STATE OF WISCONSIN

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

DISTRICT I

Case Nos. 2017AP958-CR, 2017AP959-CR,
2017AP960-CR, 2017AP961-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN A. BARWICK,

Defendant-Appellant.

ON APPEAL FROM JUDGMENTS OF CONVICTION AND ORDERS DENYING POSTCONVICTION ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE MICHELLE ACKERMAN HAVAS, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Wisconsin Attorney General

JEFFREY J. KASSEL
Assistant Attorney General
State Bar #1009170
Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 266-9594 (Fax)
kasseljj@doj.state.wi.us

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Cases

Page

Page

Statutes

Page

ISSUES PRESENTED

1. Was there sufficient evidence to convict defendant-appellant Brian Barwick in case no. 14CM4275 of unlawful use of a computerized communication system?

The circuit court held that the evidence was sufficient to support the conviction.

This Court should affirm the circuit court's ruling.

2. Was there sufficient evidence to convict Barwick of the felony bail jumping charges in case no. 15CF4127?

The circuit court held that the evidence was sufficient to support the convictions.

This Court should affirm the circuit court's ruling.

3. Was there sufficient evidence to support the domestic abuse repeater enhancers in case nos. 15CF1521 and 15CF3082?

The circuit court held that the evidence was sufficient to support the jury's finding that Barwick committed acts of domestic abuse.

This Court should affirm the circuit court's ruling.

4. Was Barwick's trial counsel ineffective for failing to move to suppress the Yahoo, Google, Facebook, and AOL search warrants?

The circuit court held that counsel was not ineffective because it would have denied a suppression motion.

This Court should affirm the circuit court's ruling.

5. Did the seizure of non-computer-related items from Barwick's home unlawfully exceed the scope of the search warrant?

The circuit court held that the police lawfully seized those items because they were evidence of a crime and were in plain view of the officers who were executing the search warrant.

This Court should affirm the circuit court's ruling.

6. Did the circuit court deny Barwick his constitutional right to present a defense when it precluded him from offering testimony that another party may have sent the emails that were the basis of many of the charges?

The circuit court excluded the evidence because Barwick's claim that someone else generated the emails was speculative and "totally unsubstantiated by any evidence."

This Court should affirm the circuit court's ruling.

7. Is Barwick entitled to a new trial because case nos. 2014CM4275 and 2015CF4127 were joined for trial with case nos. 2015CF1521 and 2015CF3082?

The circuit court ruled that the cases were properly joined for trial and that trial counsel was not ineffective for withdrawing the motion to sever case no. 2014CM4275.

This Court should affirm the circuit court's ruling.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication of this Court's decision.

INTRODUCTION

While Barwick's divorce was pending, his wife obtained a restraining order barring him from contacting her. Barwick nevertheless sent her emails and left voicemail messages; some of those emails purported to come from

someone other than Barwick. He also sent a threatening, obscenity and profanity laden email to the guardian ad litem in the divorce case. After Barwick was released on bail under a condition that he not use a computer, he sent emails to a woman he met online.

The State charged Barwick in four cases with a total of 11 counts: four counts of unlawful use of a computerized communication system; three counts of knowingly violating a domestic abuse injunction; one count of stalking; and three counts of felony bail jumping. The four cases were consolidated for trial and a jury convicted Barwick on all counts.

Barwick raises seven issues on appeal. He argues that there was insufficient evidence to convict him of one of the counts of unlawful use of a computerized communication system; that there was insufficient evidence to convict him of the three felony bail jumping counts; that there was sufficient evidence to support the domestic abuse repeater enhancers in the counts in which his ex-wife was the victim; that the search warrants directed to Yahoo, Google, Facebook, and AOL were invalid; that police unlawfully seized non-computer-related items from his home when executing a search warrant; that the circuit court denied him his constitutional right to present a defense when it precluded him from offering testimony that another party may have sent the emails that were the basis for some of the charges; and that he is entitled to a new trial because the circuit court did not sever two of the cases from the trial of the two other cases. Barwick also makes a catchall argument that he is entitled to a hearing on his claim that his trial counsel was ineffective for failing to raise any issues that were not preserved.

This Court should affirm the judgments of conviction and the order denying postconviction relief. Barwick is not entitled to relief on any of his preserved claims because the circuit court did not err and because, if the circuit court did err, any error was harmless. He is not entitled to an evidentiary hearing on his global ineffective assistance of counsel claim because the record conclusively demonstrates that his counsel did not perform deficiently.

Barwick's brief ends with a second catchall argument that all of the "errors of the trial court and trial counsel" discussed in his brief constitute plain error. (Barwick's Br. 45–46.) Because Barwick does not develop that argument beyond his conclusory assertion that all of the errors were plain error, the State does not address Barwick's plain error claim. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (this Court does not consider undeveloped arguments).

STATEMENT OF THE CASE

Case no. 2014CM4275. Barwick was charged in case no. 2014CM4275 with one count of unlawful use of a computerized communication system, in violation of Wis. Stat. § 947.0125(2)(c). (17AP958, R. 23:1.)[1] The complaint alleged that on October 6, 2014, "with the intent to frighten, intimidate, threaten, or abuse another person," Barwick "sent a message to that person on an electronic mail or other computerized communication system, and in that message used obscene, lewd, or profane language." (*Id.*)

[1] The State's references to the record use the document and page numbers in the electronically filed record.

The complaint alleged that Barwick sent five emails to Attorney K.D., who was the guardian ad litem in Barwick's child custody case, all of which were sent to him from the "brianbarwick@yahoo.com" email address (*Id.*) The fifth email reads in part:

> People like you should be lynched. I would also recommend that Judge Rosa have me dO random drug and alcohol tests on you as well as asshole testes. YOu wiill faril I \FUCKING HATE YOU YOU MUTHERFUCKING ASSHOLE4. EAT MY SHT BASTARD!!@!@ yOU ARE A PIECE Of shit and the devil will get you. I will be there to set you on fire you FUCK ASS.

(17AP958, R. 23:1–2.)

Case no. 2015CF1521. Barwick was charged in case no. 15CF1521 with two counts of knowingly violating a domestic abuse injunction, in violation of Wis. Stat. § 813.12(8), and two counts of unlawful use of a computerized communication system with intent to frighten, intimidate, threaten or abuse, while concealing identity, in violation of Wis. Stat. § 947.0125(2)(e). (17AP959, R. 1:1–3.) All four counts were charged as a domestic abuse repeater under Wis. Stat. § 939.621. (17AP959, R. 1:1–3.)

The complaint alleged that in March 2013, a domestic abuse injunction had been issued that prohibited Barwick from contacting R.B. (17AP959, R. 1:4.) On October 2, 2014, Barwick and R.B. were in court in their divorce case for a decision on child placement. (*Id.*) R.B. subsequently received two emails from "JACK WALDEN longerone69in @gmail.com," which she suspected had been sent by Barwick. (*Id.*)

The police subsequently executed search warrants for Barwick's known Yahoo email address and the Gmail

address shown in the emails sent to R.B. (*Id.*) Information obtained from Yahoo and Google indicated that the same IP address was associated with both accounts. (*Id.*)

Case no. 2015CF3082. Barwick was charged in case no. 2015CF3082 with one count of stalking, in violation of Wis. Stat. § 940.32(2m)(b), one count of knowingly violating a domestic abuse injunction, in violation of Wis. Stat. § 813.12(8), and one count of unlawful use of a computerized communication system with intent to frighten, intimidate, threaten or abuse, while concealing identity, in violation of Wis. Stat. § 947.0125(2)(e). (17AP960, R. 7:1–2.) All counts were charged as a domestic abuse repeater under Wis. Stat. § 939.621. (*Id.*)

The complaint alleged that on February 26, 2013, the day on which Barwick and R.B. had a child custody hearing, Barwick left four voice messages on R.B.'s home and cell phones in which he said, among other things, "I will hunt you down. I will kill you" and "you better fucking put blin[d]s on the back doors because I guarantee I'm coming. (17AP960, R. 7:3–4 (uppercasing omitted).)

The complaint further alleged that on August 31, 2014, R.B. received a threatening message on her Facebook account. (17AP960, R. 7:5.) Although the sender's Facebook user name was "John Wheaton," the account name listed in the browser address bar was "Jack.Walden.161," which was the user name associated with the threatening emails R.B. received on October 2 and 5, 2014. (*Id.*) Police obtained a warrant for the Facebook account associated with "Jack.Walden.161." (*Id.*) The return on that warrant revealed that the Facebook messages were sent from the same IP address associated with Barwick's known email account. (*Id.*)

Case no. 2015CF4127. Barwick was charged in case no. 2015CF4127 with three counts of felony bail jumping for using a computer on three different dates in violation of the conditions of his release in case no. 15CF1521. (17AP961, R. 1:1.)[2] According to the complaint, police were alerted to Barwick's computer activity by a woman who explained that she had made contact with Barwick through an online dating site. (R. 1:2.) Barwick used the email account "zapp1965@aol.com" to contact her. (*Id.*)

After serving a warrant on AOL, police discovered 344 emails sent from the zapp1965@aol.com email address, all of which originated from same IP address. (R. 1:3.) Most of the AOL e-mails were sexual in nature and involved Barwick inquiring about purchasing used female panties with a "hint of pee wipe" or "pussy hair trimmings." (R. 1:3.) When police executed a search warrant at Barwick's residence, officers seized 23 pairs of women's underwear, which appeared to be worn and soiled with bodily fluids, and a bag containing what appeared to be pubic hair trimmings. (R. 1:4; 48:45–49.)

Barwick was convicted following a jury trial on all of the charges. (R. 49:95–98.) The circuit court imposed sentences totaling seven years of initial confinement and seven years of extended supervision. (R. 51:65.)

Barwick filed postconviction motions in all four cases in which he alleged multiple grounds for relief. (17AP958, R. 32:1–7; 17AP959, R. 52:1–6; 17AP960, R. 37:1–6; 17AP961, R. 32:1–7.) In two of those cases, nos. 14CM4275

[2] Except where otherwise indicated, all subsequent record citations are to the record in appeal no. 2017AP961-CR.

and 15CF4127, he also included catchall claims of ineffective assistance of counsel and plain error if any of those issues were not preserved. (17AP958, R. 32:1–7; 17AP961, R. 32:8.) In an order entered on May 8, 2017, the circuit court denied the motions without a hearing. (17AP958, R. 33:1–10, A-App. 101–10; 17AP959, R. 53:1–10; 17AP960, R. 38:1–10; 17AP961, R. 33:1–10.)

STANDARD OF REVIEW

Sufficiency of the evidence. Whether the evidence is sufficient to sustain a guilty verdict is a question of law that this Court reviews de novo. *State v. Smith*, 2012 WI 91, ¶ 24, 342 Wis. 2d 710, 817 N.W.2d 410.

Statutory interpretation. Statutory interpretation presents a question of law that this Court reviews de novo. *State v. Hemp*, 2014 WI 129, ¶ 12, 359 Wis. 2d 320, 856 N.W.2d 811.

Ineffective assistance of counsel. Whether a lawyer rendered ineffective assistance is a mixed question of law and fact. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The circuit court's findings of fact will be upheld unless they are clearly erroneous. *Id.* Whether the defendant's proof satisfies either the deficient performance or the prejudice prong is a question of law that this Court reviews without deference to the circuit court's conclusions. *Id.* at 128.

Evidentiary rulings. This Court reviews a circuit court's ruling on the admissibility of evidence under the erroneous exercise of discretion standard. *State v. Ross,* 2003 WI App 27, ¶ 35, 260 Wis. 2d 291, 659 N.W.2d 122. Whether the exclusion of evidence violates a defendant's constitutional right to present a defense is a question of

constitutional fact that this Court reviews de novo. *State v. Dodson*, 219 Wis. 2d 65, 69–70, 580 N.W.2d 181 (1998).

Severance of charges. This Court reviews a circuit court's decision on a motion for severance under the erroneous exercise of discretion standard. *See State v. Hall*, 103 Wis. 2d 125, 140, 307 N.W.2d 289 (1981).

Issuance of a search warrant. An appellate court "accord[s] great deference to the warrant-issuing judge's determination of probable cause, and that determination will stand unless the defendant establishes that the facts are clearly insufficient to support a finding of probable cause." *State v. Multaler*, 2002 WI 35, ¶ 7, 252 Wis. 2d 54, 643 N.W.2d 437.

Harmless error. Whether an error is harmless is a question of law that this Court reviews de novo. *State v. Moore*, 2015 WI 54, ¶ 54, 363 Wis. 2d 376, 864 N.W.2d 827.

Entitlement to a postconviction hearing. Whether a defendant's postconviction motion alleges sufficient facts to entitle him to an evidentiary hearing is a question of law that this Court reviews de novo. *State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996).

ARGUMENT

I. There was sufficient evidence to convict Barwick in case no. 14CM4275 of unlawful use of a computerized communication system.

Barwick was convicted in case no. 2014CM4275 of one count of unlawful use of a computerized communication system, in violation of Wis. Stat. § 947.0125(2)(c), based on

an email he sent to K.D.[3] The complaint alleged that "with the intent to frighten, intimidate, threaten, or abuse another person," Barwick "sent a message to that person on an electronic mail or other computerized communication system, and in that message used obscene, lewd, or profane language." (17AP958, R. 23:1.)

Although his brief does not include a description of the content of the email, Barwick argues that there was insufficient evidence to convict him of this offense because the email did not use obscene or profane language. (Barwick's Br. 19–24.) (He says nothing about lewd language.) This is some of what Barwick wrote to K.D.:

> People like you should be lynched. I would also recommend that Judge Rosa have me dO random drug and alcohol tests on you as well as asshole testes. YOu wiill faril I \FUCKING HATE YOU YOU MUTHERFUCKING ASSHOLE4. EAT MY SHT BASTARD!!@!@ yOU ARE A PIECE Of shit and the devil will get you. I will be there to set you on fire you FUCK ASS.

(17AP958, R. 23:1–2.)

---

[3] Wisconsin Stat. § 947.0125(2)(c) provides:

> (2) Whoever does any of the following is guilty of a Class B misdemeanor:
>
> . . . .
>
> (c) With intent to frighten, intimidate, threaten or abuse another person, sends a message to the person on an electronic mail or other computerized communication system and in that message uses any obscene, lewd or profane language or suggests any lewd or lascivious act.

A. There was sufficient evidence to convict Barwick of sending an obscene email in violation of Wis. Stat. § 947.0125(2)(c).

Barwick argues that the evidence was insufficient to convict him of using obscene language because his email did not meet the "constitutional standard that applies to obscenity and obscene language" under *Miller v. California*, 413 U.S. 15 (1973). (Barwick's Br. 20.) But even if the *Miller* standard applies in this case were correct, he does not explain why his email, whose content he neither quotes nor describes, fails to meet that standard. This Court does not consider undeveloped arguments. *See Pettit*, 171 Wis. 2d at 646.

Moreover, Barwick's legal premise that the *Miller* standard applies is wrong. The only case he cites, *Barson v. Commonwealth*, 726 S.E.2d 292 (Va. 2012), held that the *Miller* test applied to Virginia's computer harassment statute as a matter of statutory construction, not because that standard was constitutionally required. *See id.* at 294–96. Barwick argues, in contrast, that the *Miller* standard is constitutionally required, not that it applies as a matter of statutory construction. (Barwick's Br. 19–21.)

Courts in other states have rejected the argument that the constitutional obscenity standard applies to statutes prohibiting obscene electronic or telephonic communications made with the intent to harass, threaten, or other improper purpose. *See, e.g.*, *Baker v. State*, 494 P.2d 68, 70–71 (Ariz. Ct. App. 1972); *People v. Hernandez*, 283 Cal. Rptr. 81, 85–87 (Cal. Ct. App. 1991); *People v. Kucharski*, 987 N.E.2d 906, 916–18 (Ill. App. Ct. 2013); *State v. Kipf*, 450 N.W.2d 397, 404–05 (Neb. 1990); *State v. Crelly*, 313 N.W.2d 455, 456 (S.D. 1981). Rather, those decisions hold, the common or

dictionary definition of "obscene" applies to such statutes. *See id.*

Kucharski is illustrative of those courts' reasoning. The defendant in *Kucharski* was convicted of violating a statute that prohibits the use of electronic communications to make any comment "which is obscene with an intent to offend." *Kucharski*, 987 N.E.2d at 913. He argued that the evidence was insufficient to support his conviction because his electronic communications were not obscene under the *Miller* standard. *Id.* at 913, 916.

In rejecting that argument, the Illinois Appellate Court noted that electronic harassment statutes and obscenity statutes have different purposes. The purpose of the harassment statute is "to prevent the personal invasion into people's homes and lives by harassing communication via telephone or other electronic devices," while the purpose of the obscenity statute is "to control the commercial dissemination of obscenity." *Id.* at 917. The court held that the harassment statute is "directed not at the communication of thoughts or ideas but at conduct, namely, the use of the telephone to offend people by the use of obscene language." *Id.* (citing *Baker*, 494 P.2d at 70).

The court held that because the electronic harassment statute included a specific intent element, it was "primarily concerned with regulating conduct rather than regulating the communication of thoughts or ideas." *Id.* at 918. Intentionally harassing conduct, the court further held, was not constitutionally protected. *Id.* Accordingly, the court concluded, "the *Miller* standard has no application here. Rather, 'obscene' as used in the electronic harassment statute should be afforded its ordinary dictionary definition." *Id.*

Wisconsin's statute likewise contains an intent element: it prohibits sending an email message that uses obscene, lewd, or profane language "[w]ith intent to frighten, intimidate, threaten or abuse" the recipient. Wis. Stat. § 947.0125(2)(c). Unlike Wisconsin's obscenity statute, whose primary purpose is "to combat the obscenity industry," Wis. Stat. § 944.21(1), the purpose of Wis. Stat. § 947.0125(2)(c) is to protect individuals from receiving harassing electronic communications. The statute is "primarily concerned with regulating conduct rather than regulating the communication of thoughts or ideas." *Kucharski*, 987 N.E.2d at 918.

The intentionally harassing conduct prohibited by Wis. Stat. § 947.0125(2)(c) is not constitutionally protected. *See Kucharski*, 987 N.E.2d at 918. Accordingly, "obscene" as used in the statute "should be afforded its ordinary dictionary definition." *Id.*

That conclusion is reinforced by our supreme court's recent decision in *State v. Breitzman*, 2017 WI 100, __ Wis. 2d __, 904 N.W.2d 93. Breitzman was convicted of disorderly conduct for "engaging in 'profane conduct, under circumstances in which such conduct tended to cause a disturbance.'" *Id.* ¶ 13. Breitzman was convicted of that offense for calling her teenage son a "fuck face," "retard," and a "piece of shit" after he burned popcorn in a microwave oven. *Id.* ¶ 18.

Breitzman argued that her trial counsel was ineffective for failing to move to dismiss the disorderly conduct charge on free speech grounds. *Id.* ¶ 40. The supreme court concluded that counsel was not ineffective "because whether profane conduct that tends to cause or provoke a disturbance is protected as free speech is unsettled law." *Id.* ¶ 48.

In its analysis of that issue, the court "recognize[d] . . . that the use of profanity alone is not enough to sustain a charge for disorderly conduct" because disorderly conduct "has two elements: first, that the defendant 'engage[d] in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct; second, that the defendant's conduct 'tends to cause or provoke a disturbance.'" *Id.* ¶ 57 (quoting Wis. Stat. § 947.01(1)). The court observed that "[p]rofanity alone might satisfy the first element, but it does not likely satisfy the second element." *Id.*

"Thus," the court held, "it is not profanity alone that is being regulated by the statute." *Id.* "Breitzman's conduct was more than just profanity, and the law does not support the notion that, because Breitzman engaged in profane conduct, she is to be protected from prosecution regardless of the fact that the circumstances tended to cause or provoke a disturbance." *Id.* ¶ 61; *see also Board of Regents-UW Sys. v. Decker*, 2014 WI 68, ¶ 45, 355 Wis. 2d 800, 850 N.W.2d 112 (affirming harassment injunction because the defendant's First Amendment right to protest "can be restricted when he engages in harassment with the intent to harass or intimidate").

Barwick's insufficiency-of-the-evidence claim is limited to his assertion that the email he sent to K.D. did not use obscene language under the *Miller* test. He does not argue that there was insufficient evidence that the language in that email was "obscene" under an ordinary dictionary definition of that term. This Court should conclude, therefore, that there was sufficient evidence to convict Barwick of violating Wis. Stat. § 947.0125(2)(c).

B. There was sufficient evidence to convict Barwick of sending a profane email in violation of Wis. Stat. § 947.0125(2)(c).

Barwick argues in the alternative that "[t]he 'profane' language option in Wis. Stat. § 947.0125(2)(c) . . . could not have been the basis for [his] conviction." (Barwick's Br. 21.) He offers three reasons for that contention, all of which lack merit.

First, Barwick argues that "[t]here should be no need to inquire further about whether an alternative kind of prohibited language, profanity, was proven." (Barwick's Br. 21.) That is so, he argues, because "[t]he jury was not instructed to consider that form of proof and its verdict cannot be rewritten to read that it somehow adjudged Barwick guilty of using some sort of language other than obscenity." (*Id.* at 21–22.) He bases that argument on the verdict form, which states, "We, the jury, find the defendant, Brian A. Barwick, guilty of Unlawful Use of Computerized Communication System: Use of Obscene Language, as charged in count one of the complaint." (17AP958, R. 22:1.)

Barwick is correct that this Court need not inquire whether there was sufficient evidence that Barwick used profane language, but for a different reason: there was sufficient evidence that he used obscene language. In the interest of completeness, however, the State notes that Barwick's assertion that the jury was not instructed about profane language is wrong. The jury was instructed that the third element of the offense was that "in sending the message, the defendant used any obscene, lewd, or profane language." (R. 49:8.) This Court "presume[s] that the jury follows the instructions given to it." *State v. Truax*, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989).

Barwick cites no authority for his assertion that the verdict form's shorthand description of the charge means that the jury's finding of guilt was limited to obscene language. This Court does not consider arguments unsupported by references relevant legal authority. *See Pettit*, 171 Wis. 2d at 646.

Second, Barwick argues that his email was not profane because it was not blasphemous. (Barwick's Br. 22.) But by any common understanding of the English language, Barwick's email was a profanity ridden missive. *See Breitzman*, 2017 WI 100, ¶ 18 (profane conduct consisted of calling the victim a "fuck face," "retard," and a "piece of shit").

Third, Barwick also argues that profane language is constitutionally protected unless they constitute "fighting words." (Barwick's Br. 22.) That argument fails because, as discussed above, Wis. Stat. § 947.0125(2)(c) "does not affect [F]irst [A]mendment rights, as it prohibits conduct rather than speech." *Kucharski*, 987 N.E.2d at 919.

C. Barwick's lawyer was not ineffective for failing to request a jury instruction that included constitutional standards for obscene or profane language.

Barwick argues that the jury should have been "instructed about the *Miller* obscenity test or about any profanity definition in order to avoid a First Amendment violation." (Barwick's Br. 24.) But he acknowledges that his trial counsel did not ask for any such instruction. (*Id.* at 44.) Because Barwick did not object to the jury instruction that the circuit court gave, this Court lacks the power to review his challenge directly. *See State v. Schumacher*, 144 Wis. 2d 388, 409, 424 N.W.2d 672 (1988).

In the catchall ineffective-assistance-of-counsel section of his brief, Barwick contends that his lawyer was ineffective for not requesting a jury instruction that incorporated the First Amendment standards he claims apply in this case. (Barwick's Br. 44.) For the reasons discussed above, however, Barwick's conduct was not protected by the First Amendment. Because Barwick was not entitled to a jury instruction that incorporated constitutional standards, his lawyer was not ineffective for failing to request such an instruction. *See State v. Cummings*, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996) ("It is well established that an attorney's failure to pursue a meritless motion does not constitute deficient performance.")

II. There was sufficient evidence to convict Barwick of felony bail jumping in case no. 15CF4127.

Barwick argues that the evidence was insufficient to convict him of bail jumping in case no. 15CF4127 because "the written appearance bond . . . did not contain a prohibition against Barwick's use of a computer." (Barwick's Br. 27.) However, the language of the appearance bond is irrelevant to Barwick's sufficiency-of-the-evidence claim because the bond was not introduced as evidence at trial. Instead, the State introduced, through the testimony of Officer James Fohr, the portion of the transcript of Barwick's April 9, 2015, initial appearance in case no. 15CF1521 in which the court said that, as a condition of release, Barwick was to have "no use of any computers." (R. 48:24–25.) Officer Fohr also read the portion of the transcript of the May 21, 2015, bail/bond hearing in which the court again told Barwick that he could have "no use of a computer." (R. 48:25–26.)

That was sufficient evidence to support Barwick's bail jumping convictions. "The judicial act is complete when the order is announced from the bench. Reducing it to writing is only a ministerial act to preserve the evidence of the order." *State ex rel. Hildebrand v. Kegu*, 59 Wis. 2d 215, 216, 207 N.W.2d 658 (1973).

Barwick's real complaint is that his lawyer was ineffective because he "[d]id not argue to the jury . . . 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." (Barwick's Br. 44.) However, Barwick has not shown that he was prejudiced by counsel's failure to introduce the written bail/bond form. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (a defendant claiming ineffective assistance of counsel must prove both deficient performance and prejudice). Had Barwick's counsel introduced the bail/bond form, the State would have introduced the "Pretrial Electronic Monitoring (GPS) Program Order For Supervision" signed by Barwick and the circuit court that included "no use of any computer" as a condition of Barwick's release. (17AP959, R. 4:1, A-App. 101). The form included a notice that "[a]ny violations of this order or re-arrest for any crime may be grounds for revocation of your release/bail, and prosecution for bail jumping." (*Id.*)

Barwick does not acknowledge that he signed that document. He does cite several federal cases involving bail forfeiture to argue that there is a distinction between appearance bonds and conditions of release. (Barwick's Br. 27–28.) But the release order in those cases "did not . . . mention forfeiture of any bond as a possible consequence of failing to appear." *United States v. Shah*, 193 F. Supp. 2d 1091, 1094 (E.D. Wis. 2002). That is because, under the

federal statutes at issue, "the penalties that flow from failing to appear as directed in a release order are separate and distinct from forfeiture of bond." *Id*. In this case, in contrast, the GPS monitoring order expressly informed Barwick that violation of its conditions, including the no-computer-use condition, "may be grounds for . . . prosecution for bail jumping."

III. There was sufficient evidence to support the domestic abuse repeater enhancers in case nos. 15CF1521 and 15CF3082.

Barwick argues that there was no evidence that he engaged in a "physical act" of domestic abuse in the two cases in which R.B. was the victim. He contends that because there was insufficient evidence that he committed those crimes as acts of domestic abuse, his convictions on all of those charges were invalid and he should be acquitted on those charges. (Barwick's Br. 28, 32.)

As an initial matter, the State notes that even if Barwick were correct that there was insufficient evidence that he engaged in a physical act of domestic violence, that would not invalidate his convictions. The domestic abuse repeater allegation is not, as Barwick contends (*id*. at 32), an element of the underlying offenses. Rather, it provides a penalty enhancer. *See* Wis. Stat. § 939.621(2); *State v. Hill*, 2016 WI App 29, ¶¶ 7–26, 368 Wis. 2d 243, 878 N.W.2d 709. If Barwick were correct, the remedy to which he would be entitled would be commutation of his enhanced sentences to the maximum unenhanced sentences. *See State v. Koeppen*, 195 Wis. 2d 117, 130–31, 536 N.W.2d 386 (Ct. App. 1995) (commuting the defendant's sentences to "the maximums permitted for the two offenses of which he stands convicted"

because the State failed to prove the repeater enhancement).[4]

Wisconsin Stat. § 968.075 defines "domestic abuse" as "any of the following engaged in by an adult person against his or her spouse or former spouse":

> 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.

Wis. Stat. § 968.075(1)(a).

Consistent with that statutory definition, the court instructed the jury that "[f]or a crime to constitute an act of domestic abuse, two things are required: First, it must involve a physical act that may cause the other person reasonably to fear imminent engagement in intentional infliction of physical pain, physical injury, or illness, or intentional impairment of physical condition." (R. 49:24.) "Second, it must have been engaged in by an adult person against his or her spouse or former spouse, against an adult with whom the person resided or had formerly resided, or

---

[4] The domestic abuse repeater enhancement has no bearing on the six-year sentence Barwick received on count one (stalking) in case no. 15CF3082 because that was the maximum unenhanced sentence he could have received. (17AP960, R.8:1, 30:1.) A repeater enhancement is not applicable when the sentence imposed does not exceed the maximum unenhanced sentence for the offense. *See State v. Harris*, 119 Wis. 2d 612, 619, 350 N.W.2d 633 (1984).

against an adult with whom the person has a child in common." (*Id.*)

Barwick does not challenge the sufficiency of the evidence with respect to the second element. Nor, with respect to the first element, does he argue that there was insufficient evidence that his emails "may cause [R.B.] reasonably to fear imminent engagement in intentional infliction of physical pain, physical injury, or illness, or intentional impairment of physical condition." (*Id.*) Those emails contained overtly threatening language, including: "u being watched, will get you soon, know when and where you sleep, uyr time is comin" (17AP959, R. 1:4); "I will hunt you down. I will kill you." (17AP960, R. 7:3 (uppercasing omitted)); "you better fucking put blin[d]s on the back doors because I guarantee I'm coming" (17AP960, R. 7:4 (uppercasing omitted); "We kill you a[n]d [R.B.'s friend]." (17AP960, R. 7:5).

Barwick's argument is limited to his contention that there was insufficient evidence that he engaged in a "physical act" when he sent those emails to R.B. This Court should reject that argument because a jury reasonably could infer from the fact that R.B. received those emails that Barwick engaged in the physical acts of typing the emails' text and clicking the "send" button. *See State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (evidence is sufficient "[i]f any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt").

Barwick also argues that "[a] 'physical act' to support domestic abuse penalty enhancement and domestic abuse instruction means an act of physical violence." (Barwick's Br. 30.) Barwick's interpretation adds words to the statute that are not there. "One of the maxims of statutory construction is that courts should not add words to a statute

to give it a certain meaning." *Fond Du Lac Cty. v. Town of Rosendale*, 149 Wis. 2d 326, 334, 440 N.W.2d 818 (Ct. App. 1989). And while the cases he cites as persuasive authority involve physical acts that were at least somewhat violent, none hold that the "physical act" must be an act of physical violence. *See Bradley v. Flynn*, No. 13-CV-859-BBC, 2015 WL 137302, at *3 (W.D. Wis. Jan. 9, 2015) (pushing victim); *State v. Siekierzynski*, No. 2015AP2350-CR, 2016 WL 4626487, at ¶ 3 (Wis. Ct. App. Sept. 7, 2016) (unpublished) (grabbing victim's arm "very hard" and pushing her) (R-App. 101); *State v. Johnson*, No. 2014AP2888-CR, 2015 WL 5331927, at ¶ 5 (Ct. App. Sept. 15, 2015) (unpublished) (choking victim) (R-App. 105).

IV. Barwick's trial counsel was not ineffective for failing to move to suppress the Yahoo, Google, Facebook, and AOL search warrants.

Barwick argues that "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." (Barwick's Br. 32 (some uppercasing omitted).) He argues that issue as though it had been preserved for appellate review, but it was not. As Barwick acknowledges later in his brief, trial counsel "[d]id not seek to suppress the results of the Yahoo, Google, Facebook and AOL search warrants . . . on the grounds for suppression argued above." (*Id.* at 44.)

"Wisconsin courts have 'continuously emphasized the importance of making proper objections as a prerequisite to assert, as a matter of right, an alleged error on appeal.'" *State v. Saunders*, 2011 WI App 156, ¶ 30, 338 Wis. 2d 160, 807 N.W.2d 679 (citation omitted). "The absence of any

objection warrants that [the court] follow 'the normal procedure in criminal cases,' which 'is to address waiver within the rubric of the ineffective assistance of counsel.'" *State v. Carprue*, 2004 WI 111, ¶ 47, 274 Wis. 2d 656, 683 N.W.2d 31 (citation omitted).

In his penultimate catchall argument that his trial counsel was ineffective, Barwick claims that his trial counsel was ineffective for failing to move to suppress the evidence obtained through the Yahoo, Google, Facebook, and AOL warrants. (Barwick's Br. 32.) This Court should reject that claim because Barwick has not shown either that his lawyer performed deficiently or that he was prejudiced.

A defendant claiming ineffective assistance of counsel must prove both that his lawyer's representation was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland*, 466 U.S. at 687. If the court concludes that the defendant has not proven one prong of this test, it need not address the other. *Id.* at 697.

A. Counsel did not perform deficiently.

Barwick has not demonstrated that his attorney performed deficiently because he has not shown that a motion to suppress the evidence obtained through the Yahoo, Google, Facebook, and AOL search warrants would have succeeded. *See Cummings*, 199 Wis. 2d at 747 n.10.

The Yahoo warrant. Barwick contends the Yahoo warrant affidavit failed to establish probable cause because it relied on the victim's "vague, generalized statement to the affiant that the messages used 'profanities' . . . without quoting the allegedly offending language." (Barwick's Br. 32.) His argument on that point is a mere two sentences that does not include citations to the record or to any legal authority. (*Id.* 32–33.) This Court does not consider

undeveloped arguments or arguments unsupported by references to the record or relevant legal authority. *See Pettit*, 171 Wis. 2d at 646; *State v. Lass,* 194 Wis. 2d 591, 604–05, 535 N.W.2d 904 (Ct. App. 1995).

The AOL warrant. Barwick's argument with respect to the AOL warrant is equally terse. He argues that "the prosecution failed to submit facts to show probable cause for violations of defendant's appearance bond" because "[h]is 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." (Barwick's Br. 33.) That argument fails for the same reason Barwick's argument that the evidence was insufficient to support the bail jumping conviction fails.

Moreover, Barwick's argument is not directed at the warrant affidavit on its face but on his contention that the affidavit misstates or omits facts that would defeat probable cause. A defendant may challenge a search warrant on that basis under *Franks v. Delaware*, 438 U.S. 154 (1978), and *State v. Mann*, 123 Wis. 2d 375, 367 N.W.2d 209 (1985). *See State v. Gordon*, 159 Wis. 2d 335, 351, 464 N.W.2d 91 (Ct. App. 1990). Barwick alleged in his postconviction motion that the search warrant was invalid under *Franks* (R. 32:6), but he does not make that argument on appeal (Barwick's Br. 43–44). *See A.O. Smith Corp. v. Allstate Ins. Co.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) ("an issue raised in the trial court, but not raised on appeal, is deemed abandoned").

Jurisdiction to issue all four warrants. Barwick argues that all four search warrants were defective because the warrant affidavits failed to include the "jurisdictional facts that are required by Wis. Stat. 968.375(1)." (Barwick's Br. 33.) He identifies two purported defects in the warrant

affidavits, though he again provides no record citations. (*Id.* at 33–34.) In any event, both of Barwick's arguments are based on an erroneous reading of the statute, which provides:

> **(1)** JURISDICTION. For purposes of this section, a person is considered to be doing business in this state and is subject to service and execution of process from this state, if the person makes a contract with or engages in a terms of service agreement with any other person, whether or not the other person is a resident of this state, and any part of the performance of the contract or provision of service takes place within this state on any occasion.

Wis. Stat. § 968.375(1).

The first purported defect identified by Barwick is that "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." (Barwick's Br. 33.) But the statute does not require that Yahoo, Google, Facebook, or AOL have a contract with or terms of service agreement with Barwick. It requires only that any of those corporate "persons" "makes a contract with or engages in a terms of service agreement *with any other person,* whether or not the other person is a resident of this state." Wis. Stat. § 968.375(1) (emphasis added).

Each of the warrant affidavits alleges that emails or messages were sent using accounts with those entities. (17AP958, R. 32:23 (emails sent from "brian_ barwick@yahoo.com" account); 32:37 (emails sent from "longerone69in@gmail.com" account); 32:49 (emails sent from "Zapp1965@AOL.com" account); 32;55 (messages sent to R.B.'s Facebook account). The judges who issued those warrants reasonably could infer, based on the ubiquitous requirement that users of online accounts agree to a terms-

of-service agreement, that Yahoo, Google, Facebook, and AOL "engage[ ] in a terms of service agreement with any other person." *See Multaler*, 252 Wis. 2d 54, ¶ 8 (a judge issuing a search warrant makes a "practical, common-sense" determination based on "all the circumstances set forth in the affidavit" and "reasonable inferences from the evidence presented in the affidavit").

The second purported defect is that "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.'" (Barwick's Br. 33.) Barwick contends that this requirement was not fulfilled because "[t]here was no assertion that Barwick [sic] emails were generated from Wisconsin or that emails were received while he was in Wisconsin which is required under Wis. Stat. 968.375(1)." (Barwick's Br. 33–34.)

But the statute does not require that Barwick be present in Wisconsin. It requires only that "any part of the . . . provision of service takes place within this state on any occasion." Wis. Stat. § 968.375(1).[5] One part of the provision of email or other messaging services is the delivery of emails and messages. The Yahoo, Google, and Facebook affidavits

[5] Barwick cites several federal court decisions that have held that "18 U.S.C. § 2703(a) authorizes a federal district court, located in the district where the alleged crime occurred, to issue search warrants for the production of electronically-stored evidence located in another district." *In re Search of Yahoo, Inc.*, 2007 WL 1539971, at *7 (D. Ariz. May 21, 2007) *see also United States v. Barber*, 184 F. Supp. 3d 1013, 1017–18 (D. Kan. 2016), *In re Search Warrant*, 2005 WL 3844032, at *5 (M.D. Fla. Feb. 13, 2006). Barwick does not explain why decisions interpreting the scope of a federal district court's warrant-issuing authority under a federal statute is relevant to whether a Wisconsin court has the authority under Wis. Stat. § 968.375 to issue a search warrant to providers of electronic communication services.

state that the emails and messages were received by K.D. and R.B. at their Wisconsin addresses. (17AP958, R. 32:23, 37, 55.) And the AOL warrant affidavit includes assertions establishing that Barwick was in Wisconsin around the time in question, including allegations that he was arrested at his Oconomowoc residence on July 11, 2015. (17AP958, R. 32:50–51.) The warrant affidavits established probable cause, therefore, that some part of the provision of the service took place in Wisconsin.

B. Barwick has not demonstrated that he was prejudiced by the failure to file a suppression motion.

Barwick makes only a perfunctory argument with respect to prejudice. He states that the evidence generated by the warrants was used to prove "that Barwick was the person sending the emails" and that "[h]ad it been excluded, the State could not have tied Barwick to the offending messages evidence beyond a reasonable doubt." (Barwick's Br. 34.) This Court should reject that argument because it is undeveloped and lacks any citations to the record. *See Pettit*, 171 Wis. 2d at 646; *Lass,* 194 Wis. 2d at 604–05.

Because Barwick fails to present a developed argument, the State will simply note that the trial record contains the following evidence from which the jury could readily have found that Barwick sent the emails in question without the evidence obtained through the AOL, Yahoo, Google, and Facebook search warrants.

AOL. The emails that were alleged to be a violation of Barwick's bail condition that he not use a computer were sent from the email address "zapp1965@aol.com." (R. 48:34–37.) Barwick testified that that was his email address. (R. 48:93.) R.B. also testified that was his email address. (R. 47:174–75.) She testified that "Zapp" was a nickname

that Barwick used in college and that he was born in 1965. (R. 47:175.)

Yahoo. The emails sent to Attorney K.D. were from "brian_barwick@yahoo.com." (R. 47:188–96.) Both Barwick and R.B. testified that that was one of his email addresses. (R. 47:174–75; 48:93.)

Google. With respect to the emails from "Jack Walden" at the email address "longerone69in@gmail.com," R.B. testified that she and Barwick had attended a family court child placement hearing at 8:30 a.m. on October 2, 2014, that she received an email from that sender at 10:24 a.m. the same day. (R. 47:169–71.) R.B. testified that she did not recognize the email address or know anyone named Jack Walden but that she believed that it came from Barwick because it referred to her mother and to the court proceedings that morning. (R. 47:172.)

Facebook. With respect to the Facebook messages, which showed "Jack Walden" as the sender, R.B. testified that she believed that Barwick was the sender based on their content. (R. 47:176–77.). R.B. testified that the messages referred by name to her best friend and correctly identified the name of her home security company. (R. 47:180.) The messages also said that her boys belong to Brian B., that "he has been killed by u," and that "w2eeeee wlll git you." (R. 47:179.)

Barwick has failed to carry his burden of demonstrating that he was prejudiced by counsel's failure to move to suppress the AOL, Yahoo, Google, and Facebook search warrants. This Court should conclude, therefore, that his lawyer was not ineffective.

V. The police properly seized non-computer-related items from Barwick's home.

Barwick argues that the circuit court erred when it denied his motion to suppress non-computer-related items—women's underwear that appeared to have been worn and pubic hair clippings—seized during a search of his residence. (Barwick's Br. 33–37.) Barwick argues that the search warrant was invalid because the affidavit failed to allege probable cause that he had committed bail jumping. (*Id.* at 36.) The State addressed that argument above. *See supra*, pp. 17–19.

Barwick also argues that the officers who executed the search warrant improperly exceeded its scope because the warrant only authorized a search for computer-related items. The circuit court rejected that argument, holding that the seizure was permissible under *State v. LaCount*, 2008 WI 59, 310 Wis. 2d 85, 750 N.W.2d 780, and *State v. Casarez*, 2008 WI App 166, 314 Wis. 2d 661, 762 N.W.2d 385, because the evidence "was discovered within the area properly designated within the warrant," "was discovered during that same search," and there was "a connection between the evidence and the criminal activity which goes to the bail jumping" charge. (R. 46:18–19.)[6]

Barwick's brief does not discuss the circuit court's rationale at all. "Failure to address the grounds on which the circuit court ruled constitutes a concession of the ruling's

[6] In some of the emails sent by "zapp1965@aol.com" that formed the basis of the bail jumping charges for violating the "no computer use" condition of release, Barwick asked the recipient about purchasing used female panties and "pussy hair trimmings." (R.1:3; 48:39–41.) That Barwick had those items in his residence was evidence that he was the person who sent those emails.

validity." *West Capitol, Inc. v. Village of Sister Bay*, 2014 WI App 52, ¶ 49, 354 Wis. 2d 130, 848 N.W.2d 875. On that basis, this Court should affirm the circuit court's ruling.

Even if the circuit court erred by not suppressing the evidence, the error was harmless. An error is harmless "if it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *State v. Hunt*, 2014 WI 102, ¶ 26, 360 Wis. 2d 576, 851 N.W.2d 434 (citation omitted).

Barwick contends that the evidence was prejudicial because it was "used as proof that the identity of the person sending the email was the defendant." (Barwick's Br. 36.) But even without that evidence, there was other evidence that Barwick was the person who sent the emails from "zapp1965@aol.com," including Barwick's own testimony and that of R.B. that zapp1965@aol.com was his email address. (R. 47:174–75; 48:93.)

Barwick also argues that the evidence was prejudicial "because it was likely to shock, inflame and bias the jury against the defendant out a [sic] sense of revulsion at what the prosecution asserted were his unconventional, idiosyncratic sexual interests." (Barwick's Br. 36–37.) Barwick presumably is arguing that the evidence should have been excluded under Wis. Stat. § 904.03.

The circuit court, noting that there was other evidence that "could be just as distasteful" as the underwear and hair, ruled that the probative value of the evidence outweighed the prejudicial effect. (R. 45:9, A-App. 116.) The circuit court said that the evidence, "[w]hile prejudicial," was "not unduly so" and that the evidence would "be handled in the most discreet way as possible." (R. 48:6.) This Court should affirm that ruling because Barwick fails to present a developed

argument as to why the circuit court erroneously exercised its discretion.

VI. The circuit court did not deny Barwick his right to present a defense when it precluded him from offering speculative testimony that another party sent the emails.

Barwick challenges the circuit court's pretrial rulings prohibiting him from testifying 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." (Barwick's Br. 37.) Barwick contends that the exclusion of that evidence violated his constitutional right to present a defense. (*Id.* at 37–39.)

At a hearing on the State's motion in limine to exclude that evidence, defense counsel told the court that Barwick would testify that on October 2, 2014, he had logged out of his computer and, when he came back to the computer, the computer was logged back in and he saw the cursor moving independently of him operating the mouse. (R. 45:38–39, A-App. 119–20.) The State responded that the court had allowed Barwick to have his own computer forensically analyzed to address this issue. (R. 45:41.) The prosecutor said that he had not received any reports or an expert witness list on this topic and there was no evidence to support Barwick's allegation that someone else was on his computer. (*Id.*) Allowing Barwick's testimony, he argued, would invite the jury to speculate. (*Id.*)

Defense counsel replied that the hard drive that was analyzed was not the same hard drive that had been on Barwick's computer when Barwick observed the activity on that computer. (R. 45:41–43, A-App. 121–22.) The hard drive that Barwick was using then, counsel said, "was removed and subsequently destroyed." (R. 45:42.)

The court said that there was "no indicia of reliability that has any link here," observing that, "[n]ow on the eve of trial there's: Oh, there was another hard drive that was removed." (R. 45:42, A-App. 121.) The court excluded the testimony because "[t]his is exactly what [its] ruling on [the] State's supplemental motion in limine . . . sought to preclude" and that the proffered evidence would "invite the jury to speculate that in fact someone else was mysteriously on my computer." (*Id.*)

Defense counsel then told the court that Barwick also wanted to testify "that there was a past incident that occurred to him wherein essentially e-mails of a, I guess I'll just say inappropriate nature, had been being sent to people as though Mr. Barwick was sending them, and that was something that occurred . . . on a separate hard drive that Mr. Barwick was using but then is not around anymore" because it had been destroyed. (R. 45:42–43, A-App. 121–22.) Counsel also told the court that Barwick wanted to testify that he had a file folder (a physical file, not a computer file folder) that contained password information and personal identifying information and that when Barwick moved out of the family home in 2012, that file folder disappeared. (R. 45:43, A-App. 122.) Counsel said that Barwick hadn't identified a specific individual who may have taken the file, but that he wanted to testify that "when he moved out, it . . . disappeared." (*Id.*)

The court ruled that "[n]one of this evidence is going to be coming in and I say 'evidence' as a way of talking in generalities, not that this actually is evidence." (R. 45:45, A-App. 123.) The court said that the fact that "someone may at some point in life had sent inappropriate e-mails that had Mr. Barwick's name on them" was not relevant and that the proffered evidence "invites speculation." (R. 45:45–46, A-App. 123–24.) The court said that the missing file folder was "a red herring," that it was not relevant and that "[i]t's simply inviting the jury to speculate that there might be something else out there containing his date of birth and his Social Security number." (*Id.*)

On appeal, Barwick does not argue that the circuit court erroneously exercised its discretion when it excluded that evidence. (Barwick's Br. 37–39.) Instead, he limits his argument to a claim that the circuit court's ruling denied him his constitutional right to present evidence. (*Id.*) However, Barwick's trial counsel did not argue that Barwick had a constitutional right to present that evidence. (R. 45:38–45.) Accordingly, Barwick failed to preserve his constitutional claim for appellate review. *See State v. Gove*, 148 Wis. 2d 936, 943, 437 N.W.2d 218 (1989) (defendant waived confrontation claim when his objection was based only on hearsay grounds).

Nor does Barwick argue that his trial counsel was ineffective for failing to argue a constitutional basis for the admission of this evidence. Barwick identifies seven claims of ineffective assistance of counsel, but the failure to argue a constitutional basis for the admission of the spoofing/hacking evidence is not one of them. (Barwick's Br. 43–44.)

Even if Barwick had included that claim in his roster of ineffectiveness claims, he fails to present a developed

argument demonstrating that he was prejudiced by the exclusion of that evidence. Barwick asserts that the evidence would have provided "a credible defense to the charges," (Barwick's Br. 38), but that conclusory assertion falls far short of carrying his burden of demonstrating that, had the spoofing/hacking evidence been admitted, there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 693.

VII. Barwick is not entitled to a new trial based on his joinder and severance claims.

Barwick argues that he is entitled to a new trial because case nos. 14CM4275 and 15CF4127 should not have been tried with the other two cases. (Barwick's Br. 39–43.) It appears that Barwick is challenging both the initial joinder of the cases for trial and the denial of his severance motions.

Before responding to Barwick's argument, the State notes that his brief lacks any meaningful citation to relevant legal authority. (*Id.*) He does not cite the statute governing joinder and severance, Wis. Stat. § 971.12. He cites one case, but he cites it only for the proposition that he was prejudiced because he was compelled to testify in the two cases that should not have been joined. (Barwick's Br. 41.) Nor does he discuss the circuit court's decision in light of the applicable standard of review or explain how its decision to deny the severance motion constitutes an erroneous exercise of discretion. *See Hall*, 103 Wis. 2d at 140. Because Barwick fails to present a developed argument supported by citations to relevant legal authority, this Court should decline to address Barwick's claim. *See Pettit*, 171 Wis. 2d at 646.

A. Barwick forfeited his claim that the circuit court erred when it joined the four cases for trial.

Barwick forfeited any objection to the initial joinder of the cases for trial because he failed to make an adequate objection to joinder. Barwick states in his brief that "[a]t the preliminary hearing on July 28, 2015[,] the court ordered, over defense objection, that the four cases would be joined for trial." (Barwick's Br. 39.) But at that hearing, when the circuit court asked defense counsel, "you are objecting to the joinder on what grounds?" counsel responded, "Without argument." (R. 39:20.)

To preserve the right to appeal a ruling, "a defendant must apprise the trial court of the specific grounds upon which the objection is based." *State v. Tutlewski*, 231 Wis. 2d 379, 384, 605 N.W.2d 561 (Ct. App. 1999). Because Barwick did not state any grounds for his objection to joinder, he has not preserved the joinder issue for appellate review.

Barwick does not argue that his counsel was ineffective for failing to make an adequate objection to joinder. (Barwick's Br. 43–44.) Accordingly, only Barwick's severance claims are properly before this Court.

B. Barwick's counsel was not ineffective for withdrawing the severance motion in case no. 14CM4275.

Barwick filed a motion to sever case no. 14CM4275, which charged him with one unlawful use of a computerized communication system against victim K.D., from the trial on the remaining charges. (R. 16:1–7.) But at a hearing on that motion, defense counsel informed the court that "[u]pon consultation with Mr. Barwick, we have decided to withdraw that motion." (R. 45:3.)

Barwick argues that his lawyer was ineffective because he "[w]ithdrew the Case No. 14CM4275 severance motion for no apparent strategic reason." (Barwick's Br. 43.) He asserts that "had he known of his right to assert a privilege against self-incrimination, he would have considered doing so" in case no. 14CM4275. (Barwick's Br. 41.) "By invoking his privilege," he says, he "could have retained his right not to testify separately" with regard to that charge. (*Id.*) Instead, "he was compelled to give incriminating answers that . . . he had sent four of five emails in the State's exhibits." (*Id.*)

Barwick has failed to demonstrate that he was prejudiced by the withdrawal of the severance motion.

1. Barwick does not allege that he would not have testified in his own defense had case no. 14CM4275 been tried separately; he merely alleges that he would have considered that. "A defendant who alleges that counsel was ineffective by failing to take certain steps must show with specificity what the actions, if taken, would have revealed and how they would have altered the outcome of the proceeding." *State v. Byrge*, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999), *aff'd*, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477. Because Barwick alleges only that he would have considered not testifying had counsel advised him of that option, he has not met that standard.

2. Barwick was not prejudiced by his admission that he sent the first four emails to K.D. because, even without that admission, there was other evidence that he did. All of Barwick's emails to K.D. were sent by "brian_barwick@yahoo.com." (R. 48:17–18.) R.B. testified that that was one of Barwick's email accounts. (R. 47:174–75.) And Officer Fohr testified, based on the information he

received from Yahoo, that Barwick was the individual associated with that account. (R. 48:17–18.)

3. The charge in case no. 14CM4275 was based on the fifth email that K.D. received from "brian_barwick@yahoo.com." (17AP958, R. 23:1–2.) Barwick's defense was that while he sent the first four emails to K.D., he did not send the fifth email. (R. 48:87–89; 49:71.) Barwick does not explain how, given that all of the emails sent to K.D. came from the same email address, he could have raised that defense without testifying.

C. Barwick's motion to sever case no. 15CF4127.

The day before trial began, Barwick's counsel orally moved to sever case no. 15CF4127, in which charged him with three counts of felony bail jumping (R. 1:1), from the other cases (R. 46:10–11, A-App. 126–27). Counsel sought severance of that case because "the specific items of testimony" relating to the bail jumping charges "would be prejudicial in terms of their tendency to shock the conscience of potential jurors," that the burden on the State in conducting separate trials "is slight given that all the evidence that they would need to move forward on that case is already in their possession," and that there was a "prejudicial effect . . . in terms of the number of counts." (*Id.*)

The circuit court denied the motion for two reasons. (R. 46:13–14, A-App. 128.) The first was that Barwick made the motion at the "absolutely 11th hour." (R. 46:13.) Barwick does not argue that circuit court erroneously exercised its discretion when it denied the severance motion because he asserted it the day before trial. (Barwick's Br. 39–43.) His only mention of that basis for the court's decision is when he

asserts that his lawyer was ineffective making an untimely motion. (*Id*. at 44.) That claim fails because Barwick has not shown that he was prejudiced.

Barwick claims that had the cases not been joined, he "could have retained the right not to testify separately to those charges" and would not have had to testify that he knew that the court made it a condition of his bail in February 2015 that he not use a computer. (Barwick's Br. 41.) (Barwick sent the emails that violated the bail condition in June and July of 2015. (R. 48:33–38.)) But when "balancing the public interest in joint trials against a claim of possible prejudice to a defendant, something more is needed than defendant's statement that he intends to testify on one charge and not on the other." *Holmes v. State*, 63 Wis. 2d 389, 398, 217 N.W.2d 657 (1974). "The defendant, opposing consolidation or urging severance, is required to present enough information, including the nature of the testimony he wishes to give on one count that would not be admissible on the other count or counts, to enable the trial court to intelligently weigh the opposing factors to be weighed and balanced." *Id*.

In this case, even without Barwick's testimony, the State already had proven through the testimony of Officer Fohr that at hearings held on April 9 and May 21, 2015, the circuit court ordered that Barwick not use a computer as a condition of Barwick's release on bail. (R. 48:24–26.) Barwick did not challenge that testimony on cross-examination. (R. 48:53–58.) Barwick has not shown, therefore, that he was prejudiced by his lawyer's failure to timely move to sever the bail jumping case.

The circuit court also denied the severance motion because even if Barwick had brought it earlier, the outcome

would not have been different. (R. 46:13) The court agreed that the number of counts "does have a tendency to look prejudicial" but that that was not a basis to sever the counts because the court would instruct the jury to look at each case and each count separately. (R. 46:14, A-App. 128.) The court further found that the burden of conducting a separate trial "is not small in any way, shape, or form. Pulling officers off the street to have them come testify, even if the evidence will be similar, essentially, we'll be going through the process, is not in the interest of judicial economy, and it certainly does a disservice to all of the witnesses including [R.B.] who need to come in and do this." (*Id.*)

So in addition to finding the motion untimely, the circuit court was unpersuaded by the reasons trial counsel offered as a basis for severing the bail jumping charges. Barwick does not argue that the circuit court erroneously exercised its discretion when it limited its rationale to the grounds advanced by trial counsel.[7]

Barwick argues that the trial on the bail jumping case should have been severed because none of the bail jumping charges were "of the same or similar character" or "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 the charges in case no. 15CF1521 and 15CF3082. (Barwick's Br. 42.) But counsel did not make that argument (R. 46:10–11, A-App. 126–27), and Barwick does not argue that counsel was ineffective for

[7] Barwick correctly notes that R.B. would not have had to testify at a trial on the bail jumping charges, but he does not argue that the two investigating officers who testified would not have had to testify at a separate trial.

failing to make that argument—his ineffective assistance claim is limited to the untimeliness of the severance motion (Barwick's Br. 44). And even if he had claimed that counsel was ineffective for not raising these arguments, the State has explained why he was not prejudiced by the joinder.

For the same reason, even if the circuit court erred when it denied the motion to sever the bail jumping case, the error was harmless. *See State v. Leach*, 124 Wis. 2d 648, 669–71, 370 N.W.2d 240 (1985) (holding that the harmless error rule applies to misjoinder). As discussed above, the State did not need Barwick's testimony to establish the conditions of his release on bail.

Moreover, the contested issue at trial with respect to the bail jumping counts was whether Barwick was the person who sent the emails from the "zapp1965@aol.com" account in June and July of 2015. (R. 1:1–2; 48:33–37.) Barwick testified that he last accessed the internet on February 5, 2015. (R. 48:92.)

But the State presented compelling evidence that Barwick sent those messages. Both R.B. and Officer Fohr testified that "zapp1965@aol.com" was one of Barwick's email addresses. (R. 47:174–75; 48:32.) Officer Fohr also testified that the IP address associated with that account in June and July 2015 was the same IP address associated with Barwick's residence. (R. 48:52.) Based on that evidence, it is clear beyond a reasonable doubt that the jury would have convicted Barwick of bail jumping even if he had not testified.

CONCLUSION

For the reasons stated above, this Court should affirm the judgments of conviction and the orders denying postconviction relief.

Dated this 7th day of February, 2018.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

JEFFREY J. KASSEL
Assistant Attorney General
State Bar #1009170

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 266-9594 (Fax)
kasseljj@doj.state.wi.us

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 10,706 words.

_____
JEFFREY J. KASSEL
Assistant Attorney General

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

I further certify that:

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

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

Dated this 7th day of February, 2018.

_____
JEFFREY J. KASSEL
Assistant Attorney General

Supplemental Appendix

State of Wisconsin v. Brian A. Barwick

Case Nos. 2017AP0958-CR, 2017AP0959-CR, 2017AP0960-CR, 2017AP0961-CR

SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

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 one or more initials or other appropriate pseudonym or designation, 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.

_____

JEFFREY J. KASSEL
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(13)

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 809.19(13).

I further certify that:

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

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

Dated this 7th day of February, 2018.

_____

JEFFREY J. KASSEL
Assistant Attorney General