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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2018AP000770 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ERIC BURROWS,

Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

Appealed from a Judgement of Conviction in the
Circuit Court of Sheboygan County, Wisconsin,
The Honorable Judge L. Edward Stengel Presiding
Trial Court Case No. 2016 CF 535

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STATEMENT ON PUBLICATION AND ORAL ARGUMEMENT

The State does not request either oral argument or publication because the briefs adequately develop the law and facts necessary for the disposition of the appeal and the case can be decided based on well-established legal principles.

STATEMENT OF THE FACTS AND CASE

On January 16, 2018, the Defendant, Eric Burrows, entered pleas of "Guilty" to Stalking – Domestic Abuse, Unlawful Phone Use – Threaten with Obscenity, and Defamation – Domestic Abuse, for events that occurred between July 30, 2016, and August 18, 2016, against the Victim in this case Erica W. (R. 11, 172.) Those events are as follows.

On August 8, 2016, Erica W. called law enforcement to report threatening voicemails and letters being sent to her employer. (R. 11 at 2.) She advised Officer Charlet Endsley of the Sheboygan Police Department that she had recently broken up with her boyfriend, Mr. Burrows, and believed these messages had been sent from him. (*Id.*)

Erica W. showed Officer Endsley a typed letter received by her employer, opened August 8th, the contents of which were harassing and threatening in nature. (*Id.*) It was written from the point of view of a female, specifically the girlfriend of Ben K., a fellow employee that Erica W. was currently seeing. (*Id.*) In the letter, the female is upset that Erica W. is seeing Ben K. and threatens to come to her place of employment and "take care of her myself in my own way in front of your employees and customers, and that is a promise," adding that the writer had "nothing to lose." (*Id.*; R. 165 at 8-10.)

Erica W. also showed Officer Endsley two voicemails, one received on August 3, 2016, and the other on August 8, 2016. (R. 11 at 2.) Both were received

at her place of employment from an outside, blocked line. (*Id.*) Both voicemails were from a woman, again pretending to be Ben K.'s girlfriend, and were also threatening and harassing in nature. (*Id.*) They used the same language as in the letter to her employer, such as saying that the caller had "nothing to lose," and that Erica W. was a "blonde bitch" and a "whore." (*Id.*) The female also repeatedly called Erica W. a "cunt." (*Id.*)

In listening to the voicemails, it also was obvious to Officer Endsley that the female was "reading off a piece of paper into the message because the female voice appears to stumble over her words which she wanted to say and then restates it." (*Id.*) These messages also contained personal information about Erica W., including her son joining the Army, things Burrows would know, but not a random female. (*Id.*) The female even threatens to prevent her son from joining the Army if she does not stop seeing Ben K. (R. 48 at 3.)

Officer Endsley asked Ben K. about his past and current relationships. (*Id.* at 3.) Ben K. indicated that he did not have a girlfriend or wife either at the present time or in the recent past. (*Id.*) Ben K. also indicated he did not recognize the voice on the phone. (*Id.*) Again, Erica W. believed the messages to be coming at the behest of Burrows. (*Id.*) Officer Endsley also asked Erica W. about Burrows' motive for these calls and letters, to which she explained a long history of controlling behavior in their relationship, how they broke up against Burrows' wishes,

and the way Burrows seemed to "amp up" after she began seeing Ben K. (R. 48 at 3-4.)

The investigation was then turned over to Detective Joel Clark of the Sheboygan Police Department, who again made contact with Erica W. Erica W. reported receiving a deluge of text messages, phone calls, and emails from Burrows between July 30, 2016, and her report to law enforcement (*Id.* at 3-4; R. 165 at 21-44.) These communications ranged from friendly, asking to rekindle the relationship, to angry, accusing her of cheating and lying. (*Id.*) One message in July consisted of him sending her a nude picture of herself and him discussing the possibility of sharing it with others without her consent. (R. 11 at 4.) This caused Erica W. to be fearful he was going to post it on social media. (*Id.*)

Erica W. also reported that a letter had been sent to her ex-husband, Jason J. (R. 165 at 14.) The letter was again from the point of view of Ben K.'s girlfriend. (*Id.* at 14.) It contained similar language and style to the letters and voicemails sent to Erica W.'s employer, including that the writer had "nothing to lose," and that Erica W. is a "dumb blonde," a "cunt," and a "bitch." (*Id.*) It also repeatedly referred to his and Erica W.'s son as a "pot head" and referenced that he was in the Army. (*Id.*) Erica W. reported the handwriting on the envelope as similar to that of Burrows. (R. 48.)

Detective Clark also learned that a letter was sent to Erica W.'s son's Army recruiter. (*Id.* at 12.) This letter

was from the point of view of her son's friend "Matt," and made spurious accusations that her son was addicted to marijuana and that Erica W. helps cover it up, clearly trying to prevent her son from getting into the Army. (*Id*.)

Erica W. also reported issues with her apartment complex before and since she moved into the unit. (R. 11 at 3-4.) The manager of the apartment complex had received a letter in the mail with "Get real, up yours" written at the top. (*Id.* at 4; R. 165 at 20.) This was a letter addressed to Erica W. and sent to Burrows' residence when she was in the process of moving. (R. 11 at 4.) The manager also reported receiving a call from a male subject claiming to be from Speedy Delivery Services, indicating he had a package for Erica W. and needed her address. (*Id.*) The manager refused to provide the information and advised that if he had a package for a tenant, it could be left at the main office and they would make sure she got it. (*Id.*)

On August 17, 2016, Erica W. contacted Detective Clark to report that a suspicious package, with her name on it, had been delivered to the main office of her apartment complex. (*Id.* at 5.) The secretary also reported receiving two phone calls regarding the package on the morning of August 17th. (*Id.*) One was from a number identified as belonging to B & B Metals Processing Inc.—Burrows' place of employment—and the other from a number that Erica W. recognized as being

Burrows' cell phone number. (*Id.*)[1] In the call from B & B Metals, a male caller wanted to make sure that the package left for Erica W. was delivered to her. (*Id.*) The secretary believed it was the same voice that called on the previous occasion, asking about delivering a package to Erica W. (*Id.*) In the call from Burrows' cell phone, a female, claiming to be Erica W.'s sister, indicated that the package contained cheese and meat, and wanted to make sure the package was delivered to Erica W. (*Id.*)

The package was opened. Inside was a live ball-python snake and a note which read: "Surprise you lying cunt. Enjoy, this is who you are. Now do u care." (*Id.*; R. 165 at 46-49.) At that point, Detective Clark decided to arrest Burrows as soon as possible based on probable cause to believe he was engaging in the crime of Stalking. (R. 191 at 37:18-22.)

Detective Clark attempted to locate Burrows that day, but was unsuccessful. (*Id.* at 29:7-8.) Therefore, it was determined that a temporary felony arrest warrant would be entered into the law enforcement computer, known as TIME. (*Id.* at 29:8-30:22.) This is a system that is shared between all law enforcement agencies across the State of Wisconsin. (*Id.* at 30:6-14; 31:12-17.)

[1] Contrary to what the Defendant-Appellant says in his brief, this was later confirmed via a subpoena for records from U.S. Cellular. (R. 15.) A review of Burrows' call history, which is more accurate than a phone download—since the user cannot alter or delete the company's stored data—showed a call from Burrows' cell phone to the apartment complex at the same date and time as seen on the caller ID. (R. 165 at 43.)

On August 18, 2016, Detective Clark coordinated with the Manitowoc County Sheriff's Department to take Burrows into custody through a traffic stop outside his place of employment in Manitowoc County. Detective Clark communicated with the Manitowoc County Sheriff's Department and they developed a plan to arrest Burrows when he left work. (*Id.* at 39:5-9, 43:13.) Detective Clark felt this—a traffic stop—was the safest way to take Burrows into custody. (*Id.* at 38:22-24.)

Detectives Clark and Cameron Stewart of the Sheboygan Police Department waited outside of Burrows' place of employment for him to exit the property in his vehicle. (*Id.* at 39:12-15.) Manitowoc County Sheriff's Department deputies waited down the road in marked squad cars. (*Id.*) When Detectives Clark and Stewart observed the Defendant exit B & B Metals, they communicated this to the Manitowoc deputies, who then initiated a traffic stop of the vehicle based on the temporary felony arrest warrant, which was based on Sheboygan Police Department's probable cause to arrest Burrows for Stalking. (*Id.* at 30:22-24, 31:9-17, 40:19-41:9.) Manitowoc County deputies took Burrows into custody, handcuffed him, and placed him the back of a squad car. (*Id.* at 35:6-13.) A marked unit from the Sheboygan Police Department was then called to the scene to take custody of Burrows and transport him back to Sheboygan. (*Id.*)

Neither Detective Clark nor Detective Stewart participated in the stop or arrest of Burrows. They did not place handcuffs on him. (*Id.* at 35: 14-19.) They did not physically place him into the Manitowoc County Sheriff's Department squad car. (*Id.* at 35:23-36:3.) As Detective Clark indicated, "We stayed back. We are not in a marked unit, so we don't participate in the traffic stop or the arrest because our vehicles are not property identified for that." (*Id.* at 35:19-22.) They then waited for a marked Sheboygan Police Department squad car to arrive on scene, at which point Manitowoc County turned Burrows over to the custody of the Sheboygan Police Department for transport and processing. (*Id.* at 36:5-8, 41:10-15.)

While Burrows was in custody, Detectives Clark and Stewart conducted a search incident to arrest of Burrows' vehicle, which he was driving at the time of the stop. No one else in the vehicle (aside from two dogs). (*Id.* at 49:22-50:3.) During that search, on the passenger side of the vehicle, Detective Stewart located a yellow sheet of paper containing a handwritten note similar in style and content to the letter sent to Erica W.'s employer. (R. 11 at 5; R. 165 at 51; R. 191 at 42:1-22.) It appeared to be a draft of another letter, containing circled and scratched out words, from the point of view of the same female, Ben K.'s supposed girlfriend. (R. 165 at 51.) It too called Erica W. a "bitch" and a "slut," and contained personal

information known to Burrows, including when she worked and that her son was going into the Army. (*Id.*)

Detective Clark also seized Burrows' cell phone from the search incident to arrest of the vehicle. (R. 191 at 50:6-11, 52:13-20.) Detective Clark believed it to be Burrows' cell phone because he was the only one in the vehicle, it was located within reach of the driver's seat, and Burrows had a cell phone holder on his belt which was empty when he was taken into custody. (*Id.* at 52:18-20.)

Both items were considered evidence of the crime for which Burrows was arrested: the letter because it matched those went to Erica W. and the phone because of the caller ID at her apartment building as well as the copious amounts of calls, texts, and emails received by Erica W. from Burrows. (*Id.* at 53:1-6.)

Burrows was then transported to the Sheboygan Police Department and interviewed. At the beginning of the interview, Burrows asked what this was about. (R. 11 at 5-6.) When Detective Clark responded it was about the letters he was sending, Burrows replied, "those letters aren't coming from me," indicating to Detective Clark that he had knowledge of the letters. (*Id.* at 6.) Detective Clark then bluffed, saying they had surveillance video of Burrows at Erica W.'s apartment complex, which showed him leaving a box there. (*Id.*) He added, truthfully, that caller ID also identified Burrows as being responsible. (*Id.*) Burrows replied that the package was not about

hurting or scaring anyone, but about people lying. (*Id.*) He added that maybe, if they had surveillance video, he was responsible for the snake in the box. (*Id.*)

In the days that followed, Detective Clark applied for and was granted a search warrant for the Defendant's home, phone, computer, printer, cell phone records, Google location data, hair, and buccal swabs. (R. 1, 13, 15, 27, and 33.)

Detective Clark executed the search warrant of the Defendant's cell phone on August 22, 2016, and located numerous items of evidentiary value. (R. 11 at 6.) Those included Google searches for Erica W.'s apartment complex and place of employment on the same dates and at the same time as relevant events, a search for Jason J.'s information, as well as searches for things such as "what is stalking a person," "how do you know if u r stalking someone," and "warning signs of stalking behavior." (*Id.* at 6-7.) Burrows also attempted to gain access to Erica W.'s Facebook account without her permission and without success. (*Id.* at 7.) He was also on Ben K.'s Facebook page. (*Id.*)

That same day, Erica W. contacted Detective Clark to report that she had received another letter in the mail at her place of employment, this one enclosed in a Get Well card. (R. 48 at 21.) The letter was addressed the same as the letter to her son's Army recruiter. (*Id.*) It had two postmarks: one dated August 17, 2016, the other dated August 19, 2016 (the result of a tear in the envelope and

it having to be manually sorted). (*Id.*) The letter was again written from the perspective of Ben K.'s girlfriend and was again similar in style and content to the other letters sent to her employer and to Jason J. (*Id.* at 22.) The letter was again harassing in nature, calling Erica W. a "cunt," "dumb," "blonde" and a "bitch." (*Id.*; R. 165 at 16-17.) It also threatened Erica W., stating that "Now your lies are going to cost you a little trip down the road to St. Nicks" (Sheboygan's local hospital) and "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 . . . I will come back for you Bitch." (*Id.*) It also again references the Army and her "pot head son." (*Id.*) Finally, it told Erica W. to "go back to your little snake hole," a direct reference to the snake delivered to her residence the same day as the letter was originally mailed. (*Id.*)

On August 24, 2016, Burrows was charged with Stalking for all these events. (R. 11.)

On August 15, 2017, Burrows filed a motion to suppress, alleging that his arrest, the seizure of evidence following his arrest, and the search warrants were all illegal. (R. 46-47.) The court held a motion hearing on September 1, 2017, at which time all motions were denied. (R. 191.)

As to the search warrants, the court ruled:

> Well, I certainly agree with Mr. Stern in the fact that it would have been so much cleaner if a simple statement as he has suggested (alleging serious emotional distress) would have been added to the affidavit in the search warrant. But I think the State also can suggest that the reasonable inferences that are drawn from the many, many

> paragraphs that are set forth in the affidavit that detail in somewhat excruciating detail all of the circumstances that this lady was suffering as a result of the alleged conduct, and I think a reasonable objective standard applied to that would certainly suggest that she is suffering emotional distress, or in alternative is put in fear of bodily injury or death.
>
> There are suggestions as to her hair being pulled out. There is suggestions as to her son being harmed while in the military. So I think looking at the facts and circumstances that are set forth and the reasonable inferences to be drawn therefrom, and also recognizing that the decision of the magistrate is to be given due deference in these matters, I do find that there is sufficient probable cause set forth to establish that there is probable cause to believe that evidence of the crimes as alleged in the affidavit are to be found on the circumstances or locations as outlined. And the motion to challenge the search warrant is denied.

(R. 191 at 24:21-25:20.)

As to Burrows' arrest, the court ruled that Manitowoc County Sheriff's Department deputies "certainly are justified in relying upon information furnished to them by another law enforcement agency. They had probable cause to place him under arrest." (*Id.* at 47:24-48:2.) Finally, as to the search incident to arrest of the vehicle, the court ruled that the "detectives certainly had legal authority to conduct a search of the vehicle that [Burrows] was operating incident to the arrest." (*Id.* at 48:5-9.) The court further expounded:

> The Court is satisfied that there is a lot of cases, and *Gant* is certainly one of more recent ones as is *Dearborn* that talk about these types of searches.
>
> And it 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 form the basis of the arrest.

> I agree with Mr. Stern 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 Mr. Burrows had been doing or 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 certainly a reasonable suspicion that some of the tools that he may have utilized if, in fact, 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. This search took place fairly contemporaneous to his arrest and being taken away from the vehicle.
>
> The Court finds that there was an exception that allowed for the search without the warrant, and the motion to suppress is denied upon those grounds.

(*Id.* at 57:24-59:4.)

ARGUMENT

The State respectfully requests this Court deny the Defendant-Appellant's request for relief because (1) there was probable cause to arrest Burrows, (2) his arrest was proper under the collective knowledge doctrine, (3) the search incident to arrest of Burrows' vehicle was lawful, and (4) the search warrants for Burrows' property were properly granted by a neutral and detached magistrate, based on probable cause.

I. PROBABLE CAUSE EXISTED TO ARREST BURROWS FOR STALKING

"Probable cause refers to the quantum of evidence which would lead a reasonable police officer to believe that defendant committed a crime. There must be more than a possibility or suspicion that defendant committed an offense, but the evidence need not reach the level of

proof beyond a reasonable doubt or even that guilt is more likely than not." *State v. Mitchell*, 167 Wis.2d 672, 681–82, 482 N.W.2d 364 (1992). Probable cause does not need to be proved by direct evidence alone. In fact, "[c]ircumstantial evidence can sometimes be, and often is, stronger and more satisfactory than direct evidence." *State v. Ritchie*, 2000 WI App 136, ¶ 16, 237 Wis.2d 664, 614 N.W.2d 837; *see State v. Johnson*, 11 Wis.2d 130, 134-35, 104 N.W.2d 379 (1960) ("Not many criminals are caught in the act like a child with his hand in the cookie jar. Circumstantial evidence may be and often is stronger and as convincing as direct evidence. The same rule of the burden of proof in a criminal case applies to circumstantial evidence as to positive, direct evidence; and in both cases the evidence must be sufficiently strong and convincing . . . .").

"[A]s a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal." *Ornelas v. United States*, 517 U.S. 690, 699, 116 S. Ct. 1657, 1663, 134 L. Ed. 2d 911 (1996). However, the reviewing court "should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Id.* This is because a trial judge and law enforcement view the facts of a case through a particular lens distinctive to their community and their experiences. *Id.*

In this case, there was ample circumstantial evidence to support the arrest of Burrows for stalking Erica W. Sheboygan County Commissioner Ryan O'Rourke found so. (R. 1, 3, 7.) Sheboygan County Circuit Court Judge L. Edward Stengel found so as well. (R. 18, 62, 190 at 44:3-8, 191 at 48:1-2.) Both made the finding on numerous occasions.

First, Burrows was the only one with motive to commit the series of acts: he was a jilted lover, unwilling to accept the fact that Erica W. had not only left him, but moved on. The letters and voicemails were also not out of the blue. They were preceded by a very controlling relationship and, when that relationship ended, a litany of texts, phone calls, and emails from Burrows, ranging from pleading to abusive. Abusive, very much like what was to follow.

Second, evidence pointed to the fact that the letters—to her employer, ex-husband, son's Army recruiter—were written by or at the direction of Burrows. That the letters (with the exception of the one to the Army recruiter) were written from the perspective of a female did not mask the fact that (1) no such female with her stated relationship to Ben K. existed, and (2) the letters contained information that only Burrows and those close to Erica W. would know about herself and her family. The language and style of all of these letters were consistent, matching that of the language used on the note in the box containing the snake. Even the letter to the Army recruiter contained the

same basic allegation contained in all the other letters: her "pot head son" should not be in the Army.

Third, evidence pointed to the fact that the voicemails left at Erica W.'s employer were at the direction of Burrows. The voicemails were, according to Officer Endsley, clearly scripted, with the female caller stumbling over her words and having to go back to restate things. A female caller who's relationship to Ben K. did not exist. They too contained information that only Burrows and those close to Erica W. would know. They too contained similar language and content as those found in the letters and on the note in the box.

Fourth, Burrows was tied to the delivery of the snake in the box through the two phone calls made after it was left. One was a female voice, but from Burrows' personal cell phone number (lending further credibility to the fact that the female voice in the voicemails and letters was at the direction of Burrows). The other was a male voice from his work phone number, reasonably believed to be Burrows himself. In fact, the secretary even linked the male voice to an earlier phone call asking for Erica W.'s address to deliver a package. And Burrows certainly knew Erica W. had moved to that apartment complex, given the "Get real, up yours" letter.

Though he was not caught with his hand in the proverbial cookie jar, but all of the evidence when stacked together pointed to only one person: Burrows. The letters, voicemails, text messages, emails, phone

calls, and finally the snake; the motive, opportunity, and clear intent. It all constituted a course of conduct, a quantum of evidence which would lead a reasonable police officer to believe Burrows committed the crime of Stalking. The evidence at that point may not have reached the level of proof beyond a reasonable doubt or even that guilt is more likely than not, but it was far more than possibility or suspicion. Detective Clark thought so. Commissioner O'Rourke thought so. And Judge Stengel thought so. This Court, in reviewing whether probable cause existed, should give due deference to their findings and find probable cause did exist to arrest Burrows.

II. BURROWS ARREST WAS PROPER UNDER THE COLLECTIVE KNOWLEDGE DOCTRINE

When reviewing a circuit court's ruling on a motion to suppress evidence, this Court applies the clearly erroneous standard to the circuit court's finding of facts. *State v. Vorburger,* 2002 WI 105, ¶ 32, 255 Wis.2d 537, 648 N.W.2d 829. In doing so, this Court should "uphold the trial court's findings . . . unless it is against the great weight and clear preponderance of the evidence." *State v. Tomlinson,* 2002 WI 91, ¶ 36, 254 Wis.2d 502, 648 N.W.2d 367.

A. A Temporary Felony Warrant Is a Tool to Communicate Probable Cause to Other Jurisdictions under the Collective Knowledge Doctrine

"A 'temporary felony want' or 'temporary warrant' meant that the suspect was alleged to have committed a felony and should be apprehended promptly, and that there was information sufficient to support an arrest warrant, but that no arrest warrant had yet been issued." *State v. Collins*, 122 Wis. 2d 320, 323, 363 N.W.2d 229, 230 (Ct. App. 1984). In other words, it is a tool used by law enforcement officers to communicate to other law enforcement officers that probable cause exists to arrest an individual for a felony crime and that that person should be taken into custody immediately.

This is an important tool because under the collective knowledge doctrine, officers can rely and act on the basis of knowledge of other officers, without themselves knowing the underlying facts, so long as reasonable suspicion or probable cause underlies the collective knowledge of the other officers. *State v. Pickens*, 2010 WI App 5, ¶¶ 12-15, 323 Wis. 2d 226, 779 N.W.2d 1; *United States v. Hensley*, 469 U.S. 221, 232, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985). That is to say, the police force is considered as a unit, and where there is police-channel communication to an arresting officer, the arrest is based on probable cause when such facts exist within a police department. *See State v. Rissley*, 2012 WI App

112, ¶ 19, 344 Wis. 2d 422, 824 N.W.2d 853 (citation omitted).

In order for the collective knowledge doctrine to apply, however, the department or officer with the knowledge supporting probable cause must communicate the existence of probable cause to the arresting officer before the arrest. The information that needs to be communicated to the responding officers is not the facts underlying the probable cause; but rather, only the fact that probable cause exists. *Pickens*, 2010 WI App 5, ¶¶ 11-12; *Hensley*, 469 U.S. at 229-31; *Schaffer v. State*, 75 Wis. 2d 673, 676, 250 N.W.2d 326 (1977), *overruled on other grounds by State v. Walker*, 154 Wis. 2d 158, 185-86, 453 N.W.2d 127 (1990).

In fact, police officers often properly act on the basis of the knowledge of other offices and even other jurisdictions without knowing the underlying facts. For example, an investigating officer with knowledge of facts amounting to probable cause may direct a second officer without such knowledge to detain a suspect. A responding officer can rely on an "attempt to locate" or police bulletin to make a stop or an arrest. Even going back to the Old West, deputies could take criminals into custody based on Wanted posters alone, carrying no more information than the fact probable cause exists and for what crime.

When those scenarios occur, the focus of the inquiry is not on whether the officer who took the suspect into

custody had the knowledge of specific and articulable facts supporting probable cause at the time of the arrest, but on whether the officer who initiated the arrest did. *Hensley*, 469 U.S. at 231-32; *Pickens*, 2010 WI App 5, ¶¶ 11-12. So long as that second officer is acting in good faith upon the collective knowledge of the other officer, then the arrest is legally justified. *Schaffer*, 75 Wis. 2d at 676-77; *see also State v. Taylor*, 60 Wis. 2d 506, 515, 210 N.W.2d 873 (1973) (stating that officers acting in good faith on basis of police dispatch may assume probable cause has been established, and it is reasonable for an officer relying on such a dispatch to apprehend the suspect of the dispatch).

In this case, probable cause existed to arrest Burrows for Stalking and that information was within the knowledge of Detective Clark. *See supra* Part I. Detective Clark communicated the fact that probable cause existed to arrest Burrows for Stalking to the Manitowoc County Sheriff's Department, both through the temporary felony warrant and when coordinating Burrows' arrest on August 18, 2016.

Defendant-Appellant argues that the Manitowoc County Sheriff Department deputies needed to possess knowledge establishing probable cause to arrest Burrows before they could do so. (App's Br. at IIB.) This argument is contrary to well established case law. In fact, it is even contrary to one of the cases relied upon by the Defendant-Appellant. (*Id.* at 19-20.)

In *State v. Black*, the Wisconsin Court of Appeals cited *Schaffer* in holding that arresting officers who have not personally acquired factual information to establish probable cause can still rely on the collective information of the police, can act in good faith on the basis of that information, and can assume at the time of apprehension that probable cause has been established. 2000 WI App 175 n.4, 238 Wis. 2d 203, 617 N.W. 2d 210. The difference in *Black* was that the detectives who possessed the knowledge of probable cause did not communicate the fact that probable cause existed to the patrol officer, but merely asked the patrol officer to get the suspect's identification. *Id.* at ¶ 17.

The same is true in *State v. Friday*, also cited by the Defendant-Appellant. 140 Wis.2d 701, 412 N.W.2d 540 (1987).[2] In that case, the State tried to impute uncommunicated information to another officer to justify a search. *Id.* at 712. The court ruled this impermissible and in doing so, cited *Schaffer*:

> Where an officer relies upon a police communication in making an arrest, in the absence of his personal knowledge of probable cause, the arrest will only be based on probable cause, and thus valid, when such facts exist within the police department.

Id. at 714 (*citing Schaffer*, 75 Wis.2d at 677); *see also State v. Cheers*, 102 Wis.2d 367, 388, 306 N.W.2d 676

[2] The Defendant-Appellant cites to 147 Wis.2d 359, 434 N.W.2d 85 (1990), which is the 1989 Wisconsin Supreme Court case that overruled the Court of Appeals decision on other grounds. (App.'s Br. at 18.) It is the Court of Appeals decision that deals with the issue of the collective knowledge doctrine, so the State will rely on that when making its argument.

(1981) ("[W]here 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."). The *Friday* Court also cited a variety of other cases where the collective knowledge doctrine was inappropriate, and in each the information the State tried to input on the other officers was wholly uncommunicated. *Friday*, 140 Wis.2d at 714-15.

Again, that was not the case here. Detective Clark—through the temporary arrest warrant and in coordinating Burrows' arrest—communicated to the Manitowoc County Sheriff's Department deputies the fact that probable cause existed to arrest Burrows. Moreover, the deputies had jurisdiction and they acted in good faith upon Detective Clark's communication.

B. Manitowoc County Sheriff's Department Deputies, not Sheboygan Police Department Detectives, Took Burrows into Custody

The communication between the two law enforcement agencies was necessary because Detective Clark did not have jurisdiction to act in Manitowoc County and was trying to effectuate the cleanest and safest arrest of Burrows as possible—something that was difficult because Burrows lived and worked in Manitowoc County. Detective Clark also wanted to arrest Burrows as soon as possible, given the ongoing abusive conduct and the recent escalation of his behavior (e.g. sending a snake in a box to her doorstep).

Detective Clark did exactly what the general public would expect a law enforcement officer to do: he coordinated with the proper authorities so that Burrows could lawfully be arrested, then turned over to him. This again is something that law enforcement does every day. Suspects live in other jurisdictions, they flee, and they jump bail. When they need to be apprehended, the law enforcement agencies communicate and coordinate with each other to take that person into custody and transport him to the proper jurisdiction to face his charges.

Detectives Clark and Stewart, though present and assisting in the form of communicating their observations, did not take Burrows into custody. They did not pull him over, order him out of the vehicle, handcuff him, or do anything that would at all indicate they were exercising their official police power over him. Instead, they stood by and allowed the Manitowoc Sheriff's Department deputies to do their job in their jurisdiction, then and only then taking custody of Burrows to be transported back to Sheboygan.

Judge Stengel agreed with the State and denied Burrows' motion to suppress on these grounds. In doing so, he ruled that probable cause existed to arrest Burrows and that the Manitowoc County Sheriff's Department deputies who effectuated the arrest "certainly [were] justified in relying upon information furnished to them by another law enforcement agency." (*Id.* at 47:24-48:2.)

Given all the evidence and case law as outlined above, this ruling is not clearly erroneous and should be upheld.

III. THE SEARCH OF BURROWS' VEHICLE WAS A LAWFUL SEARCH INCIDENT TO ARREST

A. The Jurisdictional Issue was Not Properly before the Trial Court so the Issue Should be Deemed Waived

The Defendant-Appellant argues, without any legal authority, that Detectives Clark and Stewart did not have jurisdiction to effectuate the search incident to arrest on Burrows' vehicle. (App.'s Br. at III.A.) This is the first time they raised this issue. It was not raised in their motion to suppress nor addressed by either party at the motion hearing. (*See* R. 47, 191.)

"Defenses and objections based on . . . the use of illegal means to secure evidence shall be raise before trial by motion or be deemed waived." Wis. Stat. § 971.31(2) (2017-18). "The court may consider constitutional errors not raised at trial if it is in the interest of justice to do so and no factual issues need to be resolved." *Madison v. State*, 64 Wis. 2d 564, 573, 219 N.W.2d 259, 263 (1974).

The interest of justice does not require this issue to be considered and, further, there are factual issues that would need to be resolved for this Court to do so. Because this issue was not raised in the Defendant-Appellant's trial court motion or at the

motion hearing, the State did not have adequate opportunity to question Detective Clark as to how the search incident to arrest came about. For example, did Detective Clark ask the Manitowoc County Sheriff's Department deputies for permission to search? Did the deputies request or direct Detectives Clark and Stewart to effectuate the search? Did the deputies supervise the search? Or did the detectives simply take it upon themselves to search the vehicle? Further, the State may have subpoenaed the Manitowoc County Sheriff's Department deputies to testify at the hearing if these issues were unresolved with Detective Clark's testimony.

There are simply too many unknowns based on the facts established in the lower court for this Court to make a ruling on this issue. This is not the fault of the State, but because this issue is only being raised now. Because there are factual issues that need to be resolved, this Court should find that the Defendant-Appellant waived this issue for appeal.

B. Law Enforcement Conducted a Valid Search Incident to Arrest

"[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576

(1967) (footnote omitted). Among those exceptions is a search incident to a lawful arrest, which derives from an interest in officer safety and evidence preservation. *Arizona v. Gant*, 556 U.S. 332, 338, 129 S. Ct. 1710, 1716, 173 L. Ed. 2d 485 (2009).

It is well established that "circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Id.* at 343 (internal citation omitted).

Because this is another suppression issue, this Court should apply the clearly erroneous standard and uphold the trial court's findings "unless it is against the great weight and clear preponderance of the evidence." *Tomlinson,* 2002 WI 91, ¶ 36.

In this case, Detective Clark had reason to believe that evidence of the crime of Stalking would be found in Burrows' vehicle after his arrest. Specifically, Detective Clark knew that Burrows utilized his cell phone in the commission of the offense because Erica W. identified Burrows' cell phone number as one of the numbers who called to ensure that the snake was delivered to her. Detective Clark also knew of copious amounts of harassing text messages—one containing a naked photo of herself with the implication of sharing it—and phone calls from Burrows, all originating from his cell phone. It

is also reasonable to believe in today's technological age that Burrows utilized his cell phone to send the emails in question as well as research information needed for the other acts in the course of conduct.

Not only did Detective Clark believe that the cell phone would contain evidence of the crime of Stalking, he also had reason to believe it would be in the vehicle. When Burrows was placed under arrest, he had an empty cell phone holder on belt. Again, in today's technological age, people are very rarely if ever too far from their cell phone. If the cell phone was not on his person, it is reasonable to assume it would be in the vehicle, within reaching distance of the driver's seat—and that is exactly where it was located.

While Detective Clark was searching on the driver's side, Detective Stewart was searching the passenger side, which was within the passenger compartment of the vehicle. There, he located the draft note, clearly evidence of the crime because of its similarities to the letters sent in this case.

Because Detective Clark had reason to believe that evidence of the crime of Stalking would be found in his vehicle, the search of Burrows' vehicle incident to arrest was lawful. Judge Stengel agreed, ruling that "there is certainly a reasonable suspicion that some of the tools that [Burrows] may have utilized if, in fact, 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." (R. 191 at 58:19-24.) Given the facts above, this ruling is not clearly erroneous and, therefore, should be upheld.

IV. THE SEARCH WARRANTS OBTAINED FOR BURROWS' PROPERTY WERE BASED ON PROBABLE CAUSE THAT SAID PROPERTY WOULD CONTAIN EVIDENCE OF STALKING

Search warrants may issue only upon "a finding of probable cause by a neutral and detached magistrate." *State v. Higginbotham*, 162 Wis.2d 978, 989, 471 N.W.2d 24 (1991). In reviewing whether there was probable cause for the issuance of a search warrant, the reviewing court should accord great deference to the determination made by the warrant-issuing magistrate. *Id.* The determination will stand unless the defendant establishes that the facts are clearly insufficient to support a finding of probable cause. *Id.* In doubtful or marginal cases, preference should be given to searches conducted pursuant to a warrant. *Illinois v. Gates*, 462 U.S. 213, 237 n. 10, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

Whether probable cause exists is to be determined by analyzing the totality of the circumstances. *Id.* at 238.

> Probable cause is a fluid concept, turning on the assessment of probabilities in a particular factual context. Whether probable cause exists must be determined by examining the totality of the circumstances. The probable cause standard is a practical, nontechnical one invoking

> the practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.

State v. Ehnert, 160 Wis. 2d 464, 469, 466 N.W.2d 237, 238 (Ct. App. 1991) (citing *Gates*, 462 U.S. at 230-32).

A. Probable Cause Exists to Support the Issuance of the Search Warrants

Law enforcement obtained five search warrants for Burrows' property following his arrest on August 17, 2018, for his residence, cell phone and computer, U.S. cellular phone records, Google account information, and DNA. (R. 1, 13, 15, 27, and 33.) The search warrants contained all of the information available up through his arrest, including the phone calls, voicemails, letters, text messages, emails, nude photo, snake in a box, draft letter, and interview. (*Id.*) Some search warrants also contained additional information learned as the investigation progressed, including communication between Burrows and his new girlfriend, Amy Muzik, (R. 15, 33.)

Considering all this information, Commissioner O'Rourke (on four of the warrants) and Circuit Court Judge Daniel Borowski (on one of the warrants) found sufficient evidence to support a finding of probable cause by issuing the warrants. These should be upheld because the Defendant-Appellant has not established that the facts are clearly insufficient to support a finding of probable cause.

Although none of the search warrants specifically state that Erica W. suffered serious emotional distress, the facts in this case clearly support that proposition.

Probable cause is a practical, nontechnical standard "invoking the practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Ehnert*, 160 Wis. 2d at 469. A reasonable and prudent individual would believe that Burrows' actions, culminating in the knowledge that a snake was sent to her in the mail, would lead Erica W. to suffer serious emotional distress in the form of feeling terrified, intimidated, threatened, harassed, and tormented. *See* Wis. Stat. § 940.32(1)(d). For why else would she contact law enforcement and continue to cooperate in their investigation as evidence continued to pile on. In fact, in most of the search warrants, it does state that that "Erica immediately feared Burrows" in reference to him posting her nude photo without her consent. (*See* R. 1 at 7.)

Judge Stengel agreed when he ruled:

> I think the State also can suggest that the reasonable inferences that are drawn from the many, many paragraphs that are set forth in the affidavit that detail in somewhat excruciating detail all of the circumstances that this lady was suffering as a result of the alleged conduct, and I think a reasonable objective standard applied to that would certainly suggest that she is suffering emotional distress, or in alternative is put in fear of bodily injury or death. . . . So I think looking at the facts and circumstances that are set forth and the reasonable inferences to be drawn therefrom, and also recognizing that the decision of the magistrate is to be given due deference in these matters, I do find that there is sufficient probable cause set forth to establish that there is probable cause to believe that evidence of the crimes as alleged in the affidavit are to be found on the circumstances or locations as outlined.

(R. 191 at 24:25-25:8, 11-19.)

Given Burrows' actions in this case and the fact that three neutral and detached magistrates found on six separate occasions that probable cause existed within the affidavits supporting the search warrants, this Court should give great deference to those determinations and uphold their findings.

B. If No Probable Cause Exists, the Good Faith Exception Applies

Even if this Court finds that one or more of the search warrants lacks sufficient evidence for a finding of probable cause, the evidence obtained from said search warrant(s) should not be suppressed.

When a court finds a search warrant to be invalid, the suppression of all evidence obtained pursuant to said warrant is not automatically the remedy. An exception to the Fourth Amendment exclusionary rule exists when an officer relies in good faith upon a search warrant issued by an independent and neutral magistrate. *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984); *see also State v. Eason*, 2001 WI 98, 245 Wis.2d 206, 629 N.W.2d 625 (upholding as applied to the Fourth Amendment to the Wisconsin Constitution).

The purpose of the exclusionary rule is to deter law enforcement from willful, or at least very least negligent, conduct which deprives an individual of some constitutional right. *Leon*, 468 U.S. at 919. In the case of an invalid search warrant, the mistake is with the judge or

magistrate who issued the warrant, not with the officer who executed it:

> Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion thus cannot be expected significantly to deter them. Imposition of the exclusionary sanction is not necessary meaningfully to inform judicial officers of their errors, and we cannot conclude that admitting evidence obtained pursuant to a warrant while at the same time declaring that the warrant was somehow defective will in any way reduce judicial officers' professional incentives to comply with the Fourth Amendment, encourage them to repeat their mistakes, or lead to the granting of all colorable warrant requests.

Id. at 917. An officer cannot be expected to question the magistrate's probable cause determination. *Id.* at 921. "Once the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law." *Id.* Therefore, penalizing the officer for the magistrate's error "cannot logically contribute to the deterrence of Fourth Amendment violations." *Id.*

Therefore, the only time the exclusionary rule should apply to evidence seized as a result of an invalid search warrant is when: (1) the affidavit contains information that the affiant knew or should have known to be false, (2) the issuing magistrate "wholly abandoned his judicial role" so much so that no reasonable officer would rely on the warrant, (3) the affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," and (4) the warrant is so facially deficient that the officer "cannot reasonably presume it to be valid." *Id.* at 923. In all four circumstances, the officer is at least in part at fault and therefore the purpose of the

exclusionary rule is fulfilled. Otherwise, where an officer relies in good faith upon a search warrant issued by an independent and neutral magistrate, the evidence should not be suppressed.

If the Court finds some defect in one or more of the search warrants, this Court should not order suppression as the remedy because Detective Clark relied in good faith upon the search warrants when he executed them.

First, there is no evidence that any of the affidavits contain information that Detective Clark knew or should have known to be false. The only information that Defendant-Appellant points to in his brief that he claims to be false is the information in Burrows' phone records. (*See* App.'s Br. at 8.) However, not only is that information not contained in the search warrants, but it is also not false. (R. 1, 13, 15, 27, and 33); *see supra* n. 1.

Second, there is no evidence that either Commissioner O'Rourke or Judge Borowski wholly abandoned their judicial role so much so that no reasonable officer would rely on the warrant. This only became more true with each and every subsequent approval of a search warrant and the findings of probable cause at the bail bond hearing, initial appearance, and preliminary hearing. Any reasonable officer would see each and every one of these judicial approvals as further evidence that probable cause existed and that the search warrants were legitimate.

Third, the affidavits are not "so lacking in indicia of probable cause to render official belief in its existence entirely unreasonable." *Leon*, 468 U.S. at 923. Again, multiple neutral and detached magistrates found probable cause based on these same facts at multiple levels of the trial court proceedings, including Judge Stengel at the motion hearing. Belief in the existence of probable cause to support the search warrants, including the very first one, is therefore not entirely unreasonable.

Finally, the warrant is not so facially deficient that the officer "cannot reasonably presume it to be valid." *Id.* There is more than enough evidence in the search warrants to support a finding of probable cause. Multiple neutral and detached magistrates believed so. It was not unreasonable that Detective Clark believed so as well. Otherwise he would not have arrested Burrows, signed and endorsed the affidavits, and continued his investigation.

Detective Clark did not willfully or negligently work to deprive Burrows of his constitutional rights, but instead worked to protect them by going through the proper channels to obtain warrants. He acted in good faith upon the findings of multiple neutral and detached magistrates and did what ordinary citizens would expect him to do. Therefore, this Court should not suppress the evidence obtained from any search warrant it finds deficient.

CONCLUSION

The Defendant-Appellant's claims fail as a matter of law and therefore we respectfully request that you deny his requests for relief.

Dated this 28th day of September, 2018.

Respectfully submitted,

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CERTIFICATIONS

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 **8,525** words.

I further certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief, in compliance with Wis. Stat. § 809.19(12)(f).

I further certify that this brief was delivered to the Clerk, Wisconsin Court of Appeals, 110 East Main Street, Suite 215, Madison, Wisconsin, by placing a copy of the same in the U.S. Mail with proper postage affixed on September 28, 2018.

Dated this 28th day of September, 2018.

Respectfully Submitted,

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