STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2017AP208-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHNNY K. PINDER,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A POSTCONVICTION MOTION, BOTH ENTERED IN THE OZAUKEE COUNTY CIRCUIT COURT, THE HONORABLE PAUL V. MALLOY, PRESIDING

# BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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## ISSUES PRESENTED

1. Because police acted reasonably when they tracked Johnny K. Pinder's car with a GPS device pursuant to a court order, did the circuit court correctly deny his motion to suppress evidence?

The circuit court answered yes by denying the suppression motion.

2. Because the theory of prosecution was that Pinder had burglarized an office suite, because the circuit court instructed the jury that it could convict Pinder if it found that he had burglarized an "office," and because the evidence of Pinder's guilt was overwhelming, did Pinder's trial counsel provide effective assistance by not objecting to the jury instructions on burglary?

The circuit court rejected Pinder's claim of ineffective assistance of counsel.

## STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent, and because resolution of this appeal requires only the application of well-established precedent to the facts of the case.

## INTRODUCTION

Pinder wants this Court to reverse his convictions, grant him a new trial, and instruct the circuit court to grant his suppression motion. Police suspected that Pinder had committed a string of burglaries in Mequon, so they got a

court order to track his car with a GPS device for up to 60 days. Fourteen days after the court issued the order, police tracked Pinder's car as he was burglarizing an office suite in a business park in Mequon. At trial, the court instructed the jury that to find Pinder guilty of burglary, it had to find that he had burglarized an "office." The jury convicted Pinder of burglary as a party to the crime and possessing burglarious tools. On appeal, Pinder argues that he is entitled to suppression under Wis. Stat. § 968.15, which requires police to execute a warrant within five days after it is issued. He also argues that his trial attorney provided ineffective assistance by not objecting to the instructions on burglary. Pinder contends that the instructions were misleading because they suggested that the jury could convict him simply for entering the office building, which was open to the public.

Pinder is not entitled to any relief. First, the circuit court correctly denied his suppression motion. Because the police reasonably tracked his car beyond the five-day period in section 968.15, this statute does not allow suppression here. Second, Pinder has not shown that his trial attorney provided ineffective assistance, nor can he. The instructions on burglary correctly stated the law, correctly tailored it to the facts, and were not misleading. Pinder's trial attorney thus reasonably declined to object to them. And even if the instructions were flawed, they did not prejudice Pinder because there was overwhelming evidence of his guilt.

## STATEMENT OF THE CASE

In February 2015, police received reports of burglaries at several businesses in Mequon. (R. 19:2–4.) The burglar had taken computers, credit cards, cash, and other property. (R. 19:2–4.) Surveillance-camera footage from one of the businesses showed a man exit a silver Chevrolet Impala car,

enter the building, and walk back to his car with an object in his hand. (R. 19:4–5.) The car did not have a front or rear license plate. (R. 19:5.) The stolen credit cards were used at gas stations in Mequon and Milwaukee to purchase gas for multiple vehicles. (R. 19:4–6.) Surveillance-camera footage from gas stations showed that the credit cards were being used by the same man with the same car from the footage of one of the burglaries. (R. 19:5–6.) The car "did not have a front or back license plate but appeared to have a license plate in the front window of the vehicle." (R. 19:5.)

Around February 19, 2015, a confidential informant told Milwaukee police that "JP" was burglarizing businesses from which he stole laptops, credit cards, and money, and that "JP" was using stolen credit cards to fill other people's gas tanks. (R. 19:6–7.) The informant said that "JP" had recently been released from prison and was stealing to fund his crack habit. (R. 19:6.) "JP" bragged about being able to pick locks, burglarize businesses, and "then leave things like they were prior to the burglary." (R. 19:7.)

A detective identified "JP" as Johnny K. Pinder. (R. 19:7.) The detective learned that Pinder drove a silver 2008 Chevrolet Impala with a temporary Wisconsin license plate in the front window. (R. 19:7–8.) The detective also learned that Pinder had been released from prison about two months earlier, in December 2014. (R. 19:7.)

Based on this information, the detective sought a warrant to place a GPS device on Pinder's car to track its location. (R. 19:8–11.) On February 27, 2015, the circuit court granted the request. (R. 20.) The court's order required the officers to "remove the electronic-tracking device as soon as practicable after the objectives of the surveillance are accomplished or not later than 60 days from the date the order is signed unless extended by this court or another

court of competent jurisdiction." (R. 20:2.) Officers installed a GPS device on Pinder's car on March 9. (R. 64:3.) They set up a "geofence" around Mequon so that they would get e-mail and text-message alerts if Pinder's car entered Mequon. (R. 67:123.)

Mequon police received an alert on Saturday, March 14 around 9:00 or 10:00 a.m., so one officer began tracking Pinder's car on a computer. (R. 67:123–24.) Pinder's car stopped at office buildings in Mequon and then stopped at a particular office building on West Glen Oaks Drive for "a significant amount of time." (R. 67:124–25.) After the car left the building on West Glen Oaks Drive, two officers went there to see if it had been burglarized. (R. 67:125, 171–72.) Nobody else was around when they arrived. (R. 67:176.)

Those two officers then learned that Pinder had overestimated his ability to burglarize an office without leaving a trace. The officers entered the building through an unlocked front door, which led to a common area. (R. 67:172, 176.) The building's exterior doors are unlocked on Saturdays from 8:00 a.m. to 4:00 p.m. and the hallways are publicly accessible during that time, but the interior office suites' doors are locked on Saturdays. (R. 67:96, 98–99.) The officers noticed scratches, chips, and shaving marks on or near doors in the building. (R. 67:172–73.) They inspected offices on the first floor and noticed that papers were on the floor and that cabinets and drawers were open. (R. 67:174.) They thought that one office suite, belonging to A.G. and J.S., had been burglarized. (R. 67:174–75.)

Police told A.G. about the burglary, so he met them at his office at Suite 107 in the West Glen Oaks Drive building. (R. 67:100–02.) There is a private door to enter his suite, and it had been locked that day. (R. 67:100–01, 107.) He noticed that his office suite door had scratches and that things in his

office looked out of place. (R. 67:102.) His laptop and wallet were missing, but they had been there the day before, on March 13. (R. 67:103.)

A.G.'s son told J.S. about the burglary, so J.S. went to the office. (R. 67:110–11.) J.S. noticed that her new computer, which she had not yet removed from its box, was missing. (R. 67:111.) The computer had been in her office the day before, on March 13. (R. 67:112.) She locked the door to her office when she left on March 13. (R. 67:115.)

The office building on West Glen Oaks Drive has motion-activated surveillance cameras. (R. 67:89–90.) One camera recorded footage in the morning of March 14. (R. 67:90.) The footage showed a silver vehicle parked outside of the office building. (R. 67:133.) It also showed someone exit the passenger side of the vehicle. (R. 67:133–34.) The video did not show the driver exit the vehicle. (R. 67:134, 137.) GPS data confirmed that Pinder's car was the one in the video. (R. 67:134.)

Officers stopped Pinder's car on the I-43 southbound ramp from Mequon Road. (R. 67:144, 159, 164.) Darnelle M. Polk was the driver and Pinder was in the passenger seat. (R. 67:145, 161.) Pinder was wearing the same clothes as the man in the surveillance-camera footage from outside of the office building on West Glen Oaks Drive. (R. 67:120.)

Police searched the car during the traffic stop. (R. 67:121, 145, 152, 159.) They found computers that had been stolen from J.S. and A.G., as well as A.G.'s wallet. (R. 67:103, 112, 126, 129–131, 145–46, 160.) Police also found a leather portfolio that contained tools and a laptop. (R. 67:135, 153.) The surveillance-camera footage from the office building showed Pinder holding an object that looked like the leather portfolio. (R. 67:121, 127, 135.) The officers

also found gloves and screwdrivers in the vehicle, as well as a crack pipe that Polk said was his. (R. 67:145, 147–49.) The officers arrested and searched Polk and Pinder. (R. 67:149, 151–52.) An officer found a lock-picking device in one of Pinder's pants pockets, and another lock-picking device fell out of the waist area of Pinder's pants. (R. 67:149–50.)

On March 16, 2015, the State charged Pinder with burglary of a building or dwelling as a party to the crime in violation of Wis. Stat. § 943.10(1m)(a) and with possession of burglarious tools in violation of Wis. Stat. § 943.12. (R. 1:1.) It charged Polk with burglary of a building or dwelling as a party to the crime in violation of section 943.10(1m)(a) and with possession of drug paraphernalia in violation of Wis. Stat. § 961.573(1). (R. 1:2.)

In September 2015, Pinder filed a motion to suppress the evidence found during the search of his car and his person. (R. 10.) He argued that police unlawfully used the GPS device after Wis. Stat. § 968.15's five-day limit for executing a warrant had expired. (R. 10:3–5.) On November 9, 2015, the circuit court held a hearing on the motion and ordered more briefs. (R. 64:16–17.) The court denied the suppression motion at a hearing on November 23, 2015. (R. 65:2–7.) It concluded that under *State v. Sveum*, 2010 WI 92, 328 Wis. 2d 369, 787 N.W.2d 317, section 968.15 did not merit suppression. (R. 65:2–7.) It reasoned that because officers suspected Pinder of committing several burglaries, they could not "predict when a burglary was going to occur with this type of pattern." (R. 65:6.)

Polk and Pinder had a joint trial on November 30, 2015. (R. 67.) After the close of evidence, Polk moved to dismiss the burglary charge on the grounds that he should have been charged with burglary to a *room within a building* in violation of Wis. Stat. § 943.10(1m)(f), not burglary to a

*building*. (R. 67:185–86, R-App. 102–03.) Pinder joined the motion. (R. 67:186, R-App. 103.) The State moved to amend the burglary charges to burglary of a room within a building. (R. 67:187, R-App. 104.) Because the "whole theory of the case" was that Pinder had burglarized an office suite within a building, the circuit court granted the State's motion and denied the joint defense motion. (R. 67:187–88, R-App. 104–05.)

The circuit court later instructed the jury on burglary. It first said that the State had charged Pinder with "intentionally enter[ing] an office without the consent of a person in lawful possession of that place and with the intent to steal, contrary to Section 943.10(1m) of the Wisconsin Statutes." (R. 67:216, R-App. 109.) It then said that "[b]urglary, as defined in Section 941.10 [*sic*] of the Criminal Code of Wisconsin is committed by somebody who intentionally enters a building without the consent of the person in lawful possession and with intent to steal." (R. 65:217, R-App. 110.) The court next said that to find Pinder guilty of burglary, the jury must be satisfied beyond a reasonable doubt that Pinder "intentionally entered an office," "entered an office without the consent of the person in lawful possession," "knew that the entry was without consent," and "entered the office with the intent to steal." (R. 67:217, R-App. 110.) Pinder's attorney did not object to these instructions.

The jury convicted Pinder of burglary of an office as a party to the crime and possessing burglarious tools, convicted Polk of possessing drug paraphernalia, and acquitted Polk of burglary of an office as a party to the crime. (R. 67:247–49.)

In August 2016, Pinder filed a motion for postconviction relief in which he argued that his trial counsel provided ineffective assistance by not objecting to the jury instructions on burglary. (R. 43.) The circuit court held a *Machner*[1] hearing on the motion in November 2016. (R. 70.) In January 2017, the court denied the motion in an oral ruling and a written order. (R. 50; 71.) The court said that trial counsel may have performed deficiently by not objecting but the error was "harmless." (R. 71:8–10.) It noted that the "jury didn't seem to have any confusion. They tracked along." (R. 71:8.) It also said that because there was "overwhelming" evidence of Pinder's guilt, the jury would have convicted him of burglary even if the jury instruction had been more "tailored" "to say 'a room within a building' or 'an office within the building.'" (R. 71:10.)

Pinder appeals his judgment of conviction and the circuit court's order denying his postconviction motion. (R. 51.)

## STANDARDS OF REVIEW

When reviewing a decision on a motion to suppress evidence, this Court upholds the circuit court's factual findings unless they are clearly erroneous, but it independently applies constitutional principles to the facts. *State v. Matalonis*, 2016 WI 7, ¶ 28, 366 Wis. 2d 443, 875 N.W.2d 567, *reconsideration denied*, 2016 WI 78, 371 Wis. 2d 609, 885 N.W.2d 380, *cert. denied*, 137 S. Ct. 296 (2016).

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

This Court reviews *de novo* whether a jury instruction correctly stated the law. *State v. Elverman*, 2015 WI App 91, ¶ 40, 366 Wis. 2d 169, 873 N.W.2d 528, *review denied*, 2016 WI 16, 367 Wis. 2d 126, 876 N.W.2d 511. "A claim of ineffective assistance of counsel is a mixed question of fact and law." *State v. Carter*, 2010 WI 40, ¶ 19, 324 Wis. 2d 640, 782 N.W.2d 695 (citations omitted). A reviewing court "will uphold the circuit court's findings of fact unless they are clearly erroneous." *Id.* (citation omitted). "However, the ultimate determination of whether counsel's assistance was ineffective is a question of law, which [this Court] review[s] de novo." *Id.* (citation omitted).

## ARGUMENT

### I. The circuit court correctly denied Pinder's suppression motion because police acted reasonably when they tracked his car with a GPS device pursuant to a court order.

"A search warrant must be executed and returned not more than 5 days after the date of issuance." Wis. Stat. § 968.15(1). But "[n]o evidence seized under a search warrant shall be suppressed because of technical irregularities not affecting the substantial rights of the defendant." *Id.* § 968.22. A defendant thus is not entitled to suppression when police *reasonably* perform a search more than five days after a warrant was issued. *See Sveum*, 328 Wis. 2d 369, ¶¶ 71–72.

Here, police reasonably tracked Pinder's car more than five days after the circuit court issued a warrant to do so, for three reasons.

First, the officers had no way of knowing when Pinder would commit a burglary. The officers suspected that Pinder and his car had been involved in burglaries in Mequon on

several days in February 2015. (R. 19:1–8.) As the circuit court explained, the officers could not "predict when a burglary was going to occur with this type of pattern." (R. 65:5–6.)

Second, the court did not authorize indefinite tracking of Pinder's car. Rather, it required the officers to "remove the electronic-tracking device as soon as practicable after the objectives of the surveillance are accomplished or not later than 60 days from the date the order is signed unless extended by this court or another court of competent jurisdiction." (R. 20:2.)

Third, the officers did not continuously track Pinder's car. On February 27, 2015, the circuit court authorized officers to place a GPS device on Pinder's car. (R. 20.) They did not install a GPS device on Pinder's car until ten days later, on March 9. (R. 64:3.) Officers set up a "geofence" around Mequon so that they would get e-mail and text-message alerts if Pinder's car entered Mequon. (R. 67:123.) A detective began tracking Pinder's car on March 14 when he received an alert. (R. 67:123–24.) Police arrested Pinder later that day. (R. 67:149.) Under these facts, the officers reasonably tracked Pinder's car more than five days after they got a warrant to do so.

*Sveum* is instructive. Sveum's ex-girlfriend believed that he was stalking her. *Sveum*, 328 Wis. 2d 369, ¶ 5. Police requested a circuit court order authorizing them to place a GPS device on Sveum's vehicle. *Id.* The court issued the requested order the same day. *Id.* ¶ 7. Police installed a GPS device on Sveum's vehicle the next day. *Id.* ¶ 8. "Because of the limited battery life of the GPS, the officers replaced the GPS twice." *Id.* Police removed the GPS device from Sveum's vehicle for the final time 34 days after they first installed one. *Id.* The GPS data showed that Sveum had been stalking

his ex-girlfriend. *Id.* ¶ 10. The State charged Sveum with aggravated stalking, and he filed a suppression motion alleging that police obtained the GPS data in violation of the Fourth Amendment. *Id.* ¶ 12. Sveum argued on appeal, *inter alia*, that he was entitled to suppression because the officers violated Wis. Stat. § 968.15. *Id.* ¶¶ 61, 71.

The supreme court rejected that argument, concluding that "Sveum's substantial rights were [not] violated by the officers' failure to execute and return the warrant within 5 days after the date of issuance." *Id.* ¶ 71 (citing Wis. Stat. § 968.15). The court reasoned that "the officers' use of the GPS device for 35 days was reasonable." *Id.* It was reasonable because Sveum's stalking was ongoing and a search to obtain evidence of stalking "could not have been completed in a single day." *Id.* ¶ 67. "Moreover, the daily, continuous monitoring of the GPS device on Sveum's vehicle were not separate searches requiring separate warrants, but instead were simply reasonable continuations of the original search." *Id.* (citation omitted). Because the officers did not violate Sveum's substantial rights, Wis. Stat. § 968.22 dictated that he was not entitled to suppression. *Id.* ¶ 72.

Here, similarly, police reasonably tracked Pinder's car more than five days after they got a court order to do so. Like Sveum's stalking, Pinder's suspected burglaries were ongoing. Like in *Sveum*, the Mequon officers here could not have obtained evidence of Pinder's burglary in a single day—or even within the statutory five-day period—because Pinder apparently did not reoffend in Mequon within that time. The officers here were even more reasonable than the officers in *Sveum*. Officers continuously tracked Sveum's vehicle for 35 days, but the officers here tracked Pinder's car for six days at most and apparently did so only one time when it entered Mequon. Because the officers acted reasonably, Pinder is not entitled to suppression.

Pinder's contrary arguments are unavailing. He argues, citing *Sveum*, that violation of the five-day rule in Wis. Stat. § 968.15 is not a "'technical irregularity' that can be forgiven under Wis. Stats. [§] 968.22." (Pinder Br. 17.) But that quotation is from a dissenting opinion in *Sveum*, not the majority opinion as Pinder suggests. *See Sveum*, 328 Wis. 2d 369, ¶ 91 (Abrahamson, C.J., dissenting).

Pinder next argues that *Sveum* is distinguishable because the supreme court in that case addressed only Wis. Stat. § 968.17,[2] not section 968.15. (Pinder Br. 19–20.) He is wrong. The supreme court concluded that a violation of either statute did not entitle Sveum to suppression. *Sveum*, 328 Wis. 2d 369, ¶¶ 67–72.

Pinder seems to make a policy argument that a violation of section 968.15 should result in suppression to deter police from executing "stale" warrants. (Pinder Br. 17–18.) But the supreme court has already held that a violation of this statute does not result in suppression if police acted reasonably. *Sveum*, 328 Wis. 2d 369, ¶¶ 71–72. Supreme court majority opinions are binding on this Court. *Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶¶ 50–58, 324 Wis. 2d 325, 782 N.W.2d 682. In any event, Pinder's policy concern is misplaced. A defendant may argue that probable cause had dissipated before police untimely executed a search warrant. *State v. Edwards*, 98 Wis. 2d 367, 376, 297 N.W.2d 12 (1980). Although Pinder does not make a dissipation argument, his ability to make one defeats his policy concern.

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[2] "Wisconsin Stat. § 968.17(1) requires that a search warrant be returned to the clerk of court 'within 48 hours after execution' and that such return 'be accompanied by a written inventory of any property taken.'" *Sveum*, 328 Wis. 2d 369, ¶ 68.

Pinder cites *State v. Popenhagen*, 2008 WI 55, 309 Wis. 2d 601, 749 N.W.2d 611, for the idea that he is entitled to suppression. (Pinder Br. 18.) But *Popenhagen* did not address section 968.15. *Sveum* did, and it shows that Pinder is not entitled to suppression.

In short, this Court should affirm the circuit court's order denying Pinder's suppression motion.

## II. Pinder has failed to show that his trial counsel provided ineffective assistance by forgoing an objection to the jury instructions on burglary.

### A. Controlling legal principles.

"There are two types of jury instruction challenges: those challenging the legal accuracy of the instructions, and those alleging that a legally accurate instruction unconstitutionally misled the jury." *State v. Burris*, 2011 WI 32, ¶ 44, 333 Wis. 2d 87, 797 N.W.2d 430 (citation omitted). A defendant has the burden of showing that a jury was misled. *Id.* ¶ 46. "Wisconsin courts should not reverse a conviction simply because the jury possibly could have been misled; rather a new trial should be ordered only if there is a reasonable likelihood that the jury was misled and therefore applied potentially confusing instructions in an unconstitutional manner." *Id.* ¶ 49 (citation omitted).

A jury instruction might misstate the law in one or more ways. *State v. Williams*, 2015 WI 75, ¶¶ 54–57, 364 Wis. 2d 126, 867 N.W.2d 736, *cert. denied*, 136 S. Ct. 1451 (2016). "[A] jury instruction that does not accurately state the statutory requirements for the crime charged constitutes an erroneous statement of the law." *Id.* ¶ 54 (citation omitted). On the other hand, "jury instructions may be erroneous if they fail to instruct the jury on the theory of the

crime that was presented to the jury during trial." *Id.* ¶ 57 (citation omitted). Such "jury instructions are erroneous because they do not accurately state the statutory requirements for the crime charged *as applicable to the facts presented*." *Id.* (citation omitted).

If defense counsel does not object to a jury instruction, this Court may review the instruction only within the framework of an ineffective assistance of counsel claim. *State v. Shea*, 221 Wis. 2d 418, 430, 585 N.W.2d 662 (Ct. App. 1998). A defendant who asserts ineffective assistance of counsel must demonstrate that (1) counsel performed deficiently and (2) the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

An attorney provides effective assistance by forgoing an objection to a correct jury instruction. *See State v. Ziebart*, 2003 WI App 258, ¶ 29, 268 Wis. 2d 468, 673 N.W.2d 369. Even if an instruction was incorrect, a defendant is not entitled to relief if he fails to prove that the lack of an objection prejudiced the defense. *See id.* ¶ 29 & n.10. Because a defendant must prove prejudice, the State need not prove that an incorrect but unobjected-to instruction was harmless. *See id.* ¶ 29 n.10.

### B. Because the circuit court properly instructed the jury on burglary, Pinder's trial counsel reasonably declined to object.

The circuit court properly instructed the jury on burglary. It first said that the State had charged Pinder with "intentionally enter[ing] an office without the consent of a person in lawful possession of that place and with the intent to steal, contrary to Section 943.10(1m) of the Wisconsin Statutes." (R. 67:216, R-App. 109.) It then said that "[b]urglary, as defined in Section 941.10 [*sic*] of the Criminal Code of Wisconsin is committed by somebody who intentionally enters a building without the consent of the person in lawful possession and with intent to steal." (R. 65:217, R-App. 110.) The court correctly stated the elements of burglary: a person commits burglary by "intentionally enter[ing any building] without the consent of the person in lawful possession and with intent to steal or commit a felony in such place." Wis. Stat. § 943.10(1m)(a).

The court then tailored the instructions to the facts of Pinder's case. A person may commit burglary by entering "[a] room within" "[a]ny building." *Id.* § 943.10(1m)(a), (1m)(f). As the court rightly explained, the "whole theory of the case" was that Pinder had burglarized an office suite within a building. (R. 67:187–88, R-App. 104–05.) The court used the word "office" when instructing the jury on Pinder's situation. It said that to find Pinder guilty of burglary, the jury must be satisfied beyond a reasonable doubt that Pinder "intentionally entered an office," "entered an office without the consent of the person in lawful possession," "knew that the entry was without consent," and "entered the office with the intent to steal." (R. 67:217, R-App. 110.) This instruction was proper because it fit the theory of prosecution.

The jury instructions on burglary were not misleading. Although the court used the word "building" when defining burglary, it only used the word "office" when referring to Pinder. (R. 65:216–17, R-App. 109–10.) The jury understood that the court was using the word "office" as shorthand for "[a] room within" "[a]ny building." As the circuit court explained, the "jury didn't seem to have any confusion. They tracked along." (R. 71:8.) The instructions on burglary were not misleading under these facts.

In short, because the jury instructions on burglary were proper, Pinder's trial counsel performed reasonably by not objecting to them.

### C. Alternatively, if the jury instructions on burglar were improper, Pinder is not entitled to a new trial because he failed to prove prejudice.

Even if the jury instructions on burglary were improper, Pinder's claim of ineffective assistance fails because he has not shown prejudice, nor can he because of the overwhelming evidence of his guilt.

On March 14, 2015, a detective used a computer and GPS technology to track Pinder's silver car. (R. 67:123–24.) Pinder's car stopped at a particular office building in Mequon for "a significant amount of time." (R. 67:124–25.) After the vehicle left the building, two officers went there to see if it had been burglarized. (R. 67:125, 171–72.) J.S.'s and A.G.'s shared office suite looked like it had been burglarized. (R. 67:174–75.)

Surveillance-camera footage confirmed that Pinder had committed the burglary. The footage showed a silver car parked outside of the office building. (R. 67:133.) It also

showed someone exit the passenger side of the car. (R. 67:133–34.) The video did not show the driver exit the car. (R. 67:134, 137.) GPS data confirmed that Pinder's car was the one depicted in the video. (R. 67:134.) Pinder was in the passenger seat when officers stopped his car. (R. 67:145.) Pinder was wearing the same clothes as the man shown in the surveillance-camera footage. (R. 67:120.)

Police found incriminating evidence when they searched Pinder and his car. In the car, police found computers that had been stolen from J.S. and A.G., as well as A.G.'s wallet. (R. 67:103, 112, 126, 129–131, 145–46, 160.) Police also found a leather portfolio that contained tools and a laptop. (R. 67:135, 153.) The surveillance-camera footage from outside the burglarized office showed Pinder holding an object that looked like the leather portfolio. (R. 67:121, 127, 135.) An officer found a lock-picking device in one of Pinder's pants pockets, and another lock-picking device fell out of the waist area of Pinder's pants. (R. 67:149–50.)

In short, the jury heard overwhelming evidence that showed that Pinder had burglarized J.S.'s and A.G.'s office suite. Even if the circuit court improperly instructed the jury on burglary, there is not a reasonable probability that the jury would have acquitted Pinder had it been properly instructed. Pinder's claim of ineffective assistance thus fails.

## CONCLUSION

The State respectfully asks this Court to affirm Pinder's judgment of conviction and the circuit court's order denying his motion for postconviction relief.

Dated: May 19, 2017.

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 4724 words.

_____
SCOTT E. ROSENOW
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).

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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: May 19, 2017.

_____
SCOTT E. ROSENOW
Assistant Attorney General