STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

CASE NOS. 2017AP000958, 000959, 000960, and 000961CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN A. BARWICK,

Defendant-Appellant.

Appeal From Decision and Final Order Denying Post-Conviction Motions Entered May 8, 2017,
Milwaukee County Circuit Court Judge Michelle A. Havas, Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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The circuit court denied Barwick's postconviction motion (R. 31 in Appeal No. 2017AP000958)on this issue, and ruled that the email was profane, and perhaps obscene (A. App. 108).

II. Did the Lack of a Prohibition on the Use of Computers in Brian Barwick's Appearance Bond in Case No. 15CF4127 Invalidate His Three Convictions for Bail Jumping?

The circuit court denied Barwick's postconviction motion (R. 30, Appeal No. 2017AP000961) on this issue, and ruled that the omission of an express prohibition on computer use in the written appearance bond was irrelevant because the court had set an oral condition of release that prohibited computer use (A. App. 108-09).

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The circuit court denied Barwick's postconviction motion (R. 51, Appeal No. 2017AP000959 and R. 36, Appeal No. 2017AP000960) on this issue, and ruled that because Barwick "sent" messages, he necessarily

committed a "physical act," a concept which the jury instructions did not need to define. (A. App. 109-10).

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The circuit court denied Barwick's postconviction motions (R. 31 in Appeal No. 2017AP000958), (R. 51, Appeal No. 2017AP000959), (R. 36, Appeal No. 2017AP000960) (R. 30, Appeal No. 2017AP000961) on these issues and found that the search warrant affidavits were sufficient (A. App. 106-07).

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The circuit court denied Barwick's postconviction motion (R. 30, Appeal No. 2017AP000961) on these issues, and found that the search warrant affidavits were sufficient (A. App. 106-07), and that it had previously ruled on pretrial motions that the scope of the search was proper (A. App. 105; R. 44, pp.16-20).

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The circuit court denied Barwick's postconviction motion (R. 30, Appeal No. 2017AP000961), finding that it had previously ruled on pretrial motions that defendant's testimony would have been speculative and lacking supportive proof from an expert witness (A. App. 105-06; R. 42, pp.5-8; R. 43, pp. 8-9, 38-47).

VII. Did Barwick Demonstrate Adequate Grounds to Support Both His Motion Sever the Cases for Trial and His Motions *In Limine* to Exclude Unduly Prejudicial and Inflammatory Evidence That Was Not Common to All Cases?

The circuit court denied Barwick's postconviction motions (R. 31 in Appeal No. 2017AP000958; R. 51, Appeal No. 2017AP000959; and R. 36, Appeal No. 2017AP000960; R. 30, Appeal No. 2017AP000961), finding that in Case No. 14CM4275 defense counsel had withdrawn his severance motion (A. App. 104), that defense counsel was not ineffective for having done so because it was not prejudicial (A. App. 105), that in Case No. 15CF004127 defense counsel was not ineffective for not seeking a severance because it was not prejudicial (A. App. 106), and that it had previously denied defense motions *in limine* (A. App. 105; R. 43, pp. 8-9, 15).

VIII. Did the Circuit Court Err by Not Conducting a *Machner* Hearing to Determine Whether There Were Strategic Reasons For Defense Counsel's Waiver of Objections or For Not Raising Issues Related to the Inadmissible Evidence, to the Lack of Proof of Barwick's Use of Profanity, Lack of an Appearance

Bond Prohibition on His Computer Use, and the Lack of a "Physical Act" Threatening His Ex-Wife?"

The circuit court denied each of Barwick's post-convictions motions raising the *Machner* issue, finding none of counsel's errors, if any, were prejudicial to Barwick's defense. (A. App. 105-06).

IX. As to Those Issues, Stated Above Regarding the Insufficiency of the State's Evidence, the Severance Issues, and the Admission of Inadmissible Evidence, That Barwick's Trial Counsel Did Not Raise, Was It Plain Error for The Trial Court to Deny Barwick Directed Verdicts of Acquittal or New Trials?

The circuit court denied Barwick's plain error objections in his postconviction motions (A. App. 110), and included a finding that he was not prejudiced by counsel's not seeking severances of either Case No. 14CM4275 or Case No. 15CF4157 from the other cases for trial (A. App. 105-06).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate in this case to the extent that Barwick's arguments do not fall under Wis. Stat. (Rule) § 809.22(2)(a); however, the briefs will likely fully develop the theories and legal authorities so that oral argument would be of marginal value.

Publication is appropriate under Wis. Stat. (Rule) § 809.23(a)(1) and (2) because resolution of the issues will likely clarify existing rules and apply those rules to facts significantly different from those in published opinions.

STATEMENT OF THE CASE[1]

Following a jury trial in March 2016 at which Brian Barwick was found guilty of a misdemeanor and various felony offenses related to emails sent to his ex-wife and the guardian ad litem in their child custody case, and to a woman acquaintance, Milwaukee County Circuit Judge Michelle A. Havas entered judgments of conviction and imposed sentences on June 23, 2016 as follows:

In Case No.14CM4275, which charged one count of sending an obscene, lewd, or profane email to Attorney K. D. on October 6, 2014, Barwick was sentenced to serve 90 days in the House of Correction concurrent to sentences for counts 3 and 4 and consecutive to sentences for counts 1 and 2 in Case No. 15CF1521.

In Case No. 15CF1521, which charged violations of a domestic abuse injunction by sending two emails to his ex-wife, once on October 2, 2014 and once on October 5, 2014 (Counts 1 and 3) and by sending the same emails while concealing his identity (Counts 2 and 4), Barwick was sentenced on Count 1 to two years imprisonment concurrent to Count 2; on Count 2 to two years imprisonment concurrent to Count 1; on Count 3 to two years imprisonment concurrent to Count 4, but consecutive to Counts 1 and 2; and on Count 4 to two years imprisonment concurrent to Count 3, but consecutive to Counts 1 and 2. The sentence on each count

[1] The remaining portions of the brief will refer to the four cases on appeal by their circuit court case numbers, Case Nos. 14CM4275, 15CF1521, 15CF3082 and 15CF 4127, which correspond to Appeal Nos. 2017AP000958, 2017AP000959, 2017AP000960, and 2017AP000961, respectively.

was bifurcated with one year of initial confinement and one-year extended supervision.

In Case No. 15CF3082, which charged Barwick for stalking his ex-wife between February 26, 2013 and May 2, 2015 (Count 1), by violating a domestic abuse injunction by posting a Facebook message on August 31, 2014 that was retrieved by his ex-wife on May 2, 2015 (Counts 2) and by posting the same message while concealing his identity (Counts 3), Barwick was sentenced on Count 1 to six years imprisonment (three years initial confinement and three years extended supervision) consecutive to Counts 2 and 3, and any other sentence; on Count 2 to two years imprisonment concurrent to Count 3, but consecutive to any other sentence; on Count 3 to two years imprisonment concurrent to Count 2, but consecutive to any other sentence, and with one-year initial confinement and one year extended supervision on Counts 2 and 3.

In Case No. 15CF4127, which charged three counts of bail jumping for sending emails to an acquaintance on June 28, July 4, and July 6, 2015, Barwick was sentenced on Count 1 to two years imprisonment concurrent to Counts 2 and 3, but consecutive to any other sentence; on Count 2 to two years imprisonment concurrent to Counts 1 and 3, but consecutive to any other sentence; and on Count 3 to two years imprisonment concurrent to Counts 1 and 2, but consecutive to any other sentence. The sentence on each count was bifurcated with one year of initial confinement and one-year extended supervision.

STATEMENT OF FACTS

The above sentences were based on jury verdicts in the four separate cases in which criminal complaints alleged that:

- Barwick used his computer to send an obscene, lewd, or profane Yahoo account email to a guardian ad litem in a pending child custody dispute with his then-wife; to send two Google account emails, after a domestic abuse injunction had issued against him in 2013, from the computer's IP address "75.9.162.21" that was tied both to his Yahoo account and his Google account, with an intent to harass his ex-wife; and to post an harassing Facebook message to his ex-wife that was also tied to the IP address "75.9.162.21;" and

- Barwick stalked and harassed his ex-wife in 2013 voicemails, in the 2014 email messages, and in the 2014 Facebook message that she had not read until May 2015; and that he sent three emails from IP address "75.9.162.21" to an acquaintance, during a time when his appearance bond case prohibited his use of a computer.

Pretrial matters

Pretrial issues relevant to this appeal concerned terms in his appearance bond, the joinder of the four cases for trial and motions to sever and *in limine* to exclude evidence of other acts attributed to Barwick in the four cases, the admission of evidence of personal items related to Barwick's unconventional sexual behaviors, the seizure of the items from his living quarters at his parent's home, and the court's restrictions on Barwick's proposed testimony about the origins of the emails and messages. The facts relating to those

pretrial issues are set out in the argument sections that discuss those issues.

Trial Facts[2]

In February 2013 Barwick's ex-wife reported to police that she had received some voicemail messages (Exhibit 1) that she considered threatening and that frightened her. (R. 43, pp. 154-162). Based on those messages she went to court and obtained a domestic abuse injunction (Exhibit 3) against Barwick on March 12, 2013 (R. 43, pp. 163-64).

Following a Family Court Commissioner child custody/placement hearing on October 2, 2014, she reported to police that she had received two email messages (Exhibit 4 and 5) that she considered threatening (R.43, pp. 170, 173, 175). The messages indicated that the sender had a Google email address of "longerone69@gmail.com," which she did not recognize, but she believed the sender was Barwick. The first e-mail was sent the same day as her court hearing regarding placement of her children. A police warrant in Milwaukee County Circuit Court Case No. 14SW2367 (which was attached to Barwick's post-conviction motion) directed to Google, Inc., produced data (Exhibits 14 and 15) showing that email address "longerone69@gmail.com" was tied to IP address "75.9.162.21." (R. 44, pp. 19).

[2] Trial transcript references to the trial facts will refer to the record as compiled for Case No. 15CF4127, which is Appeal No. 2017AP000691) unless otherwise indicated. The transcript of trial proceedings on March 1, 2016 is denoted as "R. 45", while the proceedings the following day, March 2, are denoted as "R. 46." These same transcripts are given different record numbers in the other three appeals.

That same month police learned that the Barwick had sent emails to Attorney K. D. , the guardian ad litem in the defendant's child custody case. D. provided the police with five emails (Exhibits 7-11). He believed Barwick sent the emails because the sender reference was an email account, "brian_barwick@yahoo.com" (R.43, p. 188). The fifth email (Exhibit 11) formed the basis for the charge in 14CM004275 for sending an obscene or profane computer message (R. 43, p. 197). Police obtained a warrant (Milwaukee County Circuit Court Case No. 15SW2228) to obtain records from Yahoo, Inc. related to email account, "brian_barwick@yahoo.com." The Yahoo response to the warrant (Exhibits 12 and 13) tied the email address to IP address "75.9.162.21." (R. 44, pp. 17-18).

In April 2015 a complaint alleging domestic abuse injunction violations and other charges was filed in Case No. 2015CF1521 (Exhibit 16) (R. 44, p. 22). The transcript of the initial appearance (Exhibit 18) indicated that a "condition of the defendant's release" was "no use of any computers." (R. 44, 24-25). At a May 21, 2015 court appearance in the same case, the transcript of the proceeding showed that the court told Barwick "no use of computer." (R. 44, p.25-26).

In May 2015 R. A. B. sent the police a screen shot of a Facebook message (Exhibit 6) that she testified so sickened her (R. 43, p. 180) that she could not sleep (R. 43, p. 181). R. A. B. indicated that the message was dated August 31, 2014, but that she hadn't opened the message until May 2, 2015, because she did not recognize the sender's name when she initially received it. R. A. B. indicated that she believed the message was from the defendant. Police obtained a warrant directed to Facebook, Inc., and the response from

Facebook (Exhibit 19) linked the Facebook user to the defendant's IP address "75.9.162.21" (R. 44, p. 28). Police also discovered a message from the same Facebook account that was sent to R. A. B.'s father, that the police considered to be threatening. (R. 44, p. 29).

In June 2015 a woman who explained that she had had contact with the Barwick through an online dating site, provided police with an AOL e-mail account that Barwick had used to contact her. Police obtained a warrant directed to AOL, Inc. (Exhibit 20) regarding email address "zapp1965@aol.com" and the AOL response indicated that IP address for that account was "75.9.162.21." (R. 43, pp. 30-33). A search warrant was executed at the defendant's residence where officers discovered numerous pairs of women's underwear, which appeared to be worn and soiled with bodily fluids. (R. 44, p. 45-49). The officers seized the defendant's desktop computer and determined that numerous emails originated from the computer at the residence with an IP address "75.9.162.21." Many of the e-mails were sexual in nature and involved Barwick inquiring about purchasing used female panties pubic hair." (R. 44, pp. 39-41).

Brian Barwick testified that while he had sent four emails to D. to complain about D. 's handling of the October 2, 2014 child custody/placement hearing, he did not send, as related to Case No. 14CM4275, the email (Exhibit 11) that was alleged to be obscene or profane. (R. 52, pp. 87-89). He also testified that he had not sent, as related to Case No. 15CF1521, emails to his ex-wife (Exhibits 4 and 5) connected to the Google email account "longerone69@gmail.com" (R. 70, p. 90). He also denied sending the August 31, 2014 Facebook message (Exhibit 6), as related to Case No. 15CF3082 (R. 70, p. 92). As related to Case No. 15CF4127, he stated that he last accessed the

internet on February 5, 2015 because the court had prohibited from computer/Internet use.

Barwick was cross-examined about his angry tone and off-color language in the voicemail messages that he did admit he left for his ex-wife (R. 70, pp. 94-97), and items that were seized from his bedroom, specifically a letter (Exhibit 30) and a photograph (Exhibit 29) pertaining to women's panties, and pubic hair samples (Exhibit 34). (R. 70, 97-100). Although he denied sending an AOL email that described those types of items (Exhibit 25) and that were attributed to "zapp1965@aol.com," he acknowledged that the email contents did describe items that were found in his bedroom. (R. 70, p. 100).

Post-Conviction Matters

The search warrants and returns directed to Yahoo, Inc. (R. 31, pp. 25-37 in Case No. 14CM4275), Google, Inc. (R. 31, pp. 38-50), AOL, Inc. (R. 31, pp. 51-59); and Facebook, Inc. (R. 31, pp. 60—66), and the search warrant and return for Barwick's living quarters (R. 31, pp 67-74) were appended to his motion for post-conviction relief (R. 31). The motion asserted that probable cause was not shown to support the warrants or the averments relating to the Wisconsin circuit court having jurisdiction to command that the warrants be executed in other states. The circuit denied the post-conviction motion on those grounds relying on its pretrial rulings for the house warrant (A. App. 105). The court also ruled, without explication, that the affidavits supporting the internet service providers warrants were "sufficient" and the jurisdictional fact challenges were "rejected." (A. App. 106-107).

Brian Barwick also submitted a 4-page affidavit to support his post-conviction motions (R. 31 in Case No.

14CM4275; R. 51 in Case No. 15CF1521, pp. 8-11; R. 36 in Case No. 2015CF3082, and R. 30 in Case No. 15CF4127), particularly to support the pretrial severance motions and ineffective assistance of counsel issue asserted in the post-conviction motion. Barwick averred that had he known, he would have chosen not to testify (which his trial counsel had not discussed with him), relying on his privilege against self-incrimination, about the email to Attorney D. (Case No. 14CM4275) and the emails to an acquaintance after the prohibition against computer use was ordered (Case No. 15CF4127). He also asserted that his trial counsel did not discuss with him that his assertion of the privilege in those two cases could have served as grounds to seek severance of those cases from the trial of the other two cases. In that circumstance, he averred, he would have reconsidered his decision to testify as to the charges in Case Nos. 14CM4275 and 15CF4127.

The circuit court rejected Barwick's contention that his affidavit's averments added new substance to the severance issues. As to Case No. 14CM4275, the court reasoned, "a decision to remain silent to the charge . . . would not have been a viable strategy because the jury [still] would [have] heard uncontroverted evidence about . . . sending harassing emails to his ex-wife contemporaneous with the child placement hearing and contemporaneous with the emails sent to Attorney D. . . . ." (A. App. 105). As to Case No. 15CF4127, the court reasoned, "remaining silent at a separate trial in 15CF4157 [still] would not have been a viable defense strategy because the jury would have heard uncontroverted evidence from the State's presentation of other acts evidence in 15CF1521."

ARGUMENT

I. Because There Was No Evidence in Case No. 14CM4275 That Brian Barwick Used Obscenity or Profanity in a Yahoo Email to K. D. , His Conviction Was Invalid.

A. The "obscene" language option in Wis. Stat. §947.0125(2)(c) could not have been the basis for Barwick's conviction.

The criminal complaint (R. 2) and amended complaint (R. 22) in Case No. 14CM4275 did not charge Barwick with s single mode of committing the offense. The complaints alleged three options under §947.0125(2)(c) that the email was (1) obscene, (2) lewd, or (3) profane. Apparently uncertain about which kind of language matched the alleged facts, the prosecution charged Barwick in a single count with using all three kinds of language. The exact words in the email are found at A. App. 138 and the email was admitted into evidence as Exhibit 11 (R. 43, p. 197).

The prosecution's uncertainty, however, was not reflected in the complaints' fact allegations. Police Officer James Fohr, the lead investigator in Barwick's cases, deemed the emails to Attorney D. to be "profane." (R. 2, p. 1; R. 22, p. 1).

When the trial commenced, however, the trial court gave an opening jury instruction that echoed the prosecutor's uncertainty. The jury was told that an element of the offense of unlawful use of a computerized communication system involved any message using any one of the three kinds of

language. (R. 51, pp. 116, 125-26). At the conclusion of the evidence, the court repeated the three kinds of language in its opening instructions (R. 53; pp. 7-8). The prosecution then argued (very briefly) in its closing remarks that the language was obscene, and lewd, and profane (R. 53, p. 51, lines 2-3).

When the trial then submitted verdict forms to the jury, however, the court changed gears. The jury was instructed to focus just on whether one kind of language was used – obscene language. (R. 53, p. 89). Hence, Barwick's first sub-argument disputes whether the message used obscene language.

The prosecution failed to adduce sufficient evidence to meet a constitutional standard that applies to obscenity and obscene language. To constitute obscenity under *Miller v. California*, 413 U.S. 15, 24 (1973), the language among other things must, for the average person, applying contemporary community standards, when taken as a whole, appeal to a prurient interest.[3] The emails perhaps used insulting or vulgar language, but it was not obscene under that test (nor did it meet any constitutional definition

[3] "The constitutional standards for assessing whether a particular item is obscene and therefore may be subject to criminal sanctions were set out in *Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 2615, 37 L.Ed.2d 419 (1973). This three part test requires a determination:

". . . (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *State v. Princess Cinema of Milwaukee, Inc*., 96 Wis.2d 646, 653, 292 N.W.2d 807, 811 (1980). (Internal citations omitted).

for profanity). Indeed, in another context outside the use of email, the language might have been deemed "abusive", as distinct from obscene, lewd, or profane under the Wisconsin disorderly conduct statute, Wis. Stat. § 947.01.[4] But, having alleged that defendant's language was obscene, the prosecution could not escape the rigors of the constitutional standard. Other courts interpreting their own "harassment by computer" criminal statutes have reached the same conclusion. See, *e.g.*, *Barson v. Commonwealth*, 284 Va. 67, 726 S.E. 2d 292 (2012) (finding emails that Barson sent to his ex-wife, stating she was having "risky gutter sex," that she was vacuum[ing] his baby to death," and that she was a "coke whore baby killing prostitute" to be outside the statutory definition of "obscene" that applied to define the word in the harassment-by-computer statute).

Judge Havas agreed that the email language here may not have been obscene "if the standard in *Miller*. . . is applied." (A. App. 108). The prejudice to defendant Barwick was that he could not have proven guilty beyond a reasonable doubt in the absence of evidence meeting the constitutional definition of "obscene."

B. The "profane" language option in Wis. Stat. §947.0125(2)(c) also could not have been the basis for Barwick's conviction.

There should be no need to inquire further about whether an alternative kind of prohibited language, profanity, was proven. The jury was not instructed to consider that form of proof and its verdict cannot be rewritten to read that it

[4] Calling another person a "son-of-a-bitch" under charged circumstances might well constitute "abusive" language, a category separate from obscene in the disorderly conduct statute. *Lane v. Collins*, 29 Wis. 2d 66, 138 N.W.2d 264 (1965).

somehow adjudged Barwick guilty of using some sort of language other than obscenity.[5]

But the prosecution alleged that defendant's language also was profane, and so Barwick's second sub-argument here disputes whether the message used profane language. Moreover, Judge Havas ruled that the language "[a]bsolutely" was profane so, to that extent, the issue needs to be addressed, even though the jury only found the language to be obscene.

The first reason to reject Judge Havas' ruling is because profanity is not the same as abusive or insulting forms of speech. Judge Havas recognized as much elsewhere in her ruling when she wrote that profanity is defined as "Irreverence towards sacred things; particularly, an irreverent or blasphemous use of the name of God." (A. App. 107). This is consistent with the Ninth Circuit's view, for example, that a "question of what constitute[d] profane language" was "usually dealt with as a branch of the common-law offense of blasphemy." *Duncan v. United States*, 48 F.2d 128, 133 (1931). But here, there obviously were no religious overtones or undertones to the email message Attorney D. received.

Secondly, profane language, however defined, cannot be prosecuted where there is no proof that it was likely to produce *imminently* lawless action, *i.e.*, that the language used amounted to "fighting words." *See, Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *Cohen v. California*, 403 U.S. 15, 16-17 (1971); *Hess v. Indiana*, 414 U.S. 105, 108, 94 S. Ct. 326, 328–29 (1973); and *State v. Douglas D.* 2001 WI 47, ¶ 27, 243 Wis. 2d 204, 626 N.W.2d 725. Here,

[5] The jury's verdict read that Barwick was guilty of "unlawful use of a computerized communication system, use of *obscene* language . . . ." (Emphasis added.) (R. 53, p. 95, lines 22-24).

there was no proof that Attorney K. D. had been or was likely to have been incited to respond violently.

Third, profane language must, in order to meet the fighting words standard, be used in face-to-face communications, and cannot be deemed an element of an offense when used in emails, where the speaker and the recipient are distant from each other. *See, e.g., State v. Drahota*, 280 Neb. 627, 788 N.W.2d 796, 804 (Neb.2010) ("[E]ven if a fact finder could conclude that [,] in a face-to-face confrontation, [insulting emails] would have provoked immediate retaliation, [the recipient of the emails] could not have immediately retaliated.")

Finally, Judge Havas sustained the verdict by declaring that "the State only needs to prove that a communication is obscene, lewd, or profane under a common understanding for those terms." Of course, that begs the question of what a "common understanding" would be (A. App. 108, fn. 5). Even Judge Havas alluded to different understandings.

United States Supreme Court and Wisconsin decisions have recognized the necessity that juries be instructed on the meaning of these forms of speech to comply with First Amendment standards. *Court v. State*, 63 Wis.2d 570, 576–77, 217 N.W.2d 676, 679 (1974):

> "*Miller* states that what appeals to the 'prurient interest' or is 'patently offensive' are essentially questions of fact. This being so defendants have a constitutional right to a jury trial of these factual issues. . . . While juries naturally reflect the standards of their local community to carry such reflection to such a degree as requiring local community standards is of questionable merit.

> We think state standards should be applicable in obscenity cases.".

But here, the jury was not instructed about the *Miller* obscenity test or about any profanity definition to avoid a First Amendment violation. The proper test for the application of these terms must be made clear in instructions to the jury. *State v. Tee & Bee, Inc.*, 229 Wis.2d 446, 454, 600 N.W.2d 230, 235 (Ct. App. 1999). Here, Judge Havas acknowledged that the jury was left to its own personal sensitivities and opinions, or some kind of "common understanding" as to what language is obscene or profane.

The insufficiency of evidence on this element of the crime was raised by motion to dismiss at the close of the State's evidence and motion of acquittal at the close of the trial. (R. 52, p. 73, and R. 53, p. 100-101). The prejudice to the defendant was that he could not have been proven guilty beyond a reasonable doubt in the absence of proof of obscenity or profanity and without the jury being properly advised as to the nature of the offense.

II. Because There was No Evidence, as Was Alleged in Case No. 15CF4127, That the Terms of Brian Barwick's Appearance Bond Prohibited His Use of a Computer, His Conviction Was Invalid.

Brian Barwick was charged in Case No. 15CF4127 with felony "bail jumping under Wis. Stats. § 946.69:

> **(1)** Whoever, having been released from custody under ch. 969, intentionally fails to comply with the *terms of his or her bond* is:
> (a) If the offense with which the person is charged is a misdemeanor, guilty of a Class A misdemeanor.

(b) If the offense with which the person is charged is a felony, guilty of a Class H felony.

(Emphasis added.)

Chapter 969 describes the procedures regarding "Bail and Other Conditions of Release." The chapter lays out clear distinctions for legal terms: "bail," "bond," and "conditions of release." "Bail" is the amount of monetary deposit posted or "given" to secure a defendant's appearance. See, Wis. Stats. §§ 969.001(1) ("monetary conditions of release"), 969.01(4) ("amount of bail"), and 969.03(3) ("bail has been given"). An "appearance bond" is a document that is "executed" (*i.e.*, signed) by the defendant. See, Wis. Stat. § 969.03(1) ("execution of an appearance bond"), and § 969.03(1) ("execution of an appearance bond"). The appearance bond document is a legal form. Wis. Stat. § 969.03(3).

"Conditions of release" are conceptually separated from "bail" and "bond." Indeed, the execution of an appearance bond itself can be a condition of release. See, Wis. Stat. § 969.03(1)(d). Chapter 969's reference to "condition of release" notes that conditions of release may be imposed in addition to setting the bail amount (Wis. Stat. § 969.01(4)) and that conditions of release can be "imposed" apart from the appearance bond (Wis. Stat. § 969.03(1) and 969.03(1)(e)).

The standardized bond form, as "executed" at Barwick's appearance with his signature on April 9, 2015 in Case No. 15CF1521, directed him (in Section "A") to post cash "bail" of $500.00 (R. 5). (A. App. 139). It then imposed four conditions of release in Section "B" and allowed for entry of "Other" conditions, in writing or print, on a blank line in the form, or by an attachment. (A. App. 139) Barwick received notice of and agreed to the four conditions in Section

B (but no others), as evidenced by his signature, and also by the reference to a deputy who furnished him with a copy of the completed form.

But neither the four conditions, nor the "Other" line, imposed a bond "term" that Barwick not use a computer. (A. App. 139).

The Initial Appearance proceeding before Judge Dallet on April 9, 2015 did, however, refer to the court's directive that there be "no use of any computers." (R. 57, p. 5 at lines 18-19) That directive not was incorporated into the written bond form which Barwick had executed. At a motion hearing before Judge Flanagan on May 21. 2015, the directive was repeated as "no use of computer" (R. 59, p. 14, line 20), but again it was not incorporated as a term of the bond.

The prosecutor's closing argument claimed that three emails from a "Zapp9165@aol.com" IP address, that were attributed to Barwick, were sent to a woman acquaintance who knew Barwick, while he was on bond. He then relied solely on the two court directives banning computer use to argue that Barwick therefore had violated the terms of his bond. (R. 53, p. 53, lines 9-18). But the prosecutor did not mention that the actual bond form (A. App. 139) did not have a computer ban in its terms in Section B.

The trial court instructed the jury that the second element of the offense to be proved was that "[d]efendant was released from custody on bond" and that "[t]his requires that after being charged the defendant was released from custody on bond under conditions established by a judge." (R. 53, p. 32, lines 5-8). Then, for the third element, the court instructed that it had to be proved that "the defendant intentionally failed to comply with the *terms of the bond*." (Emphasis added.) (R. 53, p. 32, lines 8-10).

The fact that the written appearance bond (A. App. 139) did not contain a prohibition against Barwick's use of a computer was fatal to the State's case. Although two courts directed that he not use a computer, Wisconsin law distinguishes "bond" from "conditions of release" and he was charged with a bond violation. The jury was instructed that an element of the crime that the prosecution was required to prove beyond a reasonable doubt that he "intentionally failed to comply with the terms of the bond." (R. 47, pp. 31-32).

The distinction between the written bond and its "terms" and orally-imposed conditions of release that are not then incorporated into a written appearance bond for the defendant's acknowledgement and signature, is not an artificial construct. The court in *United States v. Blankenship*, 2009 WL 3103789, at *2 (W.D.Tenn. 2009) explained the importance of the distinction between the terms of the appearance bond and the terms of a "separate release order."

> This Court places significant weight on the fact that the Appearance Bond, the only document applicable to the surety Mr. Blankenship, has as its only condition the Defendant's appearance in court. The Appearance Bond does not include as a condition, and thus Mr. Blankenship did not guarantee, Defendant's compliance with the *other terms of the separate release order*.
>
> (Emphasis added.)

Other courts have also used this rationale, noting that appearance bond terms do not equate with release order terms. See, *e.g.*, U*nited States v. Shah*, 193 F.Supp.2d 1091, 1094 (E.D.Wis.2002) (forfeiture of release bond may not be predicated upon violation of release order, rather forfeiture may be imposed only for violation of condition in the bond; it is not enough to show a violation of a conditions of release order); *United* S*tates v. Pereida*, 75 Fed. Appx. 213 (5th

Cir.2003) (appearance bond was not subject to forfeiture on grounds that defendant did not comply with condition of release, when such condition was not incorporated into the bond.

The prosecution chose to pursue felony bail jumping charges, which impose strict proof requirements as to the element of the offense relating to the terms of the appearance bond. The evidence was insufficient on that element of the offense. The insufficiency of evidence on this element of the crimes charged was raised by motion to dismiss at the close of the State's evidence and motion of acquittal at the close of the trial. (R. 46, p. 73, and R. 47, p. 100-101).

Having made a strategic choice to shoehorn the facts presented by the events surrounding the three emails from the "Zapp9165@aol.com" IP address into bail jumping counts, that expressly required proof that appearance bond "terms" were violated, the convictions cannot stand.

III. Because There was No Evidence in Case Nos. 15CF1521 and 15CF3082 That Barwick Engaged in a "Physical Act" of Domestic Abuse, His Seven Convictions for Domestic Abuse Incidents Were Invalid.

According to Wis. Stat. § 968.075(1)(a), "Domestic abuse" means any of the following engaged in by an adult person against his or her spouse or former spouse, against an adult with whom the person resides or formerly resided or against an adult with whom the person has a child in common:

1. Intentional infliction of physical pain, physical injury or illness.

2. Intentional impairment of physical condition.

3. A violation of s.940.225(1), (2) or (3).

4. A physical act that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1., 2. or 3.

Barwick's trial counsel filed a written motion (R. 10 in Case No. 2015CF1521) and objected to the bindover that followed the preliminary hearing (R. 61 in Case No. 2015CF1521). He argued: "A physical act is required. And the thrust of our motion is that this is not a physical act, this is a crime based on the content of the message; therefore, this should not apply as a felony." (R. 59, p. 4.). The motion was denied (Id., p. 5).

The issue arose again at trial. Each of the trial court's instructions, on the seven counts in Case Nos. 15CF1521 and 15CF3082 related to the domestic abuse element, required that the jury find, if Barwick sent harassing emails to his ex-wife, that the act of communicating or sending those emails to her constituted a "physical act." (R. 53, pp. 10, 13, 16, 19, 24, 27, 30). The court did not define the "physical act" element. Hence, the jury was free to find that the email itself was a physical act, and that the use of speech and language itself can become the prohibited, physical act.

In the trial court's view, to speak is to act physically. Hence, the act of expelling air while shaping one's lips to form words would be a sufficient "physical act," as contemplated by the domestic abuse statute. This would mean that all verbal arguments between domestic partners, even when lacking physical contact or displaying violence, necessarily would be covered as crimes under the statute. But this was and would be an erroneous and prejudicial application of § 968.075(1)(a).

A "physical act" to support domestic abuse penalty enhancement and domestic abuse instruction means an act of physical violence; sending emails or posting messages does not constitute a "physical" act within the meaning of the statute. See, *Bradley v. Flynn*, 2015 WL 137302 (W. D. Wis. Jan. 9, 2015); 1987 Wisconsin Act 346 (statement of legislative intent referring only to acts of "violent behavior" and "violent incidents").

Two unpublished Wisconsin decisions (since July, 2009) provide persuasive support for this proposition. In *State v. Johnson*, 2015 WI App 82, ¶¶ 26-28, 365 Wis.2d 349, 871 N.W.2d 693 (Table), the court observed:

> Johnson's wife testified Johnson "choked" her by placing his hands around her neck and squeezing, causing her pain. Her son similarly testified that he saw Johnson "choking" his mother. Johnson's wife also testified that Johnson barred her from leaving the bedroom and from answering the door when police arrived. The responding officers testified they forced entry to the apartment because they heard arguing and heard a female voice say, "You're choking me."
>
> Based on this evidence, the . . . jury could also have found that Johnson's disorderly conduct constituted an act of domestic abuse—that is, that it was committed against Johnson's wife, and that Johnson intentionally inflicted physical pain, physical injury or illness on his wife; intentionally impaired her physical condition; *or committed a "physical act that caused her reasonably to fear imminent engagement in" similar conduct.* See Wis. Stat. § 968.075(1)(a).
>
> (Emphasis added.)

In *State v. Siekierzynski*, 2016 WI App 80, ¶ 12, 2016 WL 4626487, at *3, the court observed that the offensive communications were accompanied by physical acts:

> Siekierzynski's speech—calling A.B. a "creature," saying "who are you," and telling A.B. that she could leave but the child would remain—occurred in the context of a dispute between two parents over the care for their child. . . The language, *accompanied by Siekierzynski's physical acts* of grabbing or pushing A.B.'s arm, and then blocking her exit from the residence, all in the immediate presence of their child, could reasonably be viewed by the jury as an implied threat that Siekierzynski objected to A.B.'s control of the situation beyond mere argument . . . .

(Emphasis added.)

By comparison, the Wisconsin Supreme Court has ruled that the disorderly conduct statute can be violated, depending on the circumstances, based on speech *or* physical acts. *In re Douglas D.*, 2001 WI 47, ¶ 22, 243 Wis.2d 204, 223–24, 626 N.W.2d 725, 735–36. The decision carries relevance for the current issue because it acknowledges that the act of using speech, that may be disorderly conduct, does not itself constitute the "physical act" to which that statute, Wis. Stat. § 947.01, could otherwise apply. The decision recognizes that a dichotomy between speech and physical acts has been drawn by the legislature. "[T]he statute could be interpreted to apply to disorderly physical acts. . . . *[W]e made clear that the statute also could be applied to speech, unaccompanied by physical acts."* (Emphasis added.)

The same dichotomy should be applied to the email communications attributed to Barwick. Those communications may be speech, but do not prove the physical

acts element. There was no proof whatsoever of any violent act by Barwick against his ex-wife in conjunction with the sending of the email messages. The insufficiency of evidence on this element of the crimes charged was raised by motion to dismiss at the close of the State's evidence and motion of acquittal at the close of the trial. (R. 70, p. 73, and R. 71, p. 100-101 in Case No. 15CF1521).

IV. The Warrants for Yahoo, Google, Facebook, and AOL Message Records Attributed to Barwick Were Invalid Because There Was No Probable Cause That Messages That Were Sent Through Those Providers Were Illegal and Because There Were No Jurisdictional Facts to Support the Warrants.

Evidence obtained by search warrants directed to Yahoo, Google, Facebook and AOL was used to claim that Barwick was the sender of the offending emails and messages. The prosecution used the evidence to point to Barwick as the sender because the same IP address was connected to the messages. The prosecution placed major emphasis on that evidence in its closing arguments. (R. 53. pp. 39-64; 80-94). The evidence never should have been admitted because the warrants themselves were invalid.

As to the October 31, 2014 search warrant for Yahoo, Inc. email records (Milwaukee County Circuit Court Case No. 14SW2814), the prosecution failed to submit facts to show probable cause for a violation of sending obscene, lewd or profane messages. The warrant affidavit relied solely on K. D. 's vague, generalized statement to the affiant that the messages used "profanities" contrary to Wis. Stat. 947.0125(2)(c), without quoting the allegedly offending language, so that the court was wholly dependent on K.

D.'s personal sensitivities or personal opinion as to what constituted a "profanity" or obscene, lewd, or profane language.

As to the August 10, 2015 search warrant for AOL, Inc. email records (Milwaukee County Circuit Court Case No. 15SW2183) and for data to prove the IP address that was attributed to Barwick was the source of emails from Barwick's computer for the bail jumping charges, the prosecution failed to submit facts to show probable cause for violations of defendant's appearance bond. His appearance bond did not impose a condition that he not use a computer and the warrant affidavit recited only that conditions of bail as opposed to bond had been violated by his using a computer to send messages.

As a separate warrant defect in the two above warrants and the search warrants on October 8, 2014 for Google gmail account records, and May 11, 2015 for Facebook account records, the results of which were used as proof that Barwick sent emails or posted messages from certain IP addresses, and that he used a computer to do so, the prosecution also failed to submit jurisdictional facts that are required by Wis. Stat. 968.375(1). For one, there were no facts alleged the IP address providers and Facebook had a "contract with" Barwick or that they "engage[d] in a terms of service agreement with" Barwick sufficient to confer a Wisconsin court's jurisdiction over them. Seond, the prosecution failed to submit proof that "any part of the performance of the contract or provision of service takes place within this state on any occasion." This was a second jurisdictional fact that was missing. There was no assertion that Barwick emails were generated from Wisconsin or that emails were received

while he was in Wisconsin which is required under Wis. Stat. 968.375(1).

In the absence of any evidence that the court had jurisdiction over the foreign corporations, the evidence that was seized or obtained should have been excluded. See, *e.g.*, *United States v. Barber*, 184 F. Supp.3d 1013, 1017-1018 (D. Kansas 2016) (judge in Maryland lacked authority to issue a search warrant to defendant's electronic communications service provider in California, absent presentation of evidence by government that the offense being investigated occurred in Maryland). *Cf.*, *In re Search Warrant,* 2005 WL 3844032 (M.D. Fla. Feb. 13, 2006) (§ 2703(a) permits federal district *court where the alleged crime occurred to issue warrants* for production of electronically stored evidence located in another district*); In re Search of Yahoo, Inc.*, 2007 WL 1539971 (D. Ariz. May 21, 2007) (same).

The evidence generated by the warrants was prejudicial as it was used to prove identity, that Barwick was the person sending the emails. It was a critical piece in the prosecution's case. Had it been excluded, the State could not have tied Barwick to the offending messages by evidence beyond a reasonable doubt.

V. Because the Search Warrant Directed to Barwick's Living Quarters Was Invalid, and Items Seized Were Not Included Within the Scope of the Warrant, the Evidence Introduced in the Bail Jumping Case No. 15CF4127 Was Inadmissible.

Police obtained an August 14, 2015 search warrant (Milwaukee County Circuit Court Case No. 15SW2228) for defendant Barwick's living quarters at his parents' house to seize his computer (R. 31, pp. 67-74 in Case No.

2014CM4275). The warrant's sixteen-line description of what officers could seize only authorized the seizure of computer-related devices, data, and manuals; and officers seized the defendant's desktop computer. But police also seized items relating to lurid, idiosyncratic sexual behaviors, including 23 pairs of women's underwear, which appeared to be worn and soiled with bodily fluids and baggies with pubic hairs.

Defense counsel orally objected to the admission of the controversial items as evidence, as they were not described in the warrant as the type of evidence which officers could seize, and so that the seizures exceeded the authorized scope of the warrant. (A. App. 127, 129). The court denied the suppression motion (A. App. 130-131), in part as untimely..

In his post-conviction motions Barwick renewed his oral motion. Judge Havas noted how the prosecution made use of the seized evidence in her post-conviction motion decision (A. App. 103):

> A majority of the e-mails [from the seized computer] were sexual in nature and involved the defendant inquiring about purchasing used female panties with a "hint of pee wipe" or· "pussy hair trimmings." [The] warrant was executed at the defendant's residence where officers discovered six pairs of women's underwear, which appeared to be worn and soiled with bodily fluids. The officers seized the defendant's desktop computer and determined that the all of the emails originated from the residence.

The court also received the evidence, over defense motion *in limine* objections, and instead adopted the prosecution's view that, despite the prejudicial nature of the

evidence, revealing Barwick's sexual behaviors and interests that were likely to inflame the jury against him, it was relevant to proving the identity of the sender of the AOL messages.

The warrant was invalid for several reasons. As previously argued, the prosecution failed to submit facts to show probable cause that Barwick violated his appearance bond because his appearance bond did not impose a condition that he not use a computer. The affidavit supporting the house warrant relied solely on the bail jumping theory that Barwick had violated his bond terms by sending AOL.com emails. (Officer Fohr affidavit, ¶¶ 3, 5, 6.) Yet, there was no probable cause that the appearance bond terms had been violated.

Second, the law enforcement officers who executed the search warrant unlawfully exceeded its scope by seizing non-computer-related items of evidence, as those items did not relate to his computer, but instead related to his specific sexual behaviors. The particularity requirement of the Fourth Amendment satisfies the objective of preventing general searches, and the seizure of objects different from those described in the warrant. *State v. Petrone*, 161 Wis.2d 530, 540, 468 N.W.2d 676 (1991), *cert. denied*, 502 U.S. 925, 112 S.Ct. 339, 116 L.Ed.2d 279 (1991). A search "must be conducted reasonably and appropriately limited to the scope permitted by the warrant." *Id.* at 542, 468 N.W.2d 676. The officers exceeded the boundaries set by *Petrone*.

The evidence was prejudicial as it was used as proof that the identity of the person sending the email was the defendant. As to the sexual behaviors evidence, it was prejudicial because it was likely to shock, inflame and bias the jury against the defendant out a sense of revulsion at what

the prosecution asserted were his unconventional, idiosyncratic sexual interests.

VI. Barwick Was Denied His Constitutional Right to Present a Defense in the Bail Jumping Case, No. 15CF4127, When He Was Not Allowed to Testify to Facts and Phenomena Known to Him About His Computer That Were Relevant to Whether Emails Had Been Sent By Another Party.

The defense sought permission to make opening statement remarks and to submit testimony from Barwick that: (1) the emails at issue could have been generated from outside sources (e.g., "spoofing") and other than the internet protocol addresses which were attributed as the sources, (2) Barwick had observed activity on his computer screen during times relevant to the charges against him that appeared to be generated from outside sources (e.g., "hacking'), and (3) Barwick had lost a folder containing computer access identifiers and passwords that could have been the means of access to his computers by third parties.

The parties debated the admissibility of Barwick's proposed testimony in pretrial proceedings (A. App. 111-114; 119-121; 132-137). The court, at various stages, then denied the defense arguments and prohibited Barwick from testifying on these subjects because it believed the testimony would be too speculative and irrelevant (A. App. 123-124; 137), and because there was no foundation for its admission through expert opinion evidence (A. App. 111-113).

The right of the defendant to testify in support of his defense was discussed in *Rock v. Arkansas*, 483 U.S. 44, 55 (1987), where the Supreme Court stated that "a State * * * may not apply a rule of evidence that permits a witness to

take the stand, but arbitrarily excludes material portions of his testimony." Here, the trial court arbitrarily applied the rule regarding relevant evidence to bar defendant from testifying.

Defendant's testimony, contrary to the court's ruling denying his right to testify on these subjects, was relevant to the issue of whether it was he or someone else who sent the emails as charged. His proposed testimony was based on his own first-hand observations regarding emails being generated from outside sources (e.g., "spoofing") and other than the internet protocol addresses which were attributed as the sources, and that he defendant observed activity on his computer screen during times relevant to the charges against him that appeared to be generated from outside sources (e.g., "hacking'), and that he had lost a folder containing computer access identifiers and passwords. The court instead based its denial of his right to testify that his testimony would not have been credible, which was an issue for the jury, not the court, and that his testimony had to have first been supported by expert opinion testimony.

Barwick had in fact raised a credible defense to the charges. Numerous courts have recognized that wireless internet networks and connections by IP addresses are unsecure and can be accessed by third parties other than the accused. See, e.g., *United States v. Griswold*, 2011 WL 7473466, at *1 (W.D.N.Y. June 2, 2011) ("Concerned that the IP address under investigation could have been accessed by someone not associated with the residence, [officers] decided to knock on the door of the residence and try pursuing their investigation without a search warrant."); *United States v. Grant,* 218 F.3d 72, 75 (1st Cir.2000) (acknowledging that a user other than an account registrant may have access to a

registrant's account); *State v. Bailey*, 2010 ME 15, ¶ 5, 989 A.2d 716, 719 ("The officers did not discover either the target computer or any child pornography during the execution of the warrant; instead, they determined that the IP address sharing the files was associated with an unsecured wireless router located at that residence. In other words, someone within range of the router was using it to access a peer-to-peer network and disseminate the files in question.").

VII. Barwick Demonstrated Adequate Grounds to Support His Motion Sever the Several Cases for Trial and His Motions *In Limine*, Due to the Unrelated Nature of the Evidence and the Inflammatory Nature of Evidence That Was Not Common to All Cases That Were Joined For Trial.

At the preliminary hearing on July 28, 2015 the court ordered, over defense objection, that the four cases would be joined for trial (R. 61 in Case No. 15CF1521, p. 20; R. 44 in Case No. 15CF3082, p. 20; R. 37 in Case No.15CF4127, p. 20). Objections to joinder of the cases for trial also were lodged by written defense motions to sever (R. 19 in Case No. 14CM4275; R. 27-28, Case No. 2015CF1521; R. 20-21 in Case No. 15CF3082; R. 16 in Case No. 2015CF4127), that objected to the joinder of the misdemeanor case with the felonies. Defense motions *in limine* raised the same issues of prejudice that would arise from the introduction of "other acts evidence" due to joinder of the unrelated counts for trial that were referenced in the severance motions (R. 16 in Case No. 14CM4275; R. 17, Case No. 2015CF1521; R. 9, 17, 18 in Case No. 15CF3082). The State's motions *in limine* and Wis. Stat. 904.04 "Other Acts" motions requested permission to introduce the "other acts evidence" from the unrelated counts in a single trial (R. 16 and 18, Case No. 14CM4275; R. 18, 25, 26 in Case No. 15CG1521; R. 10, 19 in Case No.

2015CF3082; and R. 6, 15 in Case No. 15CF154127). The defense severance grounds asserted that joinder of so many counts for trial would lead to a prejudicial cumulative effect that would bias the jury to believe, due to the number of counts, that Barwick must have been guilty.

Each side's opposing "Other Acts" motions *in limine* debated whether the admission of so many various emails or messages would lead to jury confusion (the defense argument), or would be relevant to showing that the messages came from a uniquely-assigned IP address for Mr. Barwick's computer for purposes of proving identity (the prosecution argument). The motions *in limine* also debated whether evidence of Barwick's online purchase orders for public hair samples and women's soiled underwear, and his possession at his living quarters of baggies with pubic hair, used women's underwear, pornography, used panty liners, and lubricant fluids would be unduly prejudicial and inflammatory (the defense argument), or would be relevant to bolstering the State's contention that computer-generated emails to an acquaintance came from Barwick because the purchase order items and items in his possession were mentioned in the emails (the prosecution argument).

Defense motions *in limine* also objected to "other acts" evidence being introduced of a Facebook message that was sent to Barwick's father-in-law, in which the ostensible sender (which the State claimed was an assumed identity used by Barwick) matched messages to his ex-wife. The issue of severance of the bail jumping case from the other charges for trial also was raised by oral defense motions (R. 44, p. 11 in Case No. 15CF 4127).

In pretrial rulings the trial court denied the defense motions to sever and *in limine* and granted the State's motion *in limine* on these issues. (A. App. 115-118; 126-128).

Barwick had a right to testify as to charges in Case Nos. 15CF1521 and 15CF3082 involving his ex-wife's allegations of domestic abuse injunction violations, concealed identity emails, and stalking. He also had a right to assert the privilege against self-incrimination as to emails to attorney K. D. (Case No. 14CM4275) and as to his AOL.com emails (Case No. 15CF4127). Because the Case Nos. 14CM4275 and 15CF4127 charges were not severed for trial from the other two cases, his compelled testimony as to those charges was prejudicial to his defense. See, *Holmes v. State*, 63 Wis.2d 389, 396-97, 217 N.W.2d 657 (1974).

In support of this ground defendant attached his affidavit to the post-conviction motion in Case. No. 14CM4275 (R. 31) which showed that had he known of his right to assert a privilege against self-incrimination, he would have considered doing so as to the charges in Case Nos. 14CM4275 and 15CF4127. By invoking his privilege, he could have retained his right not to testify separately to those charges and would not have had to give testimony and to undergo cross-examination because they were joined with Case Nos. 15CF1521 and15CF3082; instead he was compelled to give incriminating answers that, as to Case No. 14CM4275, he had sent four of five emails in the State's exhibits and, as to Case No. 15CF4127, that he knew that a court made it a condition of his bail in February, 2015 that he not use a computer. His own testimony was prejudicial to his defense, and was avoidable had his severance motion been granted.

Further, none of the charges is those latter cases were "of the same or similar character" or were "based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan" as charged in Case Nos. 15CF1521 and 15CF3082. See, Wis. Stat. § 971.12. In particular, the bail jumping charges in Case No. 15CF4127 did not involve evidence of emails to Barwick's ex-wife, so judicial economy factors favoring her having to testify just once were not at play; there was no commonality because the emails were not alleged to involve domestic abuse of any kind, much less towards his ex-wife; the email content concerned idiosyncratic sexual behaviors, not threats; and the alleged unlawfulness of the emails related to alleged 2015 bond condition violations, and not to the 2013 domestic abuse injunction. There was no commonality between the charges in 15CF4127 and 15CF1527 and 3082.

Finally, the evidence did not substantially overlap as evidence as to Case Nos. 14CM4275 and 15CF4127 was not admissible in Case Nos. 15CF1521 and15CF3082 under Wis. Stat. § 904.04(2), had the trial court properly ruled on the "other acts" motions in limine.

The circuit court rejected Barwick's contention that his affidavit's averments added new substance to the severance issues. As to Case No. 14CM4275, the court reasoned, "a decision to remain silent to the charge . . . would not have been a viable strategy because the jury would heard uncontroverted evidence about . . . sending harassing emails to his ex-wife contemporaneous with the child placement hearing and contemporaneous with the emails sent to Attorney D. . . ." (A. App. 105). As to Case No. 15CF4127, the court reasoned, "remaining silent at a separate trial in 15CF4157 would not have been a viable defense strategy

because the jury would have heard uncontroverted evidence from the State's presentation of other acts evidence in 15CF1521." However, the court did not respond to Barwick's point. His point was that he was prejudiced in the trial of Case Nos.15CF1521 and 15CF3082, by his having to testify and deny the facts in Case Nos. 14CM4275 and 15CF4127 before a jury.

Barwick's post-conviction affidavit demonstrated how prejudice did arise from the joinder of the cases, as outlined above. It also arose because of a lack of commonality between Case Nos. 14CM4275 and 15CF4127 and the domestic abuse violation cases. Joinder is only permitted if under Wis. Stat. § 971.12(1) crimes "are of the same or similar character or are based on the same act or transaction or on [two] or more acts or transactions connected together or constituting parts of a common scheme or plan."

VIII. The Circuit Court Committed Reversible Erred by Not Conducting a *Machner* Hearing to Determine Whether There Were Adequate Strategic Reasons For Defense Counsel's Waiver of Objections or For Not Raising Viable Issues.

Barwick's post-conviction motion alleged sufficient facts on its face that entitled him to relief. See *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

The post-conviction motion and the trial court's decision showed that trial counsel:

- Withdrew the Case No. 14CM4275 severance motion for no apparent strategic reason;

- Made an untimely, oral severance motion in Case No. 15CF4127 (despite substantial grounds for the motion, as argued above);

- Made an untimely motion to suppress evidence in Case No. 15CF4127;

- Did not argue a viable defense to the jury that the email in case No. 14CM4275 was neither obscene nor profane, and did not seek jury instructions defining those terms that would have favored Barwick;

- Did not argue to the jury in Case No. 15CF4127 that there was no appearance bond term prohibiting Barwick's use of a computer and introduce the bond form itself in evidence to prove that there was no appearance bond term prohibiting computer use;

- Did not argue to the jury in Case Nos. 15CF1527 and 3082 that Barwick did not commit any "physical act" and that sending an email in and of itself is not a "physical act" but is instead speech, and did not seek jury instructions defining "physical" and "act" that would have favored Barwick; and

- Did not seek to suppress the results of the Yahoo, Google, Facebook and AOL search warrants and the residence warrant on the grounds for suppression argued above.

In these circumstances Barwick was entitled to a *Machner* testimonial hearing to explore whether counsel had

valid, strategic reasons for these omissions. *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that: (1) counsel's conduct constituted deficient performance; and (2) the defendant was prejudiced as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must demonstrate that counsel's actions or inactions were outside the wide range of professionally competent assistance. *Id*. at 690. To establish prejudice, the defendant must demonstrate 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.

Barwick's post-conviction motion made that demonstration.

IX. Barwick's Convictions Should Be Reversed Because The "Plain Error" Doctrine.

Wisconsin has a plain error doctrine. See, *e.g.*, *State v. Jorgensen*, 2008 WI 60, ¶¶20-52, 310 Wis. 2d 138, 754 N.W.2d 77); *State v. King*, 205 Wis. 2d 81, 87-96, 555 N.W.2d 189 (Ct. App. 1996). Wis. Stat. § 901.03(4) also recognizes the plain error doctrine. The doctrine allows appellate courts to review errors that were otherwise waived by a party's failure to object. *State v. Mayo*, 2007 WI 78, ¶29, 301 Wis. 2d 642, 734 N.W.2d 115.

Plain error is "'error so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time.'" *State v. Sonnenberg*, 117 Wis.

2d 159, 177, 344 N.W.2d 95 (1984) (citation omitted). The error, however, must be "obvious and substantial." *Id.* For example, "'where a basic constitutional right has not been extended to the accused,'" the plain error doctrine should be utilized." If a defendant shows that the error for which no objection was made is fundamental, obvious, and substantial, the burden then shifts to the State to show the error was harmless. *State v. King*, 205 Wis. 2d at 93.

It cannot be concluded beyond a reasonable doubt that the errors of the trial court and trial counsel, discussed above, did not contribute to the verdicts in this case. That is the applicable test. See, *State v. Mayo*, 2007 WI 78, ¶ 47, 301 Wis.2d 642, 734 N.W.2d 115. The frequency of the errors, the importance of the erroneously admitted evidence, that taint resulting from the inadmissible evidence, and the adverse effects of these errors on Barwick's defenses and his right to invoke his privilege against self-incrimination, support a finding that the errors were not harmless and that plain error was committed in these cases. *Mayo*, 207 WI 78, ¶48.

CONCLUSION

For the above state reasons Brian Barwick requests that this Court reverse his convictions with directions to enter directed verdicts and judgments of acquittal for lack of sufficient evidence; or alternatively, he requests that he be granted new and separate trials, as argued above, and that the seized evidence be suppressed.

Dated this 9th day of October 2017.

Respectfully submitted,

Electronically signed by:

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 9,874 words.

Dated this 9th day of October 2017.

Electronically signed:

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CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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

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