STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2018 AP 000770-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ERIC BURROWS,

Defendant- Appellant.

BRIEF & APPENDIX OF DEFENDANT-APPELLANT

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED ON FEBRUARY 27, 2018, IN THE CIRCUIT COURT OF SHEBOYGAN COUNTY
The Honorable Edward Stengel, Presiding
Trial Court Case No. 2016 CF 535

Respectfully submitted:

ANDEREGG & ASSOCIATES
Post Office Box 170258
Milwaukee, WI 53217-8021
(414) 963-4590

By: Rex R. Anderegg
State Bar No. 1016560
Attorney for Defendant-Appellant

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ISSUES PRESENTED

I. WHETHER A "TEMPORARY ARREST WARRANT" IS LAWFUL, AND A LAWFUL MEANS OF CAUSING THE ARREST OF A SUSPECT BY ANOTHER LAW ENFORCEMENT AGENCY, WHEN THERE WAS MORE THAN ADEQUATE TIME TO SEEK AN ARREST WARRANT.

The trial court answered: Yes.

II. WHETHER A LAW ENFORCEMENT AGENCY CAN CIRCUMVENT THE JURISDICTIONAL SCOPE OF ITS AUTHORITY TO ACT, BY ISSUING A TEMPORARY FELONY WARRANT, WITHOUT COMMUNICATING THE FACTS UPON WHICH IT IS BASED, AND THEN ORCHESTRATE, DIRECT, AND PARTICIPATE IN THE ARREST BY ANOTHER LAW ENFORCEMENT AGENCY ACTING AS ITS PROXY, ONLY TO THEN IMMEDIATELY TAKE CUSTODY OF THE SUSPECT.

The trial court answered: Yes.

III. WHETHER AN ARREST BY A POLICE OFFICER, WHO HAS NO KNOWLEDGE OF ANY OF THE FACTS PUTATIVELY ESTABLISHING PROBABLE CAUSE FOR THE ARREST, IS LAWFUL.

The trial court answered: Yes.

IV. WHETHER A VEHICLE SEARCH CONDUCTED BY LAW ENFORCEMENT OFFICIALS OUTSIDE OF THEIR JURISDICTION IS LAWFUL.

The trial court answered: Yes.

V. WHETHER AN AUTOMOBILE SEARCH INCIDENT TO ARREST IS LAWFUL WHEN THE SUSPECT HAS ALREADY BEEN SECURED IN A POLICE VEHICLE AND THE CRIME FOR WHICH HE HAS BEEN ARRESTED IS "STALKING," CONTRARY TO SECTION 940.32, STATS., BASED LARGELY ON VOICEMAILS AND MAILED LETTERS FROM AN INDIVIDUAL OF A GENDER DIFFERENT FROM THE SUSPECT.

The trial court answered: Yes.

VI. WHETHER A VEHICLE SEARCH INCIDENT TO ARREST AND CONDUCTED OUTSIDE OF THE ARRESTEE'S IMMEDIATE PRESENCE VIOLATES SECTION 968.11, STATS.

The trial court answered: No.

VII. WHETHER THE POLICE HAD PROBABLE CAUSE TO ARREST THE DEFENDANT FOR STALKING WHEN THE EVIDENCE ESTABLISHED THAT THE HARRASSING LETTERS AND VOICEMAILS WERE FROM A FEMALE, LEAVING THE DEFENDANT CONNECTED TO A SINGLE ACT, WHICH IS NOT A COURSE OF CONDUCT.

The trial court answered: Yes.

VIII. WHETHER AN APPLICATION FOR A SEARCH WARRANT BASED ON AN ALLEGATION OF "STALKING" IS LEGALLY SUFFICIENT WHEN IT FAILS TO AVER, MUCH LESS ESTABLISH PROBABLE CAUSE FOR, ONE OF THE ESSENTIAL ELEMENTS OF THE CRIME.

The trial court answered: Yes.

STATEMENT ON PUBLICATION

The appellant believes the Court's opinion in this case will meet the criteria for publication as it will clarify and develop the law surrounding "temporary arrest warrants."

STATEMENT ON ORAL ARGUMENT

The appellant does not request oral argument insofar as he believes the briefs will sufficiently explicate the facts and law necessary for this Court to decide the issues presented.

STATEMENT OF THE CASE AND FACTS

A. The Criminal Complaint.

On August 24, 2016, the plaintiff-respondent, State of Wisconsin, filed a criminal complaint charging defendant-appellant, Eric Burrows, with felony stalking, contrary to section 940.32(2), Stats. (R11). The alleged target of Burrows' alleged stalking was his ex-girlfriend, E.W. (*Id.*). Curiously, the allegations consisted of E.W. receiving threatening letters and phone calls from an unknown *female,* directed to E.W.'s workplace in August of 2016, and the delivery of a small, non-poisonous, baby snake to E.W.'s apartment manager on August 17, 2016. (*Id.*). The 38-year-old Burrows had no prior criminal record, nor had E.W. ever complained of any domestic problems with Burrows, or petitioned for a restraining order, harassment or otherwise, against him. (R47-32).

B. Burrows' And E.W.'s Relationship.

Burrows and E.W., who had dated in high school, reconnected in January of 2015, and began living together at Burrows' residence until June 25, 2016, when E.W. moved out. (R47-34-37). After E.W. moved out, both started to date other individuals (E.W. began seeing "Ben," while Burrows began seeing "Amy"). (*Id.*). Despite dating others, E.W. and Burrows remained in contact through phone calls, texts, and emails. (*Id.* at 38-58). On July 12, 2016, Burrows returned a nude photo E.W. had given him, and suggested she give it to her new boyfriend, whereupon E.W. blocked Burrows' phone calls and text messages. (R48-4). Burrows never gave the photo to anyone but E.W. (*Id.*).

After July 12, 2016, communications between Burrows and E.W. consisted of emails only, with Burrows attempting to rekindle the relationship. (R47-38-58). In early August of 2016, E.W. returned a ring Burrows had given her, though again, the two continued exchanging emails up until August 18, 2016, when Burrows was arrested. (*Id.*). None of the emails contained any threats of any nature by Burrows, nor was there any evidence of any psychological distress by E.W. (*Id.*).

To the contrary, E.W. was a willing participant in the email dialogue, and responded to Burrows on 42 occasions from July 20 through August 18, 2016. (*Id.*). Notably absent from these emails were any requests by E.W. that Burrows cease contacting her, or any reference by E.W. to having received threatening phone calls or letters from anyone. (*Id.*). The absence of such references is revealing, given that on August 8, 2016, E.W. had contacted Sheboygan Police to report threatening phone calls at her workplace. (R48-2).

C. Actions By A *Female* Actor Gave Rise To Complaint.

As it turned out, E.W. had received a workplace voicemail on August 3rd, and another on August 8th, both from a *female* caller. (R48-3). The profanity laced calls warned E.W. to stay away from "Ben," E.W.'s new boyfriend, and apparently the anonymous callers' love interest. (*Id.*). The caller warned E.W. she could make problems for her if she did not cease her contact with Ben, and the calls were profanity laced. (*Id.*). While the source of the phone calls had been blocked by the caller and could not be identified, the caller presented as a woman jilted by the fact E.W. was moving in on her boyfriend, or ex-boyfriend, "Ben." (*Id.*).

E.W.'s new boyfriend Ben was also E.W.'s co-worker, explaining why the calls were directed to E.W.'s workplace. Thus, it was not surprising their workplace was also the location where two letters arrived on August 9th, accusing E.W. of having a sexual relationship during work hours with "Ben," and threatening to come to the workplace and cause trouble if it did not stop. (R48-6). E.W. discussed the threatening calls and letters with Detective Clark of the Sheboygan Police Department, allowed him to review her cell phone, and on August 10, 2016, gave him the letters, one of which stated, in part:

> International Motors Sheboygan
>
> Here is a Suggestion. If I were you I would immediately do something about that blonde whore that you have working in the Subaru Sales Depart. [E.W.] That bitch has been screwing my

> man Ben…. I would take this very serious cause I have nothing to lose besides him. ….

(*Id.*).

Upon reviewing the letters, Detective Clark opined that like the phone calls, the author of the letters was *female*:

> I met with Erica on today's date at the Sheboygan PD. She brought with her two letters that had been delivered via mail to her employer yesterday. . . . Both letters appeared to have been mailed via US mail. . . . The had [sic] writing appears to be that of a female . . . .

(R48-6). On or about August 13th, another letter was received by E.W.'s ex-husband, again authored by a female, voicing similar complaints about the relationship between E.W. and Ben. (*Id.*).

Finally, on August 17, 2016, a box addressed to E.W. was dropped off at the main office of her apartment complex. (R48-8-9). Sarah Torres, the apartment manager, called E.W. and advised that a box had been delivered to the complex that morning for her. (*Id.*). E.W. called Detective Clark and informed him of the delivery, and they met at the apartment complex. (*Id.*). According to Torres, two different phone calls had come into the apartment office that day from a male caller, one at 11:48 a.m. and one at 12:13 p.m., both inquiring about the status of the box delivery. (R48-8-24). Once there, E.W. and Detective Clark allegedly looked at the caller ID on the apartment complex phone to glean information about who the caller may have been. (*Id.*).

At this point, the investigation yielded allegations that would turn out to be demonstrably false. According to the police reports, E.W. looked at the phone numbers and claimed the first one came come from B & B Metal Processing (920-693-2874), where Burrows worked, and the second one from Burrows' cell phone. (*Id.*). A digital extraction of Burrows' cell phone, however, would later reveal that no call was placed from his phone to the apartment complex on the date and time in question. (R48-45). Similarly, the phone records for B & B

Metal Processing's business phone also revealed that neither was any call placed from that phone to the apartment complex on the date and time in question. (R48-57). The only way to reconcile these otherwise incompatible facts is to conclude the caller was "spoofing," which in the modern vernacular means someone besides Burrows made the phone calls appear to be coming from him.

In either event, E.W. never took possession of the box or viewed its contents. Rather, Sheboygan police took the sealed box from the apartment complex. After having it x-rayed at a local hospital, the box was taken and finally opened at the Sheboygan Police department by Officer Olsen. (R48-10-11). Deborah Knockson, a local reptile expert present when the box was opened, identified the contents of the box as a non-poisonous baby ball python, a safe snake routinely kept as a household pet. (*Id.*). The baby snake was turned over to Knockson for safekeeping at her residence. (*Id.*).

D. The August 18, 2016, Arrest Of Burrows.

Although E.W. and Detective Clark agreed a *female* was behind the phone calls and letters, E.W. fancied Burrows, who lived in Manitowoc County, a possible suspect. Accordingly, on August 17, 2016, the Sheboygan police sent the Manitowoc County Sheriff's Department notice that a "temporary warrant has been entered regarding Sheboygan Case C16-15346 Stalking" against Burrows." (R48-36). A search of the court files and police records received from the Sheboygan County District Attorney via discovery procedures revealed no actual warrant for Burrows' arrest.

Nevertheless, to further justify their arrest request, the Sheboygan Police Department escalated the warrantless arrest with unsupported warnings of "Officer Safety," and advised that Burrows was dangerous and likely armed. The CAD computer request for arrest issued by the Sheboygan police stated as follows:

> 8/17/2016 18:57:52 D926 Narrative: ATL **OFFICER SAFETY** ERIC R BURROWS…A TEMPORARY WARRANT HAD BEEN ENTERED REGARDING

> SHEBOYGAN CASE C16-15346 STALKING. VICTIM IS [E.W.]. …ERIC IS KNOWN TO BE A NAZI SYMPATHIZER AND IS HEAVILY ARMED AT THIS RESIDENCE. HE WILL LIKELY BE ARMED IN ANY VEHICLE HE IS DRIVING… ERIC MAY BE DRIVING ANY ONE OF THE LISTED VEHICLES BELOW . . . [LIST OF VEHICLES] . . . . **USE CAUTION WHEN COMING IN CONTACT WITH ERIC AS HE HAS REPEATEDLY STATED HE HAS NOTHING TO LOSE.

(R48-36). It should be noted the "nothing to lose" remark had been made by the female caller, not Burrows.[1] (R48-3).

The next day, August 18, 2016, two Sheboygan police officers traveled to Manitowoc County to orchestrate the arrest of Burrows. Detective Clark summarized these activities as follows:

> On 8/18/2016 Det. Stewart and myself conducted surveillance on B&B Metals in Newton, WI [Manitowoc County]. At approximately 4:46 pm we observed a blue Ford F450 truck belonging to Eric Burrows leave B&B and proceed south on Hwy 42. I had requested assistance from the Manitowoc County Sheriff's Office and they performed a felony stop on the vehicle due to the weapons history with Eric.

(R48-12). What "weapons history," if any, Burrows had was not elaborated and as previously noted, Burrows had no criminal history.

Nevertheless, acting upon the notice and the false "officer safety" warnings, five police vehicles descended upon

[1] At the time the notice was issued, Detective Clark knew the "nothing to lose" quote was made not by Burrows, but instead, by whatever female, identifying herself as an ex-girlfriend of "Ben" (E.W.'s new boyfriend), had made that claim in a letter. Detective Clark also knew the voice threats made against E.W. had also been made by a *female*.

Burrows' vehicle loaded with deputies armed with rifles and wearing tactical gear. (R191-70). Sheboygan Police officers watched as Manitowoc officers took Burrows from his truck, pushed him to the ground, handcuffed him and then secured him in a Manitowoc police squad car. (R48-12). Contrary to the Sheboygan Police Department's CAD notice, Burrows was *not* armed and did *not* resist the officers with violence. (*Id.*). After Burrows had been secured in the Manitowoc squad car, the Sheboygan police officers took custody of him and then conducted a search of Burrows' vehicle. (R191-36). They entered his vehicle and seized his cell phone and other papers without a warrant. (R48-12). No weapons or contraband of any kind were found in Burrows' vehicle during this search.[2] (*Id.*).

E. Further Search Warrants And The Letter Mailed To E.W. While Burrows Remained In Custody.

After Burrows was taken into custody on August 18, 2016, in Manitowoc County, he was eventually turned over to Detective Clark and, following a short interrogation, jailed. (R48-12-13). The fruits of the evidence seized from Burrows' vehicle in the wake of his arrest was then leveraged to obtain a series of warrants to search Burrows' residence where Sheboygan police seized his computer, wireless printer, and other papers. (*Id.*). The warrant to search Burrows' residence did not include an application for entry into his truck, or for seizure of his cell phone and papers in the truck, a seizure that, as noted, had already occurred earlier that day. (R48-12).

Burrows remained in the Sheboygan jail until August 23, 2016, on which day he was released after posting bond. On August 24, 2016, the complaint was filed, and Burrows made his initial appearance. The complaint, however, conveniently omitted two critical developments in the investigation that had

[2] As noted, Burrows had no criminal record, no history of violence, and was a respected business owner in Manitowoc County. The overblown and hyperbolic notice ("heavily armed at his residence," "likely armed in any vehicle he is driving," "nothing to lose," etc.) created an unnecessary risk that Burrows, a law-abiding citizen, could have been mistakenly shot by police.

occurred on August 22, 2016, while Burrows was still in jail. (R11).

First, on that date, four days after Burrows' arrest and while he was still in jail, E.W. received an additional threatening letter from a *female* that referenced the earlier phone calls and letters. (R48-21-22). This letter bore a postmark of August 19, 2016, the day *after* Burrows' arrest, and a day on which Burrows was still in jail. (*Id.*). E.W. immediately contacted Detective Clark about the August 19th letter. After reviewing the letter, which had come inside of a get-well card, Detective Clark opined that the letter addressed to E.W. was from a woman and described its contents:

> The letter within is addressed to [E.W.] and starts with the line. "I must say you are the biggest lying CUNT I have ever known almost as big as you nose is." It continues on as if from the position of a jilted ex-girlfriend of Ben and eventually says "Now your lies are going to cos (sic) you a little trip down the road to St. Nicks." It also stated "I was by you the other day, CUNT. You seen me, I seen you. I was going to rip your fucking hair outta your head but you where (sic) trying to feed LIES to some poor family that doesn't realize how you ruin peoples lives, so I backed Down. Don't be too disappointed, I will come back for you Bitch." It also again references the army, as well as telling [E.W.] to go back to her little snake hole.

(R48-21-22).

Second, on August 22, 2016, Sheboygan Police had other evidence proving Burrows was not the perpetrator of the stalking crime. On that date, Detective Clark completed a physical extraction of Burrows' cell phone. (R48-15, 38). While he found some internet searches he construed as having evidentiary value (but which were normal, innocuous inquiries by an ex-boyfriend merely curious about where his ex-girlfriend was living and working), what was most notable about the extraction is what Detective Clark did *not* find: any evidence of a phone call placed from Burrows' phone to E.W.'s

apartment complex at 12:13 p.m. on August 17, 2016, or any other time on that day. (R48-45). Indeed, an official cell phone extraction of Burrows' phone conducted for the Sheboygan Police Department by Cellulite on that same date verified and confirmed that *no call* was made from Burrows' cell phone to the E.W.'s apartment complex, or to any other number, at 12:13 p.m. on August 17, 2016. (R48-45).[3]

Nevertheless, not only did the State go forward with charging Burrows with felony stalking, but at the October 7, 2016, preliminary hearing, Detective Clark testified that a call had been placed from Burrows' cell phone to E.W.'s apartment complex on the day the baby snake was delivered. (R190-19-20). Cunningly, he made no mention of the fact the claim had since been discredited by the cell phone investigations. (*Id.*). Worse still, he deceitfully positioned the cell phone investigation as having actually confirmed the claim:

> I looked at the caller ID that comes into the office that captured phone calls at Oak Creek. One, that the first call that the male's voice was on was from B and B Metals, which is a company that is owned by the defendant, or he is at least vice president of and part owner of. The second one was from a number that I didn't initially recognize, however when Erica looked at it, she said that's Eric's personal cell phone number, **which has since been supported by search warrants on his phone records.**

(R190-19-20) (emphasis added). In short, Detective Clark's testimony was based on a false identification.

Consequently, the felony stalking case continued forward, and a parade of search warrants ensued. Subsequent to Burrows' arrest, the State obtained eight warrants, the following of which are germane to this petition:

1. August 18, 2016 Search of Burrows' Residence;

[3] Likewise, the B & B Metal Processing business phone records for August 17, 2016 do not show a phone call to E.W.'s apartment complex at 11:48 a.m. on that day. (R48-54).

2. August 22, 2016 Search of Burrows' cell phone and computer;

3. September 2, 2016 U.S. cellular search warrant of Burrows' cell phone - 920-374-1127;

4. February 16, 2017 Google Inc. Search Warrant for information associated with Burrows' email account address: erburrows21@gmail.com between the dates of 01/012016 and 8/20/2016; and

5. April 18, 2017 Search Warrant for DNA Sample from Burrows.

(R46).

On August 15, 2017, Burrows filed a motion to suppress based on an illegal arrest, the illegal seizure of evidence following his arrest, and the issuance of warrants without probable cause. On September 1, 2017, the court held a hearing on the motion. (R46; R47; R48). At the outset of the hearing, the State conceded it had wrongfully alleged that Burrows had a prior domestic abuse incident against E.W. (R190-7). Thereafter, however, the circuit court denied all of Burrows' motions. On September 14, 2017, the circuit court entered an order memorializing those decisions. (R69).

On January 16, 2018 and faced with the prospect of going to trial with the unlawfully seized evidence, Burrows entered into a plea agreement with the State. (R171). Burrows pled guilty to two misdemeanor charges and entered into a deferred conviction agreement on the felony stalking charge. (R171; R172). On February 27, 2018, Burrows was sentenced. (R172). This appeal followed. (R182).

Argument

I. THE "TEMPORARY ARREST WARRANT" ISSUED BY THE SHEBOYGAN POLICE TO ORCHESTRATE THE ARREST OF BURROWS WAS UNLAWFUL AND VIOLATED THE SEPARATION OF POWERS DOCTRINE.

The "temporary arrest warrant" is a construct largely unknown to Wisconsin law. It has been referenced by the Wisconsin supreme court, *State v. Allen,* 2010 WI 89, 328 Wis. 2d 1, 786 N.W.2d 124, but neither that case nor any published case defines it, much less addresses its propriety, or the limits of its use. An unpublished decision quotes one police officer's understanding of the concept:

> [A] temporary felony warrant is a warrant that can be issued pending the charges. It gives us some time to enter a warrant. Our reports have to be done. It's a warrant that can be entered prior to the case being sent to the district attorney's office for review and official charges being sent.

State v. Ott, 2015 WI App 75, ¶7, 365 Wis. 2d 194, 870 N.W.2d 247. The officer went on to explain that "when a temporary felony warrant is active in the system, police officers from other jurisdictions will detain a suspect who is the subject of the warrant if he or she is stopped or pulled over." *Id.* at ¶9.[4]

Under this formulation, upon stopping a driver (e.g., for speeding) an officer making a routine check for outstanding warrants would then take the individual into custody. This was neither the means nor the ends, however, for which the device was employed in this case. Here, the "temporary warrant" was deployed as the functional equivalent of an arrest warrant and then used for a targeted take-down of its subject. It was, whatever the State may wish to call it, an "arrest warrant," and

[4] Burrows is cognizant of Rule 809.23(3) which precludes the citation of an unpublished opinion as precedent or authority, or for its persuasive value, even if issued after July 1, 2009, if it is a per curiam opinion, which *Ott* is. *Ott* is cited here, however, not as precedent or authority, nor for its persuasive value, but instead, simply to help elucidate the concept of a "temporary warrant."

because it was positioned by police as "temporary," it is most accurately denominated a "temporary arrest warrant." Again, the concept is something of a peculiarity to our jurisprudence, although it appears to be a familiar concept in Iran. Asghari, Houriyeh, *Temporary Arrest Warrant with an Outlook toward International Documents,* International Academic Journal of Law and Politics, Vol. 1, No. 1 (2016).

More pertinent to this case, Detective Clark also shared his understanding of a temporary felony warrant:

> I can explain my understanding of it. It's not something that I do, I clear it with a boss of mine, ether my captain or my lieutenant. Get a verbal okay from them and then the dispatcher is advised to enter a temporary felony [warrant] into the system. Common uses are for, for example, **when we don't have a Judge or an arrest warrant or DA officer to assist us in getting a warrant,** like overnight or something this is taking place in case someone else comes across the defendant, that we have probable cause to arrest. . . . **That's the end of my involvement with that.**

(R190-29-30) (emphasis added). Here, Detective Clark put meaning to why the device is referred to as "temporary." It serves as a sort of dragnet only until police can get access to a judge to seek an actual arrest warrant which, if issued, will then allow them to go out and actively track down the individual and take him or her into custody.

Before examining the constitutional problems with how the device was used in this case, there are two striking observations that must be made regarding Detective Clark's account of his actions in this case. First, the temporary warrant was issued on August 17, 2016, which was a Wednesday. Burrows was not arrested until the end of the business day on August 18, 2016, a Thursday. Therefore, the idea that the police did not have access to a judge or a district attorney to seek a judicially issued arrest warrant is simply not true. Second, the idea that upon issuing the temporary arrest warrant, Detective Clark ended his involvement in the matter

is also false. As previously noted, he then leveraged the temporary arrest warrant to orchestrate Burrows' arrest by Manitowoc sheriff deputies. (R190-30-31).

When a "temporary arrest warrant" is viewed in a larger and logical context, the picture that emerges is of a device that has evolved in law enforcement circles to address situations of immediacy and urgency. It is compelled by circumstances when the delay associated with getting a judicial warrant could prove catastrophic to public safety or result in the escape of a suspect who knows she is being pursued, or the loss or destruction of critical evidence. It is, in short, a device to bridge the gap until a judicial warrant is obtained. That is decidedly not, however, how the temporary arrest warrant was employed in this case. Here, the "temporary arrest warrant" was treated as an interchangeable and equivalent substitute for a judicial warrant, all at the sole discretion of law enforcement.

Consider Detective Clark's concession that at 7:00 p.m. on August 17th, when he issued the temporary arrest warrant, he could have paged an assistant district attorney and court commissioner to seek a warrant. (R190-33). And juxtapose that concession to the fact this is precisely what he did the next night, at 9:25 p.m., when he wanted a search warrant for Burrows' residence. (R46-1). Even more remarkable is the detective's concession that, in fact, he may have discussed the matter with the district attorney on the morning of August 18th, and then decided to just go ahead with the temporary warrant. (R190-40). This begs the question, though the answer is unknown, of whether the district attorney opined there was insufficient evidence for a judicial warrant.

In either event, the circuit court at least detected the odor of malfeasance, even if it then failed to appreciate its degree and significance:

> While the Court in hindsight would strongly suggest there could have been an opportunity to take this matter in front of a magistrate. If the officer felt that he had sufficient probable cause on the 17th to enter it into the system as a temporary arrest warrant, he could have early on the morning of the 18th got over to the DA's

> office and had an arrest warrant issued. But be that as it may, the time frame in question is not such that the Court finds that there has been any violation in failing to do that.

(R190-47). In short, the circuit court recognized the constitutional problem, but apologetically deemed it inconsequential. This is unfortunate because given the facts of this case, such a ruling does not merely step upon the slippery slope that leads to an equivalency between police-issued and judicially-issued warrants, it slides straight to the bottom.

Detective Clark's issuance and use of a "temporary arrest warrant" in this case violated basic principles of separation of powers, as he purported to exercise a power constitutionally vested and retained by *the judiciary.* The first clear pronouncement by the Supreme Court that a warrant under the Fourth Amendment must be issued by a "neutral and detached" magistrate surfaced in *Johnson v. United States,* 333 U.S. 10 (1948). In *Johnson,* Justice Robert Jackson emphasized that the inferences drawn from evidence to determine whether probable cause existed for a fourth amendment intrusion must be made by "a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Id.* at 14. As originally formulated by Justice Jackson, the requirement of a "neutral and detached" magistrate was tied to the concept of separation of powers - the magistrate approving the warrant must not be "an eager (or sullen) police apparatchik or agent." *Id. See also State v. Fremont*, 749 N.W.2d 234, 237 (Iowa 2008).

In addition to *Johnson,* three other Supreme Court cases developed the neutral-and-detached-magistrate requirement in the separation of powers context. *Coolidge v. New Hampshire,* 403 U.S. 443 (1971) (state attorney general wrongfully issued warrant); *Shadwick v. City of Tampa,* 407 U.S. 345 (1972) (court clerk of judicial branch sufficiently disassociated from role of law enforcement to issue arrest warrant and "[w]hatever else neutrality and detachment might entail, it is clear that they require severance and disengagement from activities of law enforcement"); *Lo–Ji Sales, Inc. v. New York,* 442 U.S. 319 (1979) (town justice wrongfully issued

warrant). *Johnson, Coolidge, Lo–Ji Sales*, and *Shadwick* suggest the warrant requirement reflects a preference for one sort of government officer - a judge - over the far more competitively charged police officer, when it comes to making the discretionary decisions that authorize fourth amendment intrusions.

A preference for warrants is rooted in the constitutional principle of separation of powers, which recognizes distinct roles for the judicial branch, which issues it, and the executive branch, which executes it. *See e.g., State v. Chamu-Hernandez*, 212 P.3d 514, 518 (Or. App. 2009). An arrest warrant may therefore only be issued by an impartial magistrate upon a showing of probable cause. *See, e.g., State v. Ward*, 2000 WI 3, ¶ 26, 231 Wis. 2d 723, 604 N.W.2d 517. It "interpose[s] the magistrate's determination of probable cause between the zealous officer and the citizen." *Payton v. New York*, 445 U.S. 573, 602-03 (1980). Detective Clark was nothing, if not zealous. And while his enthusiasm is to be admired, this does not mean he should be allowed to dispatch with constitutional principles and constitutionally developed procedures, in the service of that enthusiasm.

While police can arrest suspects without first obtaining an arrest warrant when they have probable cause to believe a crime has been committed, *see, e.g., Rinehart v. State*, 63 Wis. 2d 760, 766-76, 218 N.W.2d (1974), they cannot issue their own arrest warrants. Such authority lies exclusively within the province of the judicial branch. It is a basic judicial function, and the determination of whether sufficient probable cause exists in a particular case is one which can be made only by a judicial officer. *City of Birmingham v. 48th Dist. Court Judge*, 255 N.W.2d 760, 762 (Mich. App. 1977). If police were permitted to issue and circulate "temporary arrest warrants" with no description or summary of the facts upon which probable cause is based, they would effectively be able to issue their own general arrest warrants. Not only would this unlawfully infringe on the judiciary's exclusive province to issue warrants, it would eradicate the interposition of the judicial branch between the zealous officer and the privacy interests of citizens.

Sheboygan police could have sought an arrest warrant for Burrows, and no exigent circumstances made issuing a "temporary" arrest warrant necessary while proceeding in that constitutional manner. There was no reason to suppose Burrows posed any threat to the public's safety nor, because there is also no evidence to suggest Burrows was even aware of law enforcement's interest in him, was there any danger of Burrows absconding or destroying evidence. Thus, the fourth amendment and constitutional principles were simply sacrificed on the altar of convenience. Why take a chance with the judiciary if the executive branch of government has devised a way to exercise the same power?

Should the State claim exigent circumstances justified Detective Clark's actions in this case, such a claim would be belied by the record. Sheboygan police issued the temporary warrant on a Wednesday, and then waited until the end of Thursday to direct Burrows' arrest, using the "temporary arrest warrant" it issued as the cornerstone for the arrest. In the interim, it ignored the fact it had access to a court commissioner not only at the time it issued the temporary arrest warrant, but for an entire business day thereafter, and seemingly decided, with the consent of the district attorney, that *its* warrant was just as efficacious as any that might be issued by the judiciary. Such use of a "temporary arrest warrant" is constitutionally improper and violated the separation of powers doctrine.

II. THE ARREST OF BURROWS WAS UNLAWFUL BECAUSE EITHER IT WAS AN EXTRA-JURISDICTIONAL ACT, OR THE ARRESTING AGENCY DID NOT HAVE INFORMATION ESTABLISHING PROBABLE CAUSE FOR THE ARREST.

A. Sheboygan Police Were Outside Their Jurisdiction And Thus Without Legal Authority To Act.

The manner in which Sheboygan police deployed the temporary arrest warrant in this case puts the State on the horns of a dilemma. While Manitowoc deputy sheriffs nominally made the arrest, they were just the catspaw of the Sheboygan police. The Sheboygan police were the real actors, but without jurisdictional authority to do so. And yet, if the arrest is attributed to the Manitowoc sheriff's deputies, they possessed no information upon which to base the arrest, as such was held exclusively by Sheboygan police, and never communicated to Manitowoc authorities.

The record reveals it was the Sheboygan police who developed the facts, eschewed seeking an arrest warrant, issued a dressed-up temporary arrest warrant, surveilled Burrows until he was on the road, trailed him while updating Manitowoc deputies of his location, directed his stop and detention, were present for the arrest, and then immediately took custody of him from Manitowoc officials. The arrest of Burrows was, in every real and substantive sense, effectuated by the Sheboygan police. Indeed, Detective Clark conceded that he participated and assisted in the arrest. (R191-34-35). And the search of the vehicle was, as discussed below, conducted by Sheboygan police, outside of their jurisdiction.

Police acting outside of their jurisdiction do not act in their official capacity and do not have any official power to arrest. *State v. Slawek*, 114 Wis. 2d 332, 335, 338 N.W.2d 120 (Ct. App. 1983). Outside their jurisdiction, police authority is commensurate with that of an ordinary citizen. *Id.* Consequently, a narrow exception to the rule allows police officers to make a lawful arrest outside of their jurisdiction when they witness the commission of a crime, *State v.*

Barrett, 96 Wis. 2d 174, 181, 291 N.W.2d 498 (1980), provided the crime committed in their presence is a felony or serious misdemeanor affecting a breach of the peace. *Slawek*, *supra*; *Radloff v. National Food Stores, 247 Inc.,* 20 Wis. 2d 224, 237a, 123 N.W.2d 570 (1963). Such crimes are limited to those where the public security requires it: acts involving, threatening, or inciting violence. *Id*. at 237b, 123 N.W.2d at 571. *See also City of Waukesha v. Gorz*, 166 Wis. 2d 243, 246–49, 479 N.W.2d 221 (Ct. App. 1991) (drunk driving arrest lawful since it puts lives on the road in serious danger, as demonstrated by increasing slaughter on our highways).

Burrows did not commit any crime in the presence of Sheboygan police, much less one that involved, threatened, or incited violence. Accordingly, Sheboygan police did not have lawful authority to effectuate his arrest. Here, Sheboygan police circumvented this rule by having another law enforcement agency do their bidding via the issuance of a "temporary arrest warrant." Thus far, the gambit has worked, as the circuit court stated:

> He enlisted the assistance of the Manitowoc County Sheriff's Department. The only evidence that we have in the record is that the Manitowoc County Sheriff's Department stopped Mr. Burrows' vehicle after being alerted by the City of Sheboygan Police detectives, and placed Mr. Burrows under arrest.

(R190-47-48). This elevates for over substance. The Manitowoc Sheriff's Department was merely the agency by which the principal, the Sheboygan police, effectuated the arrest of Burrows. The arrest should be attributed to the Sheboygan police, and they did not have the authority, outside of their jurisdiction, to arrest Burrows.

B. Manitowoc Sheriff Deputies Did Not Have *Any* Knowledge Upon Which To Base Their Arrest Of Burrows, Much Less Knowledge Rising To The Level Of Probable Cause.

To get around the jurisdictional problem, the State will likely contend the arrest was not extra-jurisdictional because

Manitowoc deputy sheriffs were the ones who actually arrested Burrows. And indeed, this is how the circuit court resolved the issue:

> They certainly are justified in relying upon information furnished to them by another law enforcement agency. They had probable cause to place him under arrest. . . . So the motion to either dismiss or suppress the fruits of the arrest is denied at this point.

(R190-47-48). This, however, is not an accurate portrayal of the facts of this case. Manitowoc officials did not rely on information from Sheboygan police. Manitowoc officials relied on a simple directive to arrest Burrows.

This, in turn, begs the question of how Manitowoc officials could lawfully arrest Burrows when they did not possess any knowledge of any facts to determine whether they had probable cause to do so. Here, the individuals who took Burrows down in the felony arrest knew "nothing" about what Burrows had allegedly done. The State will likely attempt to bridge this gap by invoking the collective knowledge doctrine. If so, it will run into two roadblocks: (1) the knowledge purporting to establish probable cause was never communicated to the Manitowoc Sheriff's Department; and (2) the Manitowoc Sheriff's Department is not the same law enforcement agency that possessed the information.

This Court addressed the collective knowledge doctrine in *State v. Friday*, 147 Wis. 2d 359, 434 N.W.2d 85 (1990) (overruled on other grounds). Its discussion of the parameters of the doctrine, and its limitations, reveal why the doctrine cannot sanitize the actions of Manitowoc officials in this case:

> In . . . *State v. Middleton*, 135 Wis. 2d 297, 312 n. 7, 399 N.W.2d 917, 924 (Ct. App. 1986), we cited *United States v. Clark*, 559 F.2d 420, 424 (5th Cir. 1977), for the proposition that "in determining the existence of probable cause for a search, [the] court looks to the collective knowledge of [the] police . . . rather than the sole knowledge of the officer who performed

> the actual search." But *Clark* is not nearly as broad as . . . *Middleton* . . . suggests. Indeed, the quotation omits a crucial qualification. The *Clark* court's statement, in its entirety, was: "In addition to examining the totality of the circumstances, ***in view of the degree of communication between them***, we look to the collective knowledge of the police officers, rather than the sole knowledge of Officer Kennedy, who performed the search of the truck." *Id.* at 424. (Emphasis added.)

Friday at 712. (Emphasis in original). As the degree of communication between the respective officers is a critical inquiry, it is dispositive here that there was none. The only thing Sheboygan police communicated to Manitowoc sheriff's deputies was "arrest him."

In *State v. Black*, 2000 WI App 175, 238 Wis. 2d 203, 617 N.W.2d 210, this Court reaffirmed that for the collective knowledge doctrine to apply, the information which forms the basis for probable cause must actually be passed on to the arresting officer:

> The State would have us attribute the collective knowledge of [the investigating officers] in support of [the responding officer's] identification search. We disagree with this approach because the cases upon which the State relies are not on point. For instance, . . . the court in *Desjarlais v. State*, 73 Wis. 2d 480, 491, 243 N.W.2d 453 (1976), stated that where there is a "police-channel communication" to an arresting officer who acts in good faith on the information, the arrest is valid if probable cause is demonstrated by the facts held by the department "which were summarized in police dispatches." In both these cases, the collective police information was communicated to the arresting officer prior to the arrest. In the present case, the information was not given to the officer. We therefore conclude that in order for the collective-information rule to apply, such

> information must actually be passed to the officer before he or she makes an arrest or conducts a search. This conclusion is supported by *State v. Friday*, . . . where we held that collective police data cannot support an officer's search when the data is not in fact communicated to the officer prior to the time the search is made.

Black, 238 Wis. 2d 203, ¶ 17, n.4.

The communications deficiency is further exacerbated by the fact the officers possessing the knowledge, and the officers making the arrest, were not even from the same law enforcement agency. The collective knowledge doctrine applies when the knowledge is possessed within the same law enforcement agency. Unshared information should not permit one law enforcement agency to act as a blind proxy for another:

> There are many cases upholding a police officer's probable cause determination when the officer relied on the collective information ***within* the police department** relayed through police channels. However, none of them hold that the on-the-scene officer's determination may be based on *uncommunicated* information reposing in other officers ***elsewhere in* the department**. The collective knowledge or imputation rule has always been couched in terms of the arresting (or searching) officer's reliance upon a police communication.

Friday at 713-714. (bold emphasis added; italicized emphasis in original; quotations and footnote omitted), *citing Schaffer v. State*, 75 Wis. 2d 673, 677, 250 N.W.2d 326, 329 (1977)(where officer relies on police "communication" in making arrest, arrest will be valid when such facts exist within police department); *State v. Cheers*, 102 Wis. 2d 367, 388, 306 N.W.2d 676, 685 (1981)("where an arresting officer *is given information through police channels* such as roll call, this court's assessment of whether the arrest was supported by probable cause is to be made on the collective knowledge of the police force.").

In this case, Manitowoc law enforcement officials had no personal knowledge of the allegations against Burrows, only the bald claim he had engaged in stalking behavior, with a trumped-up warning that he was armed and dangerous. The arresting officers, therefore, did not have probable cause to arrest Burrows and the arrest cannot be resurrected by uncommunicated knowledge possessed by a different law enforcement agency. Were it otherwise, arrests made without probable cause could be legitimized, *post hoc,* by combing through other law enforcement agency databases to build a case for probable cause, using information unknown to the arresting officer at the time of the arrest.

III. THE SEARCH OF BURROWS' VEHICLE FOLLOWING HIS ARREST BY SHEBOYGAN POLICE OFFICALS WAS UNLAWFUL.

A. Sheboygan Police Were Outside Their Jurisdiction.

Although the Sheboygan police used the Manitowoc sheriff's department to nominally arrest Burrows, they then proceeded to take custody of Burrows and perform the search of his vehicle themselves. Once again, Sheboygan police were outside of their jurisdiction, and therefore with very limited authority to act. Thus, even if one were willing to sanitize the arrest choreographed by Sheboygan police by reasoning they did not actually handcuff Burrows, the fact remains they were the ones who conducted the search of Burrows' vehicle, outside their jurisdiction. There is no authority for such action. Accordingly, the search conducted by Sheboygan police was unlawful, even if the arrest was lawful and the evidence obtained in that search should have been suppressed.

B. There Was No Reasonable Basis To Believe Burrows' Vehicle Contained Evidence Of "Stalking."

Burrows was arrested and handcuffed by Manitowoc sheriff deputies and placed in a sheriff deputy's squad car. From there, he was turned over to the Sheboygan police and relocated to the Sheboygan police vehicle. Thereafter, Sheboygan police conducted a search of Burrow's vehicle

which Detective Clark characterized as "incident to arrest." (R191-41). Detective Clark, who began police work in 1984, (R191-28), may have believed a right to legally search Burrows' vehicle arose *ipso facto* in the wake of his arrest. While such was true when Detective Clark became a police officer, *see New York v. Belton*, 453 U.S. 454, 458 (1981), and remained the conventional thinking for a long time thereafter, the idea a vehicle search incident to arrest was always legal ended in 2009, when *Arizona v. Gant*, 556 U.S. 332 (2009) was decided. The next year, Wisconsin adopted the holding in *Gant*. *State v. Dearborn,* 2010 WI 84, 327 Wis. 2d 252, 786 N.W. 2d 97.

Gant exposed the fiction on which such thinking had been based: that *Belton* had countenanced such searches even when there is no possibility the arrestee could gain access to the vehicle at the time of the search. *Gant* recognized that lower court decisions were treating the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel v. California,* 395 U.S. 752 (1969). Under this broad reading of *Belton,* a vehicle search was authorized incident to every arrest of a recent occupant notwithstanding that in most cases the vehicle's passenger compartment will not be within the arrestee's reach at the time of the search. *Gant* rejected that rationale and here, Burrows was safely locked away in the Sheboygan police squad before the search of his vehicle took place. In the wake of *Gant,* the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.

Following *Gant,* only a narrow exception survives, as the Supreme Court reasoned that circumstances unique to the vehicle context will justify a vehicle search only when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." In many cases, there will be no reasonable basis to believe the vehicle contains relevant evidence. *See*, *e.g., Atwater v. Lago Vista,* 532 U.S. 318, 324 (2001); *Knowles v. Iowa,* 525 U.S. 113, 118 (1998). In others, including *Belton* and *Thornton v U.S.,* 541 U.S. 616 (2004), the offense of arrest will supply a basis for searching

the passenger compartment of an arrestee's vehicle and any containers therein. *Gant*, at 344.

Such an exception does not warrant the search conducted by Sheboygan police in this case, even if this Court determines there was authority to search outside their jurisdiction. The crime for which Burrows was arrested was for alleged "stalking," and not the kind of stalking that might be conducted with a vehicle. Nor was he arrested for drug trafficking, for example, or for possession of a firearm or other contraband. On the contrary, the alleged stalking activity consisted of letters sent and phone calls made by "a female" to E.W.'s place of employment. There was also the delivery of a baby, non-poisonous snake to E.W.'s apartment manager. Further evidence of stalking was therefore not likely to be found in Burrows' vehicle.

Although Detective Clark never testified he searched Burrows' vehicle because he believed it contained evidence of stalking, the circuit court stated:

> [I]t is generally allowed that police officers may search the passenger compartment of a motor vehicle if there is reasonable belief that the defendant, the person who has been arrested may have access to those locations, or that there is a reasonable suspicion that these locations may contain evidence of the offense that for the basis of the arrest. I agree . . . that we frequently see these in drug-related cases, but quite frankly there is a lot of similarities that one could draw from this type of offense as well as the drug-related offenses. We know from the evidence in the other hearings that this is a series of events that have gone on for approximately two weeks at this point. We also know that Burrows had been . . . allegedly doing these actions at all times during the day. Certainly he was at work during a good part of the 18th. I think there is . . . reasonable suspicion that some of the tools that he may have utilized if . . . he was committing this offense, could be found within the confines

> of the passenger compartment of the motor vehicle he was operating at the time of his arrest.

(R191-58-59). The supposed similarities between drug trafficking and stalking is not a persuasive rationale. Indeed, the two identified by the court – a "two week period" and actions happening "during the day" – do not make much sense.

The idea that it was reasonable to believe a search of Burrows' vehicle would yield evidence of stalking is unpersuasive. *See Gant* at 343, *citing Thornton, supra* at 632. The evidence relevant to the stalking crime against E.W. consisted of letters, voicemails from a blocked number, and a snake, all of which were already held by the Sheboygan police at the time of Burrows' arrest. No evidence suggested the perpetrator had used a vehicle to stalk E.W., and the evidence, as already noted, pointed to a *female* perpetrator and *not* Burrows. When viewed from the standpoint of the police at the time of the arrest, there was no reasonable basis to believe that a search of Burrows' vehicle would turn up evidence of stalking.

C. The Search Violated Section 968.11, Stats.

Even if this Court were to determine that the search of Burrows' vehicle was constitutional, it nevertheless violated section 968.11, Stats., which states:

> When a lawful arrest is made, a law enforcement officer may reasonably search the person arrested **and an area within such person's immediate presence** for the purpose of:
>
> (1) Protecting the officer from attack;
>
> (2) Preventing the person from escaping,
>
> (3) Discovering and seizing the fruits of the crime, or
>
> (4) Discovering and seizing any instruments, articles or things which may have been

> used in the commission of, or which may constitute evidence of the offense.

(Emphasis added). Only section 968.11(4) could possibly have application here, but because Burrows' vehicle was not within his immediate presence, the search was not permitted by section 968.11.

IV. EVEN IF THE FACTS DEVELOPED BY SHEBOYGAN POLICE ARE IMPUTED TO MANITOWOC SHERIFF'S DEPUTIES, THEY DID NOT CONSTITUTE PROBABLE CAUSE TO ARREST.

The crime for which Burrows was arrested – stalking – is comprised of the following elements:

> (1) Burrows intentionally engaged in a course of conduct directed at E.W.;
>
> (2) The course of conduct would have caused a reasonable person to suffer serious emotional distress, to fear bodily injury or death to herself or member of her family household;
>
> (3) the conduct caused E.W. to suffer serious emotional distress, induced fear in E.W. of bodily injury or death; and
>
> (4) Burrows knew or should have known that at least one of the acts constituting the course of conduct would cause E.W. to suffer serious emotional distress.

Section 940.32, Stats.

The requirements for an arrest in Wisconsin are codified in section 968.07, Stats. Since it is undisputed that no legitimate arrest warrant was ever issued in this case, nor any reasonable grounds to believe one had been issued, the legality of Burrows' arrest boils down to whether there was probable cause to believe he had committed, or was committing, a crime.

Section 968.07(1)(d). The test under section 968.07(1)(d) is whether the arresting officer could have obtained a warrant on the basis of information known prior to the arrest. *Loveday v. State,* 74 Wis. 2d 503, 274 N.W. 2d 116 (1976). As discussed below, the underlying substance of the information the Sheboygan police possessed was insufficient to establish probable cause to arrest Burrows.[5]

"Probable cause is the *sine qua non* of a lawful arrest." *State v. Mitchell,* 167 Wis. 2d 672, 684, 482 N.W. 2d 365 (1982). Probable cause to arrest is the quantum of evidence within the arrest officer's knowledge at the time of arrest which would lead a reasonable police office to believe that the defendant probably committed or was committing a crime. There must be more than a possibility or suspicion that the defendant committed an offense. *Mitchell,* at 681-682.

As previously noted, stalking requires "a course of conduct." Here, however, the information available to the police, at best, pointed to Burrows' possible involvement in a single act: the delivery of the non-poisonous snake to E.W.'s apartment complex. All the other alleged acts, both in substance and delivery, and in the estimation of the investigating officer, were the work of an unknown female. In other words, aside from the phone numbers on the apartment complex caller ID (which later turned out not to be from Burrows' phones), no one identified Burrows as the perpetrator of the stalking behavior. A single act cannot constitute a "course of conduct." And yet, acting only on mere suspicion because Burrows and E.W. had a prior relationship, and E.W.'s hunch that it was Burrows, Sheboygan police caused Burrows to be arrested.

[5] All the facts the State argued justified Burrows' arrest were in the possession of Sheboygan police by Wednesday August 17, 2016. That they did not seek an arrest warrant on that day or the next, and may have even met with the Sheboygan district attorney and walked away without a warrant, is a tacit admission they did not have probable cause to arrest Burrows. The absence of any exigency coupled with their failure to even attempt getting a warrant betrays the very idea they possessed probable cause to arrest.

V. THE SEARCH WARRANTS WERE NOT SUPPORTED BY PROBABLE CAUSE, AND ALL EVIDENCE SEIZED PURSUANT THERETO MUST BE SUPPRESSED.

On August 18, 2016, at 9:25 p.m., Sheboygan police obtained a warrant to search Burrows' residence. (R46-3, 12). The facts upon which the search warrant was based are found in the affidavit of Detective Clark, which was read into the record. (R46-3-11). All the subsequent search warrants were based on the same set of alleged facts and therefore are all subject to the same legal analysis. (R191-17).

Probable cause requires underlying facts and circumstances, not just conclusions, that a specific crime has been committed and such must be contained within the four corners of a search warrant. *Illinois v. Gates,* 462 U.S. 213, 238 (l982); *State v. Eason*, 2001 WI 98, ¶ 11, 245 Wis. 2d 206, 629 N.W.2d 625. Probable cause requires there be reliable evidence a crime has been committed by the defendant. *Gates, supra. See also State v. Pasek,* 50 Wis. 2d 619, 624, 184 N.W.2d 836 (1971) and *Sanders v. State,* 69 Wis. 2d 242, 259, 230 N.W. 2d 845 (1975). In *Pasek,* the supreme court stated that probable cause requires that the information upon which a complaint is based lead a reasonable person to believe that guilt is more than a mere possibility. The quantum of information which constitutes probable cause is measured by the facts of the particular case. *Id.* at 628.

Probable cause to believe Burrows committed the crime of stalking under section 940.32, Stats., must necessarily be examined from the standpoint of the elements of that crime. As noted above, section 940.32(2)(c) includes the following as an essential element of the offense of stalking:

> The actor's acts cause the specific person to **suffer serious emotional distress** or induce fear in the specific person of bodily injury to or the death of himself or herself or a member of his or her family or household.

(Emphasis added). "Suffer serious emotional distress" is further defined as "feel[ing] terrified, intimidated, threatened, harassed, or tormented." Section 940.32(1)(d).

The affidavit supporting the search warrant does not allege that E.W. suffered serious emotional distress, nor does it allege she felt terrified, etc. Regarding this element of the crime, the baby snake delivery can play no meaningful role, not simply because E.W. never received it, but also because the affidavit fails to allege she was ever aware of it. In other words, E.W. could not have suffered serious emotional distress from the baby snake as she never saw it, and it was taken into police custody in a sealed box and opened by a police officer, not E.W. Here, the requisite third element of the offense is not even presented as a conclusion. Absent that element, there can be no probable cause that the crime in question was committed.

While Burrows readily admitted he engaged in a series of emails with E.W. between July 20th and August 18th, 2016, E.W. answered these emails on 42 occasions and never told Burrows to stop emailing her. E.W.'s emails reveal she was not, as a result of Burrows' conduct, experiencing any "serious emotional distress," as required for the crime of stalking. Likewise, the other evidence in this case, workplace phone calls and letters do not have "observational reliability".

In *Sanders, supra,* the Wisconsin supreme court discussed the issue of evidence "reliability" and defined it as the reliability of the circumstances underlying the means by which information was obtained. *Id.* at 258-59. The element of observational reliability is satisfied when the means is "direct personal observation." While the affidavits mention threatening phone calls and letters, they came from a *female* not Burrows. All the search warrant affidavits submitted in this case fail to contain evidence of observational reliability, and no factual statements that E.W. suffered serious psychological distress.

In examining probable cause to issue a warrant, a court will look to the information contained within the four corners of the search warrant and affidavit. *Eason*, 2001 WI 98, at ¶ 11. Conspicuous by its absence in the affidavits for search warrants is any allegation, much less information, that E.W. suffered severe emotional distress. The trial court resolved the issue against Burrows by filling in the blank with what could reasonable be inferred from the affidavit. (R191-25). In so

doing, it went outside the four corners of the affidavit. Having failed to develop and present factual evidence that E.W. suffered severe emotional distress as a result of Burrow's alleged actions, the evidence seized as a result of all the search warrants should have been suppressed.

Conclusion and Relief Requested

For all the foregoing reasons, Burrows respectfully requests this Court vacate his convictions and sentences, and remand with directions that the circuit court suppress the evidence obtained as a result of Burrows' arrest, and the subsequent searches.

Dated this 26th day of August, 2018.

/s/ Rex Anderegg
REX R. ANDEREGG
State Bar No. 1016560
Attorney for the Defendant-Appellant

CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, minimum 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 9,155 words, as counted by Microsoft Word 2016.

Dated this 26th day of August 27, 2018.

/s/ Rex Anderegg
REX R. ANDEREGG

CERTIFICATION OF 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 s. 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, and a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 26th day of August, 2018.

/s/ Rex Anderegg
REX R. ANDEREGG

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that I have submitted an electronic copy of the respondent's brief-in-chief and appendix, if available, in *State of Wisconsin v. Eric Burrows,* 2018 AP 000770-CR, which complies with the requirements of s. 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 26th day of August, 2018.

/s/ Rex Anderegg
Rex Anderegg