for the seizure of evidence 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). Assuming that the first element was met, that last three are not.

Objects that fall "within the plain view of an officer who has a right to be in the position to have the view are subject to valid seizure and may be introduced in evidence." *State v. Edgeberg*, 188 Wis. 2d 339, 346, 524 N.W.2d 911 (1994) quoting *State v. Bell*, 62 Wis. 2d 534, 540, 215 N.W.2d 535, 539 (1974). Such a seizure, "following a plain view[,] is not the product of a search." *Edgeberg*, 188 Wis. 2d at 534 citing *Bell*, 62 Wis. 2d at 540. In *Edgeberg*, the court found that an officer's plain view observation of marijuana plants within a residence was not a search under the plain view doctrine, and upheld the seizure of the plants the following day pursuant to a valid search warrant. *Edgeberg*, 188 Wis. 2d at 334, 337. The fact of the matter is, that a cell phone cannot be considered evidence of criminal activity without establishing probable cause that it is connected to criminal activity. Cell phones are, as the *Riley* court noted, personal computers in which an individual has a heightened expectation of privacy. See *Riley* at 2489. Unlike marijuana plants that are readily identifiable, and the possession of which is in itself illegal, cell phones are clearly legal to possess and use. Mr. Redmond contends that looking at the screen of his cell phone, even if it was, improbably, on, constitutes a search because it cannot be said to be inadvertent. We look at cell phone screens to see what is displayed. Under *Riley*, law enforcement is not allowed to do so without a warrant.

The State argues that it is not logical to distinguish between a photograph and a text message on the basis of differences inherent in looking at a picture and reading a text. (State's Resp. Br. 17.) Mr. Redmond has two responses.

First, the cases cited by the State to support their argument are inapposite. The two federal district court cases cited by the State, *United States v. Nyuon* (D.S.D March 29, 2013) and *United States v. Gomez* (S.D. Fla. 2011) were decided before *Riley*, and would likely be decided differently today. The Minnesota Supreme Court decision referenced by the State to support its argument is readily distinguishable from the instant case. In *State v. Holland*, the defendant voluntarily showed a responding officer text messages which were consistent with his version of events. *State v. Holland*, 865 N.W.2d 666 (Minn. 2015). The responding officer gave the phone to a detective, who in turn put the phone on airplane mode to prevent it from sending or receiving data until he could obtain a search warrant. *Id*. The Minnesota Court ruled that the police had probable cause to seize the phone because it could be "useful evidence of crime," given the detective's suspicions that the time of the victims' deaths may have been "much longer than the 20 to 25 minutes indicated by the text messages." *Id*. Here, of course, Mr. Redmond did not offer the police the cell phone at issue for an open-ended view, and Officer Davis indicated he merely glanced at it. In addition, Officer Davis took no precautions to safeguard the phone until a proper search warrant could be issued, which is what the Riley court instructs law enforcement to do. *Riley*, 134 S. Ct. at 2495.

Secondly, though the State contends that one can recognize the import of a text message as quickly as a photograph, their own brief indicates otherwise. Texts messages require a different type of cognitive effort. Here, the text message at issue, "I'm finna have to go on da run smh," requires a good deal more

thought decipher than, for example, the officers immediate recognition of pot plants in *Edgeberg*. The State, itself, had to search the internet to define terms and thought it necessary to supply this Court definitions for "smh" and "olive," in order to clarify the meaning of the texts. (State's Resp. Br. 14, notes 4 and 5). To contend that text messages are in plain view in the same way that physical objects, or physical objects depicted photographically, are is simply incorrect.

B. The error in admitting the text messages was not harmless.

The State argues that if the admission of the text message was error, it nonetheless was harmless. It is the State's burden to show, beyond a reasonable doubt, that the jury would have returned the same verdicts absent the error. See *State v. Martin*, 2012 WI 96 ¶ 45, 343 Wis. 2d 278 816 N.W.2d 270 (citation omitted).

The State provides bullet points of the evidence it asserts would have resulted in the same jury verdicts. First it points to evidence that Mr. Redmond ran from police when they arrested him. Without the text message, a jury could certainly have had doubts about why he fled (i.e. because of his probationary status). The State also asserts that the recordings of the phone calls provide such solid evidence that a jury, hearing them, would have had no doubt as to Mr. Redmond's guilt. However, as the trial court noted, the recordings were largely unintelligible.[1]

In addition, the State relies on T.P.'s statements to police at the time of the alleged incident that Mr. Redmond hit her and that she did not feel safe. The

[1] The trial court said: "We played an entire tape of totally illegible, ununderstandable stuff because you said it was relevant somehow to the context." R. 77:96.

record indicates, however, that she was less than credible – a jury certainly did not have to believe the statements the police attributed to her, statements that she subsequently utterly disavowed in an affidavit filed with the court, beyond a reasonable doubt. Finally the State writes that the "police found a gun and magazines in a room in which Redmond had been staying consistent with the gun that T.P. had told police Redmond had during the incident." (State's Resp. Br. 20-21.) This is simply not true. The police found two .40 caliber magazine clips and a black digital scale in a suitcase found by police in an upstairs bedroom, a suitcase Mario Redmond, Sr. acknowledged as his own in his affidavit. *No gun was ever recovered*.

In short, it cannot be said that the admission of the text message into evidence was harmless error.

III. THE EVIDENCE WAS INSUFFICIENT TO CONVICT MR. REDMOND OF THE INITIAL THREE INTIMIDATION OF A WITNESS CHARGES.

Mr. Redmond stands by the arguments put forth in his initial brief that the evidence was insufficient to convict him of the first three intimidation of a witness charges. There recordings of telephone conversations were very difficult to understand and possessed no probative value. A jury was left to speculate, and a verdict cannot be based on mere guesswork. See *State v. Routon*, 2007 WI App. 178, ¶ 12, 280 Wis. 2d 243, 694 N.W.2d 498.

Even if the telephone recordings were understandable, T.P. was not a witness at the time they occurred because Mr. Redmond had not been charged with a crime. Again, a jury's determination that he meant to intimidate her from testifying at a future court date when none existed would be based merely on

conjecture. Furthermore, the elements of the conspiracy charge were not proven beyond a reasonable doubt. In particular, there was no evidence probative of an act that went beyond mere planning or agreement toward the commission of the intended crime.

CONCLUSION

For the foregoing reasons Mario Martinez Redmond respectfully requests this Court for the following relief. First, Mr. Redmond asks this court to remand this case to the trial court for an evidentiary hearing on ineffective assistance of counsel claims.

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

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 17th day of December, 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 3,000 words.

Dated this 17th day of December, 2015.

_____
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 17th day of December, 2015.

_____
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 Reply Brief 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 17th day of December, 2015.

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Gabriel Houghton