08AP0658

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2008AP658 CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

MICHAEL A. SVEUM,
Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION
AND ORDER DENYING POSTCONVICTION MOTIONS
ENTERED IN DANE COUNTY CIRCUIT COUNT,
THE HONORABLE STEVEN EBERT, PRESIDING.

BRIEF OF DEFENDANT-APPELLANT

Submitted by:
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Pro Se

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ISSUES PRESENTED

I. Does a court order authorizing for a period of 60 days on a single showing of probable cause unlimited intrusions into a vehicle and any buildings containing the vehicle violate the Fourth Amendment?

Trial court answer: No.

II. Is a Global Positioning System device that intercepts and records satellite radio signals exempt from the scope of the Wisconsin Electronic Surveillance Control Law codified in Chapter 968?

Trial court answer: Yes.

III. Did the search warrant satisfy the probable cause and particularity requirements of the Fourth Amendment?

Trial court answer: Yes.

IV. Does a prior stalking conviction involving the same victim itself have evidentiary value beyond satisfying the status element under sec. 940.32(3)(b) when the facts underlying the prior conviction are also presented?

Trial court answer: Yes.

V. Did trial counsel provide effective assistance?

Trial court answer: Yes.

VI. Was the erroneous stalking jury instruction harmless error since the defendant was also charged as a party to a crime?

Trial court answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case presents three important issues of law in the State of Wisconsin. First, is a Global Positioning System device that intercepts and records satellite radio signals a "tracking device" for purposes of sec. 968.27(4)(d), and therefore their use exempt from the provisions of the Wisconsin Electronic Surveillance Control Law? Second, does the phrase "under the same circumstances" in sec. 940.32(2)(a) refer to only the "course of conduct" engaged in by the defendant that results in the stalking charge brought forth, or include all prior acts of the defendant during his lifetime for which he has already been held criminally liable? Finally, is the party to a crime provision under sec. 939.05 applicable to the stalking statute in light of sec. 940.32(1)(a)10, which itself criminalizes causing a person to engage in specific acts that constitute stalking conduct?

These are issues of first impression and require the court to interpret the meaning of three statutes. Sveum does not request oral argument because he believes these issues can be adequately presented in written briefs. However, the case merits a recommendation for publication under sec. 809.23. Publication of this case will clarify the meanings of secs. 968.27(4)(d), 940.32(2)(a), and 940.32(1)(a)10, and therefore assist prosecutors, defense attorneys, defendants and judges statewide.

STATEMENT OF THE CASE

Michael Sveum was charged with stalking his ex-girlfriend Jamie Johnson from September 22, 1999 to May 27, 2003, as a party to a crime in violation of secs. 940.32(3)(b) and 939.05. A jury found him guilty and he was sentenced to 7 ½ years in prison and 5 years extended supervision. The trial court denied postconviction motions seeking a new trial due to the introduction of evidence obtained in violation of the Wisconsin Electronic Surveillance Control Law; and raising Fourth Amendment, ineffective assistance of counsel and erroneous jury instruction claims. This appeal followed. Additional information relevant to the arguments presented herein will be provided where appropriate.

ARGUMENT

I. The trial court erred when it denied motions to suppress evidence obtained using GPS devices.

a. The court order authorizing the use of a GPS device violated the Fourth Amendment.

A Fourth Amendment search occurs where there is entry into a garage or similar structure to gain access to a vehicle, so a warrant is required. U.S. v. Hufford, 539 F.2d 32, 34 (9th Cir. 1976). Entering a vehicle or opening its hood or trunk also constitutes a search under the Fourth Amendment. Id.

On April 22, 2003, Madison Police Detective Mary Ricksecker applied for a court order to place a Global Positioning System (GPS) device on a 1990 Chevrolet Beretta

belonging to Michael Sveum for a period of 60 days (A:25-28). Judge Richard Callaway granted an order the same day (A:29-30). The order authorized the police:

> ...to surreptitiously enter and reenter the vehicle and any buildings and structures containing the vehicle or any premises on which the vehicle is located to install, use, maintain and conduct surveillance and monitoring of the location and movement of a mobile tracking device in the vehicle and...to obtain and use a key to operate and move the vehicle for a required time to a concealed location and...to open the engine compartment and trunk areas of the vehicle to install the device.

(A:29-30). The order was effective for a period of 60 days (A:30). Between April 23, 2003 and May 27, 2003, three different GPS devices were installed and used on Sveum's vehicle (A:89-90).

The U.S. Supreme Court has long held that authorizing "a series of intrusions, searches, and seizures pursuant to a single showing of probable cause" violates the Fourth Amendment. Berger v. New York, 388 U.S. 41, 59 (1967). But that is exactly what Judge Callaway did.

> The authorization given in this instance did not limit the number of entries nor did it specify the general time or manner of entry. Thus the authority given was far too sweeping.

U.S. v. Ford, 553 F.2d 146, 152 (D.C. 1977).

The Fourth Amendment's protections against physical trespass do not disappear simply because a probable cause showing has been made for gathering evidence by electronic device. Id. at 158. Quite the contrary, when a court receives a request for authorization to surreptitiously enter a protected area for the purpose of installing and maintaining an electronic surveillance device, "the judicial authorization

therefore should circumscribe that entry to the need shown." Id.; Berger, 388 U.S. at 69.

The affidavit and request for the order here did not show that unlimited entries into the vehicle and any buildings containing the vehicle were necessary. The affiant averred that the limited use of the GPS device's battery required the use of the vehicle's battery power in order to effectively install and maintain the device over an extended period of time, and requested authorization to secretly enter the vehicle to install and retrieve the device (A:27-28). This information showed the need for only two entries into the vehicle itself, one to install the device and one to retrieve it. No need to enter any buildings was shown. It is difficult to image a scenario that presents the need for unlimited entries into any vehicle that the police wished to monitor using a GPS device. A statement indicating that the GPS device required daily programming or that its recording capacity was limited to 24 hours is necessary just to show the need for daily entries into the vehicle.[1]

"The entry provision in the [order] here, essentially authorizing unlimited entries on private property was impermissibly overbroad." Ford, 553 F.2d at 173. "[A]nd the fact that the police may have acted with restraint in executing the [order] cannot legitimate the surveillance." Id. at 174-175. As the U.S. Supreme Court stated in a passage directly applicable here:

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[1] Authorizing the use of a GPS device in a constitutional manner is not difficult. On October 26, 1999, a detective in the State of Washington applied for and received a 10-day warrant to install GPS devices in two vehicles belonging to a murder suspect. State v. Jackson, 150 Wash.2d 251, 257 (2003). The devices were connected to the vehicles' 12-volt electrical systems. Id. The detective obtained a second 10-day warrant to maintain the GPS devices on the vehicles upon a new showing of probable cause. Id.

> It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer.

Katz v. U.S., 389 U.S. 347, 356 (1967); Berger, 388 U.S. at 100.[2] The trial court upheld the use of the GPS device, finding that the court order was supported by probable cause (A:58-61). This was error.

The State relied on information from the GPS device at trial. To convict Sveum the State had to prove, *inter alia*, that he intentionally engaged in a course of conduct directed at Jamie Johnson. *Sec.* 940.32(2)(a). "Course of conduct" includes "[m]aintaining a visual or physical proximity to the victim" and "contacting the victim by telephone." *Sec.* 940.32(1)(a).

Johnson testified that she was living at 2709 Post Road in Madison, Wisconsin from February-April of 2003 (A:117-119), and that she arrived home at 9:05 p.m. on April 25, 2003 (A:122). Brad Ruff testified that information from the GPS device showed that on April 25, 2003, Sveum's vehicle traveled to a location 468 feet from 2709 Post Road and remained there from 8:14-9:08 p.m. (A:91-94). He also testified that Sveum's vehicle then traveled to a shopping mall located near Mineral Point Road and the Beltline, arriving there at 9:16 p.m. and leaving at 9:19 p.m. (A:95). A TDS Telecom employee testified that at 9:17 p.m. on April 25, 2003, a call was placed to 2709 Post Road from a payphone located in that same shopping mall (A:82-88). Ruff further testified that information from the GPS device showed

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[2] In Berger, the Court vacated a conviction that relied on evidence gained under an order authorizing wiretapping for a period of 60 days even though all the evidence was obtained within 13 days. Berger, 388 U.S. at 100.

that on April 26, 2003, Sveum's vehicle again traveled to the area of 2709 Post Road and remained there from 8:28-9:43 p.m. (A:96-98). This evidence was vital to the conviction as no one testified to actually seeing Sveum or his vehicle anywhere near 2709 Post Road or anywhere near a telephone that was used to place a call to that residence at any time.

In addition, the "fruit of the poisonous tree" doctrine excludes at trial evidence derived from information gained in an illegal manner. Wong Sun v. U.S., 371 U.S. 471 (1963). Information obtained using the GPS device was made an integral part of the application for a warrant to search the residence located at 2426 Valley Street in Cross Plains, Wisconsin (A:34-35). A review of that warrant application with the GPS device information excised results in no facts linking Sveum or any criminal activity to that residence. Thus, the items seized from the residence must be excluded as "fruits of the poisonous tree." The items seized included approximately 90 documents introduced at trial (R.66). One of those documents was a "log" located in Renee Sveum's bedroom, which the State contends shows that Sveum was surveilling Johnson from March 19, 2003 to May 22, 2003 (A:40-41). The discovery of this "log" led to the party to a crime stalking charge against Renee Sveum, and her trial testimony against Sveum. The State is unable to bring Sveum to trial, let alone obtain a conviction, without the information unlawfully obtained using the GPS device, the tainted seized documents, and Renee Sveum's tainted trial testimony.

b. The electronic communication intercepted by the GPS device was obtained in violation of the Wisconsin Electronic Surveillance Control Law.

The Wisconsin Electronic Surveillance Control Law (WESCL), codified at secs. 968.27-968.37, prescribes the procedure for securing judicial approval to intercept electronic communication. Under the WESCL, the attorney general together with the district attorney of the county where the interception is to take place must approve a request by law enforcement to apply for an order authorizing the interception of electronic communication, and only the chief judge may grant such an order. *Sec.* 968.28. These actions did not occur here. In addition, such an order may only be entered if there is probable cause to believe that an individual is committing or has committed an offense enumerated in § 968.28, which does not include the crime of stalking. *Sec.* 968.30(3)(a). Further, no order may authorize the interception of electronic communication for a period longer than 30 days. *Sec.* 968.30(5). This mandate was violated here. Finally, the contents of the intercepted communication must be recorded and immediately filed with the court issuing the order to be sealed. *Sec.* 968.30(7)(a). Here, the recorded contents were not filed with the court or sealed. The contents of any intercepted electronic communication obtained in violation of the WESCL, and all evidence derived therefrom, must be suppressed. *Sec.* 968.30(9)(a).[3]

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[3] Section 968.30(9)(a) provides in relevant part:

> Any aggrieved person in any trial, hearing or proceeding in or before any court...may move before the trial court or the court granting the original warrant to suppress the contents of any intercepted wire, electronic or oral communication, or evidence derived therefrom, on the grounds that the communication was unlawfully intercepted; the order of authorization or approval under which it was intercepted is insufficient on its face; or the interception was not made in conformity with the order of authorization or approval. The motion shall be made before the

Since it is clear that the procedure prescribed by the WESCL for securing judicial authority to intercept electronic communication was not followed in this case, the resolution of this claim centers on whether law enforcement's use of the GPS device constitutes an interception of electronic communication under the WESCL. The terms "intercept" and "electronic communication" are defined in secs. 968.27(9) and 968.27(4).[4] Section 968.27(4)(d) indicates that

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trial, hearing or proceeding unless there was no opportunity to make the motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire, electronic or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of ss. 968.28 to 968.38.

[4] Section 968.27(9) reads:

> "Intercept" means the aural or other acquisition of the contents of any wire, electronic or oral communication through the use of any electronic, mechanical or other device.

Section 968.27(4) reads:

> "Electronic communication" means any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature wholly or partially transmitted by a wire, radio, electromagnetic, photoelectronic or photooptical system. "Electronic communication" does not include any of the following:
>
> (a) The radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit.
> (b) Any wire or oral communication.
> (c) Any communication made through a tone-only paging device.
> (d) Any communication from a tracking device.

"'[e]lectronic communication' does not include any...communication from a tracking device." The term "tracking device" is not statutorily defined. However, the WESCL is modeled after the federal Electronic Communications Privacy Act (ECPA). State v. Gilmore, 210 Wis.2d 820, 828 (1996). And the ECPA's statutory history defines a tracking device as:

> a communication device that emits a signal which can be received by special tracking equipment allowing the user to trace the geographical location of the transponder. Such devices are used by law enforcement personnel to keep track of the physical whereabouts of the sending unit.

(A:51).

This definition is consistent with § 968.27(4)(d). Since the statute only excludes "communication *from* a tracking device," only devices that transmit some type of communication are considered "tracking devices" under § 968.27(4)(d). Such devices include beepers and transponders.[5]

In the present case, the affidavit and request for the GPS order notes that a GPS device:

> is equipped with a radio satellite receiver, which, when programmed periodically records, at specific times, the

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[5] A beeper is a radio transmitter, usually battery operated, which emits periodic signals that can be picked up by a radio receiver." U.S. v. Knotts, 460 U.S. 276, 277 (1983). "A transponder is an electronic device which responds to a signal from a radar station so that the radar station can locate and identify the aircraft." Johnson v. State, 492 S.2d 693, 694 n. 1 (Fla. App. 1986).

> latitude, the longitude, date and time of readings and stores these readings until they are downloaded to a computer interface unit and overlaid on a computerized compact disc mapping program for analysis.

(A:27).[6]

This description makes it clear that no communication came from the GPS device. It did not transmit or exchange any signals or information.[7] Rather, it only intercepted and recorded radio signals (i.e., electronic communication) transmitted from GPS satellites to Sveum's vehicle, wherever it was located, as noted in the affidavit. And these actions clearly constitute an interception of electronic communication under the WESCL. Nothing in the WESCL or ECPA states that "electronic communication" does not include any communication from a satellite. Rather, § 968.27(4) mirrors

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[6] The Global Positioning System is a satellite navigation system that consists of satellites orbiting the earth and ground control stations (A:31). The satellites transmit precisely timed radio signals that are picked up by a GPS receiver. Id. Each satellite sends a distinct C/A (Course/Acquisition) code, which is the clock information, that allows it to be uniquely identified. Using an onboard computer, the receiver measures the time delay between transmission and reception of each radio signal to determine the distance to each satellite. Id. The satellites also transmit a navigational signal giving their exact position. Id. By determining the position of, and distance to, at least three satellites, the receiver can compute its position using trilateration. Id. The ground stations continuously track the flight paths of the satellites and contact each one regularly with a navigation update, which synchronizes the onboard clock and adjusts the orbital information that allows the receiver to calculate the position of the satellite. Id.

[7] "Communication" is defined as "an act or instance of transmitting" or "the exchange of information." Webster-Merriam's Collegiate Dictionary 11th ed. 2006 at 251. "Absent statutory definition, words are construed according to their common meaning." State v. Martin, 162 Wis.2d 883, 904 (1991).

18 U.S.C. § 2510(12) and "the plain wording of § 2510(12) encompasses satellite signals." U.S. v. McNutt, 908 F.2d 561, 564 (10th Cir. 1990).

After trial, the court "accepted the arguments of the state and considered the GPS device to be one that, as used in this case, provides tracking information which is information about where the defendant's vehicle was at various times on public roads." (A:23). However, had Sveum's vehicle been stolen or hidden, the GPS device would not have helped law enforcement track it down since it did not emit any signals. The court then concluded that "a GPS device, as used here, is a tracking device,...a tracking device that is specifically excluded from the requirements of sections 968.28-968.30, Stats." (A:24). This was error.

II. The trial court erred when it denied the motion to suppress items seized pursuant to a search warrant.

On May 27, 2003, Detective Ricksecker applied for a warrant to search the residence at 2426 Valley Street in Cross Plains, Wisconsin and Sveum's Chevrolet Beretta (A:32). Judge Paul Higginbotham issued a search warrant the same day (A:38). Numerous items were seized during the execution of the warrant, which included approximately 90 documents introduced at trial (R. 66).

a. There was insufficient probable cause to support the issuance of the search warrant.

Search warrants may issue only upon a finding of probable cause. State v. DeSmidt, 155 Wis.2d 119, 131

(1990). To establish probable cause, the warrant application must contain:

> sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked to the commission of a crime and that they will be found in the place to be searched.

Id. A nexus between each item to be seized and the place to be searched must be established by specific facts; an officer's "training and experience" is insufficient. Richards v. Wisconsin, 520 U.S. 385, 390-94 (1997); U.S. v. Schultz, 14 F.3d 1093, 1097 (6th Cir. 1994).

In reviewing whether probable cause existed, courts consider only the facts presented to the warrant-issuing judge. DeSmidt, 155 Wis.2d at 132. The duty of a reviewing court is to ensure that the judge "had a substantial basis for concluding that the probable cause existed." Id. at 133.

The warrant application made no mention of items that tend to identify the residents of the dwelling, phone bills, cameras and film, and audio or visual recording equipment; items listed on the warrant (A:32-39). Thus, there was no probable cause shown for their seizure.

The warrant also allowed the seizure of computers and computer equipment (A:38-39). The warrant application mentioned Sveum's 1996 stalking conviction involving Johnson that the affiant investigated, in which no use of computer equipment was alleged (A:33). The affiant then made a lengthy statement about the general use of computers to store information (A:35-36). There is no link between that general discussion of computer use and criminal activity.

The warrant application contains no specific facts to show how any computer equipment played a role in the crime under investigation, or that any such equipment would be found in the residence or the vehicle. Additionally, there was

no effort made to determine if there was computer equipment in the places to be searched. U.S. v. Hay, 231 F.3d 630, 633 (9th Cir. 2000). Absent a sufficient basis in fact from which to conclude that computer equipment containing evidence of criminal activity will likely be found at the places to be searched, a reasonable nexus is not established as a matter of law. Thus, there was no probable cause to support the issuance of a warrant to seize computer equipment.

Finally, the warrant allowed the seizure of journals, calendars, logs documenting travel or appointments, binoculars, flashlights, ski masks, documents mentioning Johnson or Bonnie or Jay Gould, and personal information related to Johnson or her family (A:38-39). The affiant averred that her investigation resulting in Sveum's 1996 stalking conviction involved testimony that he used ski masks, flashlights and binoculars to stalk Johnson, and that he kept calendars documenting her whereabouts (A:35). However, the warrant application contained no facts to show that Sveum used or kept any such items in the crime under investigation here.

> The proof must be of facts so closely related to the time of the issuance of a warrant as to justify a finding of probable cause at that time.

Sgro v. U.S., 287 U.S. 206, 210 (1932). Facts showing that Sveum used and kept such items in 1996 are too stale to satisfy the probable cause standard. Additionally, these items are as consistent with lawful conduct as they are with unlawful conduct. "Mere suspicion that the objects in question are connected with criminal activity will not suffice." Wayne LaFave, Search and Seizure, at 414 (3d. ed. 1996).

The affiant also averred that she knows from training and experience that persons who engage in stalking behavior

will have these items in the home (A:37). However, the warrant application contained no specific facts to show that any of these items would be found in the residence or the vehicle. An officer's "training and experience" cannot substitute for the lack of evidentiary nexus. Richards, 520 U.S. at 390-94; Schultz, 14 F.3d at 1097. Blanket inferences of this kind substitute generalities for the required showing of specific "underlying circumstances" that establish evidence of criminal activity will likely be found in the place to be searched. Here the affiant:

> did not have anything more than a guess that contraband or evidence of a crime would be found in the [residence or the vehicle], and therefore the warrant should not have been issued. To find otherwise would be to invite general warrants authorizing searches of *any* property owned, rented or otherwise used by a criminal suspect – just the type of broad warrant the Fourth Amendment was designed to foreclose.

Id. at 1097-98 (emphasis in original). In short,

> probable cause to believe that a person has committed a crime *does not automatically give the police probable* cause to search his house for evidence of that crime.

State v. Higginbotham, 162 Wis.2d 978, 995 (1991). For these reasons, there was no probable cause to support the issuance of a warrant to seize these items.

b. The search warrant did not describe the items to be seized with sufficient particularity.

General warrants are prohibited by the Fourth Amendment. The problem is not the intrusion, but the general exploratory rummaging through a person's property without

guidance to the officer conducting the search. The particularity requirement makes general searches impossible and leaves nothing to the discretion of the officer executing the warrant. Andresen v. Maryland, 427 U.S. 463 (1976).

To determine whether a warrant lacks sufficient particularity, one must examine both its particularity and its breadth. U.S. v. Kow, 58 F.3d 423, 426 (9th Cir. 1995). A warrant "must be no broader than the probable cause on which it is based." U.S. v. Weber, 923 F.2d 1338, 1341 (9th Cir. 1990). In determining whether a description is sufficiently precise, courts consider one or more of the following: (1) whether probable cause exists to seize all items of a particular type described; (2) whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not; and (3) whether the items could have been described more particularly. U.S. v. Spilotro, 800 F.2d 959, 963 (9th Cir. 1986).

The warrant allowed the seizure of all computers and devices related to computers, cameras and film, binoculars, flashlights, ski masks, and audio and/or video recording equipment in any format (A:38-39). These descriptions are non-specific, resulting in a general warrant. Kow, 58 F.3d at 426 (computers); U.S. v. Drebin, 557 F.2d 1316, 1322 (9th Cir. 1977)(films). In a passage directly applicable here, in analyzing a similarly non-specific warrant, the Illinois Supreme Court stated:

> [T]he property described is 'certain automobile tires and tubes,' which is property that may be found in great quantities and which is subject to lawful trade in every city in the United States. There is no effort to identify these tires and tubes by name, number, color, size, or material. ... There was nothing in the warrant which gave the sheriff information by which he could select

> certain property within the description in the warrant and refuse to take other property equally well described in the warrant. The warrant was insufficient.

People v. Prall, 314 Ill. 518, 523 (1924). Because there was no probable cause to seize all items of these types, and the warrant lacked objective standards by which executing officers could differentiate items subject to seizure from those which were not, these descriptions were not sufficiently precise. Spilotro, 800 F.2d at 963.

The warrant did limit the computer equipment to seizure by ownership, "excluding any computer equipment belonging to persons other than Michael Sveum." (A:39). However, this limitation alone did not satisfy the particularity requirement. Neither the warrant nor the application "sets out clear standards which assure the [judge] that the executing officer will be able to differentiate" computer equipment belonging to Michael Sveum from computer equipment belonging to others. U.S. v. Klein, 565 F.2d 183, 186 (1st Cir. 1977). Predictably, the computer equipment seized did not belong to Michael Sveum, but rather the homeowner, his mother Mary Ann Sveum. At the suppression hearing, Detective Vicki Anderson described the circumstances which led her to believe that the seized computer equipment *probably* belonged to Michael Sveum (A:52-57). However, the validity of a warrant must be appraised by the facts revealed to the judge and not those later found to exist by the executing officer. Whiteley v. Warden, 401 U.S. 560, 564 (1971).[8]

[8] A warrant was later issued to search the seized computer and 16 computer disks. This warrant was also unconstitutional, but Sveum does not challenge it on appeal because no incriminating evidence was discovered.

The warrant also allowed the seizure of all phone bills, journals, calendars, logs or similar items documenting travel or appointments, items that tend to identify the residents of the dwelling, documents mentioning Jamie Johnson or Bonnie or Jay Gould, and personal information related to Johnson or her family (A:38-39). A warrant authorizing a search of a person's papers is an especially sensitive matter, calling for careful exercise of judicial supervision and control. Andresen, 427 U.S. at 482. Warrants failing to specify what phone bills, journals, calendars, or logs documenting travel or appointments should be seized, or what evidence would identify the residents of the dwelling are overbroad. U.S. Crozier, 674 F.2d 1293, 1298 (9th Cir. 1982); U.S. v. Dozier, 844 F.2d 701, 705 (9th Cir. 1988)(phone bills); Kow, 58 F.3d at 426 (journals); Center Art Galleries-Hawaii v. U.S., 875 F.2d 747, 749 (9th Cir. 1989)(calendars); U.S. v. Apker, 705 F.2d 293, 296 (8th Cir. 1983)(indicia).

Additionally, the warrant failed to list, by name, Johnson's family members (A:39); again providing no guidance to the executing officer. Furthermore, warrants with no time limitations as to documents are overbroad. U.S. v. Cardwell, 680 F.2d 75, 76 (9th Cir. 1987); U.S. v. Abrams, 615 F.2d 541, 543 (1st Cir. 1980); U.S. v. Slaey, 433 F.Supp.2d 494, 499-500 (E.D. Pa. 2006). Finally, the crime alleged was stalking. Yet no direction was given to the executing officers as to what items or information may constitute evidence of stalking. The only guidance was that items mentioning Jamie Johnson or Bonnie or Jay Gould deserved attention.

The warrant application included a statement that one person had received special, out-of-state training in the crime of stalking (A:36). From that statement, one can deduce that without such special training a person would be unable to

define and combat the crime, like identify items constituting evidence of stalking. However, "there is no indication on the face of the warrant that the people executing the warrant would be experts in the field" of stalking. Klein, 565 F.2d at 186. And courts "cannot assume that...officers have read the statutes recited in a search warrant and will limit their search to evidence of these crimes." Spilotro, 800 F.2d at 969. Thus, "the warrant does not reveal with any degree of certainty that authorized [items] will not be seized." Klein, 565 F.2d at 188.

And that is exactly what occurred. While the discovery turned over by the State included only about 90 seized documents that were introduced at trial, the executing officers actually seized thousands of documents (A:63-64). These documents, which the State still possesses today, included numerous financial documents (A:64), and none of them fit within any description on the warrant. Thus, the executing officers exceeded even the authority granted under this general warrant. Grossly exceeding the scope of a warrant requires suppression of all evidence seized under the warrant. U.S. v. Medlin, 842 F.2d 1194, 1199 (10th Cir. 1988).

The warrant could have specified what phone bills, journals, calendars and logs could be seized, and what evidence would identify the residents of the dwelling. It also could have listed the names of Johnson's family members, and have limited the scope of the seizure to a time frame within which the suspected criminal activity took place; March 20-May 7, 2003, as alleged in the warrant application (A:34-35). Finally, it could have indicated that the people executing the warrant would be experts in the field of stalking, and have limited the scope of the seizure to evidence of Michael Sveum stalking Jamie Johnson. In short, these descriptions were not sufficiently particular since there was no probable cause to seize all items of these types; the

warrant lacked objective standards by which executing officers could differentiate items subject to seizure from those which were not; and the items could have been described more particularly. Spilotro, 800 F.2d at 963.

Therefore, even if this court finds that the use of the GPS device was lawful, the search warrant was not. Thus, the items seized from 2426 Valley Street and Sveum's vehicle must be suppressed. Under this scenario, Sveum is entitled to a new trial. It would warrant a dismissal of the party to a crime charge since Renee Sveum was only charged based on the documents seized from 2426 Valley Street. Without the seized documents and Renee Sveum's involuntary testimony, there is no evidence showing that Sveum may have himself been stalking Johnson. No one testified to seeing him or his vehicle anywhere near Johnson's residence or anywhere near a telephone that was used to place a call to her. Nor did anyone testify that Sveum told them that he surveilled or telephoned Johnson.

In addition, at the time of the alleged offense it was not a crime to cause a person to maintain a visual or physical proximity to another person, or to cause a person to contact another person by telephone. *Compare* § 940.32(1)(a)10 (2001-2002) *with* § 940.32(1)(a)10 (2003-2004). Thus, at a new trial Sveum can contend that he caused another person to surveille Johnson and telephone her on April 25, 2003, as well as surveille her on April 26, 2003. Especially since the GPS device had no ability to determine who was operating his vehicle. Sveum is entitled by law to present such a defense.

The trial court upheld the search of 2426 Valley Street and Sveum's vehicle in a single sentence:

> *Finding that the GPS was appropriate and the* information obtained from it was appropriate, I'll find

> that the search warrants for the residence and the house were also appropriate.

(A:62). This was error.

III. The trial court erred when it admitted evidence of the defendant's prior stalking conviction.

One element of the crime charged is that Sveum had a prior stalking conviction involving Jamie Johnson. *Sec.* 940.32(3)(b).

> Where prior convictions is an element of the charged crime, the risk of a jury using a defendant's prior convictions as evidence of his or her propensity or bad character is great. And where the prior offense is similar or of the same nature or character as the charged crime, the risk of unfair prejudice is particularly great.

State v. Alexander, 214 Wis.2d 628, 642-43 (1997).

Trial counsel moved to exclude evidence of Sveum's prior stalking conviction by offering to stipulate to that element of the crime pursuant to Alexander. The State opposed the motion, arguing that Alexander was inapplicable because the prior conviction was not being offered solely to prove that Sveum had a prior stalking conviction. The court accepted the argument of the State, concluding:

> that the evidence of Mr. Sveum's prior conduct with this same victim goes directly to at least a couple of the elements that the State must prove. That would be whether or not he intentionally engaged in this course of conduct and that intent would be shown through the fact that he had previously engaged in stalking conduct and so, therefore he understands what that is and that supports his intent to continue to do that after his first conviction. And the effect that it had on his victim certainly goes to the element of whether or not those acts

> induced feared into Jamie Johnson. The fact that Mr. Sveum had previously been convicted again goes to his knowledge that what he was doing was held to be criminal in the past and that his knowledge of his intent to continue to engage in that sort of behavior....That evidence does go to the defendant's intent now. I think it could be considered at least knowledge if not the absence of mistake or accident and its similar consideration of plan...

(A:72-73). This was error.

The court's conclusion makes it clear that at best only the facts surrounding Sveum's prior conviction would tend to show intent, not the conviction itself. But even that is incorrect.

> Common sense dictates that, whatever the intent [Sveum] displayed at the time of his earlier act, the incident is not relevant to whatever intent he might have had in respect to the charged crime.

State v. Sonnenberg, 117 Wis.2d 159, 170 (1984); State v. Evers, 139 Wis.2d 424, 433 (1987)("The real question, however, is to what extent do the prior instances tell us of the defendant's present intentions, other than to show the prohibited purpose that the defendant is a bad person and therefore has a propensity toward criminality.").

In addition, the applicable stalking statute no longer has a knowledge element. *Compare* § 940.32(2)(b) (1999-2000) *with* § 940.32(2)(b) (2001-2002). Finally, evidence of the prior conviction was not admissible to show plan. Obviously, the prior conviction was not a step in a plan leading up to the charged offense. State v. Pharr, 115 Wis.2d 334, 338 (1983).

IV. The trial court erred when it denied the defendant's ineffective assistance of counsel claim.

To prevail on an ineffective assistance of counsel claim, a defendant must show that counsel's performance was deficient and that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must show that counsel's conduct fell below an objective standard of reasonableness. Id. at 688. To prove prejudice, the defendant:

> must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id. at 694. "[P]rejudice should be assessed based on the cumulative effect of counsel's deficiencies." State v. Thiel, 264 Wis.2d 571, 605 (2003).

a. Counsel was ineffective during voir dire.

In opposing trial counsel's motion to exclude evidence of Sveum's prior stalking conviction, the State indicated that the prior conviction would be a big part of its case (A:65-69). The court denied the motion moments before the start of jury selection (A:72-74). Thus, counsel knew that the State would be presenting evidence of Sveum's prior conviction to the jury, and that they would be focusing on his prior conviction during deliberations as it would be part of the written jury instruction.

Voir dire plays a critical function in assuring the defendant that his Sixth Amendment right to an impartial jury will be honored. Gomez v. U.S., 490 U.S. 858, 873 (1989). The court informed the prospective jurors of Sveum's prior stalking conviction involving Johnson (A:75-76). Counsel failed to ask them whether this information would cause anyone to automatically conclude that Sveum must be guilty of stalking Johnson in this case, or if it would prevent anyone from being fair and impartial in listening to the evidence presented and reaching a verdict.

After trial, the court accepted the argument of the State and found that "counsel made a strategic decision not to ask these questions because they would further draw attention to Sveum's prior conviction." (A:11). If this were true, then counsel never would have mentioned in his opening statement "that Mr. Sveum has already been convicted of stalking." (A:77). And counsel would not have stated:

> You've been told about all the things that happened that resulted in a conviction. He's been convicted already for this. He's been convicted for the threat that was issued in 1994 and he's gone to prison for it. The question is, has he learned how to conduct himself so at least it's not illegal stalking. ... Remember all of the things that were listed for you that resulted in the first trial and conviction?

(A:78). Nor would counsel have stated in closing:

> The statement that's linking Mr. Sveum to the last three elements of stalking is a statement made in 1994, and that's still being used. It was used to convict him in 1996.

(A:132). Counsel only had two opportunities to speak directly to the jury, and both times he mentioned Sveum's prior stalking conviction. This proves that his failure to ask at voir dire the questions necessary to ensure an impartial jury was

deficient performance, not a strategic decision. And due to counsel's deficiency, there is no assurance that Sveum's Sixth Amendment right to an impartial jury was honored. Thus, the trial court erred in denying relief on this issue.

b. Counsel failed to request a curative instruction on the prior stalking conviction.

Trial counsel was ineffective for failing to request a curative instruction which would have told the jurors that evidence of Sveum's prior stalking conviction was received solely because it bears upon elements of the offense charged, and it must not be used for any other purpose, particularly as proof of the guilt of the stalking offense now charged. After trial, the court accepted the State's argument that evidence of Sveum's prior stalking conviction was not just a status element but rather proves the elements of the present offense, so the lack of a curative instruction did not prejudice Sveum (A:12-13). This was error.

Although Sveum disputes whether the prior conviction itself had any evidentiary value with respect to the elements of the offense charged beyond the status element he offered to stipulate to as noted in sec. III above, the issue here is not whether the evidence was admissible for such a purpose. Rather, the argument presented is that the jury needed to be instructed that it must not use the prior conviction for an impermissible purpose – as propensity evidence. There is no question that "the risk of a jury using a defendant's prior convictions as evidence of his or her propensity or bad character is great." Alexander, 214 Wis.2d at 642. The trial

court recognized as much as after ruling it would allow evidence of the prior conviction it stated:

> I think that should there be any issue as to whether or not there is unfair prejudice, that can certainly be ... addressed by a cautionary instruction which would reduce the danger of unfair prejudice.

(A:73-74). But counsel failed to request a cautionary instruction. Thus, the trial court erred in denying relief on this issue.

c. Counsel failed to admit evidence of a pending appeal.

When evidence of a prior conviction is introduced to the jury, "[e]vidence of the pendency of an appeal is admissible." *Sec.* 906.09(5). When Sveum's trial began, an appeal regarding his prior stalking conviction was before this court in Appeal No. 2005AP2646, a fact known to counsel, Detective Ricksecker and Renee Sveum. Counsel was ineffective for failing to introduce this evidence on cross-examination. The court found that counsel's omission was not prejudicial given the other evidence presented (A:13). However, "prejudice should be assessed based on the cumulative effect of counsel's deficiencies." Thiel, 264 Wis.2d at 605.

d. Counsel failed to adequately cross-examine Jamie Johnson.

To obtain a conviction, the State had to show that Sveum committed an act that induced fear in Jamie Johnson of bodily injury or death. *Secs.* 940.32(2)(b) and (c). To

satisfy this element, Johnson testified that on October 17, 1994 she had a confrontation with Sveum and he told her that one day when she comes home he would be hiding in the bushes and blow her head off (A:103-105). She also testified that she called Detective Ricksecker on March 28, 2003 because she started receiving hang-up telephone calls that made her feel terrified because she had a feeling it was Sveum (A:119-120). She further testified that the only contact with her in this case was the hang-up calls and she never saw Sveum (A:126). Finally, she testified that no one else was present on October 17, 1994 to hear the threat Sveum allegedly made to her (A:123-125). Thus, it is clear that Johnson's credibility was vital to the jury's verdict. "Any information that would serve to undermine [her] credibility ... was thus essential to an effective defense." State v. Jeannie M.P., 286 Wis.2d 721, 733 (Ct. App. 2005). "In this situation, trial counsel was aware of the need to locate any evidence or information to impeach [Johnson's] testimony." Thiel, 264 Wis.2d at 598. Or at least he should have been aware of this need.

Sveum advised counsel prior to trial that he never threatened Johnson with bodily harm, but rather went to her apartment on October 17, 1994 and told her that if she did not return his diamond ring that he had been trying to get back for nearly three months he would mail to her parents a copy of a letter she wrote him a year earlier mentioning an abortion she had. Johnson became angry and threw the ring at Sveum and he left. Sveum provided counsel with a copy of this letter (A:44).He also provided counsel with a copy of a notarized letter from a friend of Johnson's named Susan Applebaum which indicates that Applebaum spoke to Johnson in late 1994 and she was upset that Sveum asked for his diamond

ring back, but she never mentioned that he had threatened her with bodily harm (A:45).

Sveum also advised counsel that just seven days after Johnson claimed he threatened her and the same day she obtained a restraining order against him, she obtained a replacement title to his car by lying to officials at the Department of Transportation. Sveum provided counsel with a copy of documents that prove these facts (A:47-50). Finally, Sveum advised counsel that several police reports from 1995-1996 prove that Johnson had voluntary contact with him twice in 1995, and remained in close proximity to him for several hours at a concert in 1996 while his first stalking charge was pending.

Counsel was ineffective for failing to question Johnson about these incidents since no reasonable person would have engaged in such acts if they had been threatened with bodily harm. Thiel, 264 Wis.2d at 609 ("JoAnn told the police she was afraid of Thiel, yet she met with him after she filed her complaint....This incident was not exploited by counsel at trial."). Johnson's credibility "was subject to attack with readily available information." Id. at 613. Had this information "been presented at trial, [it] might have prompted jurors to question [Johnson's] credibility." Jeannie M.P., 286 Wis.2d at 733. "[C]redibility was *the issue* upon which a reasonable doubt turned." Thiel, 264 Wis.2d at 614 (emphasis in original). "[C]ounsel's failure to pursue and present this impeaching evidence was objectively unreasonable and thus constituted deficient performance." Jeannie M.P., 286 Wis.2d at 737. And prejudice is presumed in those instances where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." U.S. v.Cronic, 466 U.S. 648, 659 (1984).

The State does not argue that Johnson did not engage in the acts Sveum alleges. Nor did the State argue that counsel had a strategic reason for not attacking Johnson's credibility by questioning her about these acts. Because there are none. Despite these concessions, the trial court concluded:

> An evidentiary hearing is unnecessary on this claim. Even if Sveum's allegations are proved true, Sveum's counsel made 'a reasonable decision that makes particular investigations unnecessary,' the decision not to impeach Johnson's credibility in the suggested manner....Given both the long history between Johnson and Sveum, such impeachment concerning Johnson's credibility could have easily backfired on Sveum....The potential downside of the strategy Sveum now suggests, coupled with the deference the court gives to a counsel's decisions leads the court to find that the failure to pursue the approach Sveum suggests was not unreasonable.

(A:18-19).

There is simply no strategic advantage for a criminal defense attorney not to attack the credibility of a complainant. Noticeably absent from the court's decision is any explanation of how impeaching Johnson's credibility could have "backfired on Sveum" or "the potential downside" of such impeachment. Only two persons know for sure what happened between Sveum and Johnson on October 17, 1994. The critical evidence against Sveum was Johnson's testimony. There were no witnesses to the alleged threat. Thus, Johnson's credibility was the essential consideration for the jury. Counsel's failure to impeach Johnson regarding her claim that Sveum threatened her with bodily harm that day was not only objectively unreasonable but also prejudicial to Sveum. Had jurors heard the information counsel failed to present, they might have concluded that Johnson's version of events was not beyond a reasonable doubt. "In determining

whether a reasonable probability [of a different outcome] exists, courts must focus on whether the [unpresented] evidence impaired the defendant's ability to receive a fair trial." Crivens v. Roth, 172 F.3d 991, 996 (7th Cir. 1999). Here, counsel's failure to "present at trial facts that would cast doubt on the credibility of the State's principal witness undermines confidence in the verdict." Jeannie M.P., 286 Wis.2d at 741. Thus, the trial court erred in denying relief on this issue.

e. Counsel failed to object to questions put to Renee Sveum.

Renee Sveum testified on cross-examination that she knew Sveum well and did not think that he would harm Johnson (A:79-81). On redirect the State asked Renee if she knew that Sveum threatened Johnson with bodily harm on October 17, 1994, to which she replied "no" (A:81). Counsel was ineffective for failing to object on foundation grounds as Renee was the first witness offered and no one had testified that Sveum threatened Johnson. After trial, the court found that counsel's error was not prejudicial given the other evidence presented (A:14). However, "prejudice should be assessed based on the cumulative effect of counsel's deficiencies." Thiel, 264 Wis.2d at 605.

f. Counsel failed to request a curative instruction on the other acts evidence.

Our supreme court has long recognized the danger of allowing into evidence prior acts of the defendant – the

probability of receiving a fair trial becomes low. Paulson v. State, 118 Wis. 89, 99 (1903); State v. Spraggin, 77 Wis.2d 89, 102 (1977). The prejudicial effect of other acts evidence is so well known that there is a standard cautionary instruction. *See* Wis. JI-Criminal 275.

Sveum was charged in this case with stalking Johnson from September 22, 1999 to May 27, 2003 (A:43). Trial counsel moved to exclude evidence concerning the acts underlying Sveum's 1996 stalking conviction on the grounds that they would prejudice the jury (A:42). The court denied the motion, noting that a cautionary instruction could address any issue of unfair prejudice (A:73-74).[9] The State elicited from Johnson testimony regarding at least 10 alleged prior acts by Sveum from 1994-1996 (A:99-117). There can be no question that this evidence was prejudicial. Yet counsel failed to request a cautionary instruction. In denying relief on this issue the trial court held:

> The acts Sveum raises are not 'other acts evidence,' but were necessary for the jury's consideration of the present stalking charges. The stalking statute deals with a pattern of conduct over a period of time and the line of Sveum's acts does not artificially stop at the date of his prior stalking conviction. It reaches back further, including the October 17, 1994 incident in which he threatened to

[9] In deciding whether to admit other acts evidence, the court is to engage in a three-step inquiry: (1) is the evidence offered for an acceptable purpose under § 904.04(2); (2) is the evidence relevant under § 904.01; and (3) is its probative value substantially outweighed by the danger of unfair prejudice under § 904.03. State v. Sullivan, 216 Wis.2d 768, 772-773 (1998). The proponent of the evidence bears the burden of persuading the trial court that this inquiry is satisfied. Id. at 774. However, neither the motion to exclude (A:42), nor the attorneys at the motion hearing (A:65-71) made any mention of what the prior acts were or the circumstances surrounding any of them, so it was impossible for the court to engage in this inquiry.

> someday kill Johnson. This evidence was not admitted to prove Sveum had a bad character, but to establish the 'course of conduct' and Johnson's 'circumstances' as Wis. Stat. § 940.32(2)(a) requires....As a result, the court finds that Sveum's counsel's failure to instruct the jury on the prior acts was not ineffective assistance of counsel.

(A:19-20). This was error.

The court misinterprets § 940.32(2)(a).[10] A plain reading of the statute reveals that the phrase "under the same circumstances" refers to only the current "course of conduct" engaged in by the defendant that resulted in the stalking charge brought forth, not all his or her past conduct as the court concluded. To hold otherwise implicates several constitutional protections – producing an absurd result – something courts are to avoid. State v. Sweat, 208 Wis.2d 409, 422 (1997).

The obvious problem with the court's conclusion is that it subjects Sveum to double jeopardy. Sveum's 1996 stalking conviction was due to his alleged acts from 1994-

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[10] Section 940.32(2) reads in relevant part:

(2) Whoever meets all of the following criteria is guilty of a Class I felony:

(a) The actor intentionally engages in a course of conduct directed at a specific person that would cause a reasonable person under the same circumstances to fear bodily injury to or the death of himself or herself...
(b) The actor intends that at least one of the acts that constitute the course of conduct will place the specific person in reasonable fear of bodily injury to or the death of himself or herself...
(c) The actor's acts induce fear in the specific person of bodily injury to or the death of himself or herself...

1996. The State was allowed to present evidence of those alleged acts in this case. Those prior acts alone were sufficient to again convict Sveum of stalking in this case since they satisfied all of the elements of § 940.32(2).[11] But the jury was not cautioned that the prior acts were admitted solely for some admissible purpose under § 904.04(2), and they were not instructed that they could not rely on the prior acts to find Sveum guilty of stalking in this case. Such cautionary instructions were necessary to protect Sveum from double jeopardy. Counsel was ineffective for failing to request such instructions.

The trial court's conclusion also offends the statute of limitations, which is a substantive defense. Modica v. Verhulst, 195 Wis.2d 633, 644 (Ct. App. 1995). Holding that the phrase "course of conduct" in § 940.32(2)(a) is not limited to acts that occurred within six years of the filing of an information violates the statute of limitations. *Sec.* 939.74(1). Finally, the court's conclusion violates one's right to due process and equal protection. Noticeably absent from the court's decision is any authority supporting its interpretation of § 940.32(2)(a). Not surprising though since the court's interpretation produces an absurd result. Thus, the court erred in denying relief on this issue.

When a postconviction motion alleges sufficient facts which, if true, would entitle the defendant to relief the trial court has no discretion and must hold an evidentiary hearing. Nelson v. State, 54 Wis.2d 489, 497 (1972). The motion must

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[11] At trial, Johnson testified that she ended her relationship with Sveum in 1994, but he continued to come to her apartment and continued to call (A:101-102). She also testified that Sveum threatened to blow her head off on October 17, 1994 (A:103-105). She further testified that the following evening she saw Sveum outside her apartment and did not feel safe physically (A:106-107).

contain "facts that allow the reviewing court to meaningfully assess [the defendant's] claim." State v. Bentley, 201 Wis.2d 303, 314 (1996). Motions sufficient to meet the Bentley standard should allege "the five 'w's' and one 'h'; that is, who, what, where, when, why, and how." State v. Allen, 274 Wis.2d 568, 585 (2004).

The trial court assessed Sveum's Sixth Amendment claim and concluded:

> Despite Sveum's multiple complaints regarding his trial counsel's conduct, the court finds that after examining the totality of the evidence, Sveum has failed to allege facts that would show a reasonable probability of a different outcome. Even when looking at the cumulative effect of any of counsel's deficiencies, the defendant was not prejudiced, given the evidence presented against him. As a result, he is not entitled to an evidentiary hearing.

(A:20). This was error.

"[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Strickland, 466 U.S. at 696. "[A]n analysis focusing on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." Lockhart v. Fretwell, 506 U.S. 364, 369 (1993). "In determining whether a reasonable probability exists, courts must focus on whether the [unpresented] evidence impaired the defendant's ability to receive a fair trial." Crivens, 172 F.3d at 996. Here, the unpresented evidence in subsections c. and d. above impaired Sveum's ability to receive a fair trial. Likewise, counsel's failure to request a curative instruction on the prior stalking conviction and the other acts evidence coupled with his deficient performance during voir dire also impaired Sveum's

ability to receive a fair trial. Finally, it must be remembered that:

> Even if the odds that the defendant would have been acquitted had he received effective representation appear to be less than fifty percent, prejudice has been established so long as the chances of acquittal are better than negligible.

U.S. ex rel. Hampton v. Leibach, 347 F.3d 219, 246 (7th Cir. 2003). Thus, not only has Sveum shown that counsel's performance was deficient, but he has also shown that the deficiency was prejudicial. Strickland, 466 U.S. at 687.

V. The trial court erred when it denied the defendant's erroneous jury instruction claim.

Sveum was convicted of stalking Johnson as a party to a crime in violation of § 940.32(3)(b). This section provides a harsher penalty for violations of § 940.32(2) when the defendant has a prior stalking conviction involving the same victim. To prove that Sveum violated § 940.32(2), the State first had to show that he "intentionally engage[d] in a course of conduct directed at" Johnson. *Sec.* 940.32(2)(a). Section 940.32(1)(a) defines "course of conduct," and then lists 10 specific acts that are included in the definition, which are in relevant part:

1. Maintaining a visual or physical proximity to the victim.
6. Contacting the victim by telephone or causing the victim's telephone or any other person's telephone to ring repeatedly…
7. Sending material by any means to the victim…

8. Placing an object on or delivering an object to property owned, leased, or occupied by the victim.

9. Delivering an object to a member of the victim's family or household or an employer, coworker, or friend of the victim...

10. Causing a person to engage in any of the acts described in subds. 7. to 9.

The legislature revised § 940.32(1)(a) in 2003, expanding § 940.32(1)(a)10 to apply to subds. 1 through 10, instead of just 7 to 9. *Compare* § 940.32(1)(a)10 (2001-2002) *with* § 940.32(1)(a)10 (2003-2004).

The jury instruction concerning "course of conduct" given at trial was as follows:

> Course of conduct means a series of two or more acts carried out over time however short or long that show a continuity of purpose. Acts that you may find constitute a course of conduct are limited to, one, maintaining a visual or physical proximity to Jamie Johnson. Two, contacting Jamie Johnson by telephone or causing Jamie Johnson's telephone or any other person's telephone to ring repeatedly or continuously regardless of whether a conversation ensues. And three, causing any person to engage in either of the acts described in Paragraphs one and two.

(A:127). The third method in this instruction is only within the "course of conduct" under the 2003-2004 statutes, not the applicable 2001-2002 statutes. Thus, the jurors were erroneously instructed that they could find Sveum guilty if the evidence convinced them that he committed an act which at the time was not criminal. The prosecutor seized this opportunity when in closing he stressed to the jury that the

State has proven that Sveum caused Renee Sveum to maintain a visual or physical proximity to Johnson (A:128-131).

The trial court acknowledged that the instruction was erroneous, but accepted the State's argument that the error is harmless because it is clear beyond a reasonable doubt that the jury would have found Sveum guilty absent the error since the jurors were also instructed that they could find him guilty as a party to the crime (A:22). The court also found that Sveum waived his right to challenge the instruction since he failed to object to it (A:22). This was error.

"The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense." Carella v. California, 491 U.S. 263, 265 (1989)(citation omitted). "Jury instructions relieving States of this burden violate a defendant's due process rights." Id. "[O]nce the jury has been instructed on the principles it must apply to find the defendant guilty beyond a reasonable doubt, a court must assume on appeal that the jury has abided by those instructions." State v. Poellinger, 153 Wis.2d 493, 507 (1990).

"[W]hen a case is submitted to the jury on alternative theories, the unconstitutionality of any of the theories requires that the conviction be set aside." Boyde v. California, 494 U.S. 370, 379-380 (1990)(citations omitted). "In those cases, a jury is clearly instructed by the court that it may convict a defendant on an impermissible legal theory, as well as on a proper theory or theories." Id. at 380. "Although it is possible that the guilty verdict may have had a proper basis, it is equally likely that the verdict...rested on an unconstitutional ground...and we have declined to choose between two such likely possibilities." Id. Under these circumstances, the trial

court's mistake cannot be dismissed as harmless error. Bachellar v. Maryland, 397 U.S. 564, 570-571 (1970).

And instructing the jury that they could find Sveum guilty as a party to a crime pursuant to § 939.05 did not remedy the error, but rather compounded it. The party to a crime statute is not applicable to the stalking statute. To hold otherwise would render § 940.32(1)(a)10 superfluous. Obviously, this would produce an absurd result, something courts are to avoid. Sweat, 208 Wis.2d at 422.

Finally, the State did not offer any waiver argument on this issue. Had it done so, Sveum would have included in his written response what the State already recognized – that his counsel failed to object, not him, therefore he was denied his Sixth Amendment right to the effective assistance of counsel. The State has long known that such a Sixth Amendment claim requires a court to reach the merits of an allegedly erroneous jury instruction absent an objection. State v. Shah, 134 Wis.2d 246, 252 n. 5 (1986).

Counsel's failure to object to the jury instructions does not preclude this court's review of claimed errors in the instructions. Id. This court has the authority to review challenges to jury instructions which raise federal constitutional questions going to the integrity of the fact-finding process absent an objection. State v. Zelenka, 130 Wis.2d 34, 44-45 (1986). Sveum's challenge to the erroneous jury instruction raises state and federal constitutional questions[12] relative to the State's burden of proof beyond a

[12] The right to trial by jury is guaranteed by secs. 5 & 7 of Article I of the Wisconsin Constitution and the Sixth and Fourteenth Amendments to the Federal Constitution. And the supreme court has held that the right to a unanimous jury verdict inheres in the state constitutional right to trial by jury. Holland v. State, 91 Wis.2d 134, 138 (1979).

reasonable doubt and his right to a unanimous verdict. Those matters go directly to the integrity of the fact-finding process, and trial counsel's failure to object at trial must not preclude Sveum from raising the matter on appeal.

CONCLUSION

For the reasons stated herein, Sveum requests the following relief:

1. vacation of the conviction and sentence with a remand to the circuit court for a new trial.

Dated this 28th day of April 2008.

Respectfully submitted,

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Pro se

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in secs. 809.19(8)(b) and (c), Stats., for a brief using a proportional serif font. The length of this brief is 9077 words.

Michael A. Sveum

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