STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2008AP658-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL A. SVEUM,

Defendant-Appellant.

APPEAL FROM A JUDGMENT
OF CONVICTION AND ORDER DENYING
POSTCONVICTION RELIEF, ENTERED IN THE
CIRCUIT COURT FOR DANE COUNTY,
HONORABLE STEVEN EBERT, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Did the judicially-authorized installation of a Global Positioning System (GPS) device on the under-carriage of Sveum's car violate the Fourth Amendment?

The trial court concluded at both the pretrial suppression hearing and at the postconviction stage that the installation of the GPS device did not violate the Fourth Amendment because there was no "search" and Sveum did

not have a reasonable expectation of privacy in the position of his automobile on the public highways.

2. Did the search of Sveum's Cross Plains residence pursuant to a search warrant violate the Fourth Amendment?

The trial court concluded that the warrant authorizing the search of Sveum's residence was valid as it was supported by probable cause.

3. Did the trial court erroneously exercise discretion when it allowed the state to introduce proof of Sveum's 1996 conviction for stalking the same victim in this case, Jamie Johnson, to prove elements of the offense?

The trial court ruled that the 1996 stalking conviction was relevant and admissible to prove the following elements of this offense: (1) Sveum intentionally engaged in a course of conduct directed at Johnson; and (2) Sveum had a previous conviction for stalking the same victim, Jamie Johnson, within seven years of this offense.

4. Has Sveum met his burden of proving deficient performance and prejudice to substantiate his various claims of ineffective assistance of trial counsel?

The trial court summarily rejected all of Sveum's ineffective assistance challenges after concluding that, even if counsel's performance was deficient in one or more respects, Sveum failed to meet his burden of proving prejudice in any respect.

5. Has Sveum proved that the trial court erred in instructing the jury regarding the "course of conduct" element of stalking?

The trial court ruled at the postconviction stage that the portion of the instruction defining "course of conduct," which refers to causing a third person to engage in any of

the enumerated forms of stalking, was erroneous but harmless because Sveum was also charged as being a party to the crime with his sister under Wis. Stat. § 939.05. The court also held that Sveum waived any objection to the instruction.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary. The briefs of the parties should adequately address the legal and factual issues presented.

Publication may be of benefit only if this court believes it would be of value with regard to the Fourth Amendment implications of installing a GPS device on a suspect's vehicle. In all other respects, this case involves the application of firmly established principles of law to the facts presented.

STATEMENT OF THE CASE

Sveum appeals (114) from a judgment of conviction (81), as amended October 8, 2007 (101), and from a decision and order denying direct postconviction relief February 20, 2008, entered in the Circuit Court for Dane County, the Honorable Steven D. Ebert presiding (113).

The information charged Sveum and his sister, Renee Sveum, with stalking one Jamie Johnson between September 22, 1999 and May 27, 2003, as parties to the crime, in violation of Wis. Stats. §§ 940.32(3)(b) and 939.05 (9). Renee Sveum eventually entered into negotiations with the state and agreed to testify against her brother in exchange for having the stalking charge against her dismissed if she successfully completed a first offender's program (120:107). After a trial held October 9 through 12, 2006, a Dane County jury returned a verdict finding Sveum guilty as charged of stalking Johnson as party to the crime (68; 122:66-67).

Sveum was sentenced to the maximum 12 1/2-year term for this offense consisting of 7 1/2 years' confinement in prison, followed by 5 years' extended supervision, consecutive to any other time being served (123:25-26).

Sveum filed several motions for direct postconviction relief (93-96). Both Sveum and the state filed a number of briefs and memoranda addressing the various issues raised in the motions (104-109). The trial court decided all of the postconviction motions in a Decision and Order issued February 20, 2008 (113; A-Ap. 9-24). Sveum appealed (114).

This is not Sveum's first stalking conviction. He was convicted in 1996 of stalking the same victim, Jamie Johnson. After a jury trial held October 8 and 9, 1996, Sveum was convicted of stalking Johnson in violation of Wis. Stat. § 940.32(2), (2m) (1:2). Sveum was also convicted at that time of related charges of harassment, violating a harassment injunction, and criminal damage to property, also involving Johnson. Sveum was sentenced November 5, 1996, to three consecutive three-year prison terms for harassment, violating the harassment injunction order and criminal damage to property. With regard to the stalking conviction, the trial court imposed an eleven-year term of probation. Sveum remained in confinement for the first three offenses from November 5, 1996, until his mandatory release date of July 2, 2002 (1:2, 6). Sveum remained on probation for the stalking conviction after his release.[1]

The complaint in this case alleged that Sveum and his sister, Renee, acting as parties to the crime, began to stalk Johnson anew beginning in September of 1999 while Sveum was still in prison for his 1996 convictions and continued after his release until his arrest on May 27, 2003 (1:2-8). Because Sveum had been convicted of stalking Johnson in 1996, less than seven years before the stalking

[1]Sveum was also convicted of felony bail jumping July 29, 1991, apparently involving another victim. *See State v. Sveum*, 2002 WI App 105, ¶1 n.2, 254 Wis. 2d 868, 648 N.W.2d 496.

began anew in 1999, the state charged him for the aggravated form of stalking the same victim within seven years of the previous conviction, in violation of § 940.32(3)(b).

Additional relevant facts will be developed and discussed in the Argument to follow.

ARGUMENT

I. THE INSTALLATION OF THE GPS DEVICE ON SVEUM'S CAR DID NOT VIOLATE THE FOURTH AMENDMENT BECAUSE (1) THIS WAS NOT A "SEARCH," AND (2) IT WAS JUDICIALLY AUTHORIZED BASED UPON PROBABLE CAUSE. NOR DID IT VIOLATE THE WISCONSIN ELECTRONIC SURVEILLANCE CONTROL LAW BECAUSE SVEUM HAD NO REASONABLE EXPECTATION OF PRIVACY IN THE LOCATION OF HIS CAR ON THE PUBLIC HIGHWAYS.

A. Statement of facts relevant to the Fourth Amendment challenge.

On April 22, 2003, Madison Police Detective Ricksecker applied for judicial authorization to install a Global Positioning System (GPS) device on Sveum's automobile for a period of time not to exceed sixty days (40:21-24; A-Ap. 25-28). The affidavit in support of the request for judicial authorization described in great detail the facts that provided probable cause to believe Sveum had been stalking Johnson at least since March 3, 2003, shortly after his release from prison, and that he had been using his automobile to assist in his stalking of her on many of those occasions (40:21-23; A-Ap. 25-27). This, the detective alleged, necessitated the installation of a GPS device on Sveum's car to track his movements (40:23-24; A-Ap. 27-28). After detailing the probable

cause to support installation of the tracking device on Sveum's car (40:21-22; A-Ap. 25-26), the affidavit alleged the following with regard to the GPS device:

> Your affiant states that the Global Positioning System (GPS) tracking device, which is covertly placed on a criminal suspect's automobile, is equipped with a radio satellite receiver, which, when programmed, periodically records, at specified times, the 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.

(40:23; A-Ap. 27.)

The affidavit went on to allege:

> Your affiant believes that the installation of the Global Positioning System (GPS) tracking device has been shown to be a successful supplement to visual surveillance of the vehicle due to the inherent risks of detection of manual, visual surveillance by the target of law enforcement personnel. The Global Positioning System (GPS) tracking device lessens the risk of visual detection by the suspect and is generally considered more reliable since visual surveillance often results in the loss of sight of the Target Vehicle.

(40:23-24; A-Ap. 27-28.)

Dane County Circuit Judge Callaway issued an order the same day, April 22, 2003, authorizing installation of the GPS device on Sveum's Chevy Beretta for not more than sixty days (116:31; 40:25-26; A-Ap. 29-30). Judge Callaway found, "there is probable cause to believe that the installation of a tracking device in the below listed vehicle is relevant to an on-going criminal investigation and that the vehicle is being used in the commission of a crime of stalking, contrary to Chapter 940.32 of the Wisconsin Statutes" (40:25; A-Ap. 29).

Pursuant to that judicial authorization, police magnetically attached the GPS device to the undercarriage of Sveum's black 1990 Chevy Beretta parked in the driveway of his mother's home at 2426 Valley Street in Cross Plains, in the early morning hours of April 23, 2003 (116:42-43). The device was powered by its own battery and no power was taken from the car to run it. Nor did the car need to be moved or opened up to install the device (116:43-44). The device also did not intercept conversations of anyone inside or outside the car; it simply tracked the whereabouts of the car (116:44). Because the battery life is only 14-21 days, police attached a new device in the identical fashion at the same location two weeks later (116:45-46, 72, 74). Police then downloaded the information stored on the first GPS device into a computer program that was provided by the Wisconsin Department of Justice's Division of Criminal Investigation (116:46-47). The GPS device was replaced in the same fashion a second time, and that device was removed May 27, 2003 (116:47). The car was registered to Sveum, and it was parked at the Valley Street residence where he was believed to be staying (116:39-40, 86-87).

The GPS devices provided police with information that helped them establish probable cause to support search warrants for the Valley Street residence as well as for the computer police found in Sveum's bedroom inside (116:48, 51-52, 57-62, 89).

After a pretrial hearing held November 4, 2005 (116), the trial court denied the suppression motion (116:102-07). The court held as follows: (1) judicial authorization was supported by probable cause as alleged in the affidavit (116:103-05); (2) installation of the GPS device was, in any event, lawful because Sveum had no reasonable expectation of privacy in the location of his car on the public highways (116:105-06); and (3) the subsequent searches of the Cross Plains residence and the computer found therein pursuant to warrant were reasonable (116:107).

At the postconviction stage, Sveum filed another challenge to the installation of the GPS device (40:6-10). The state opposed the motion, arguing that there was no reasonable expectation of privacy in the car's whereabouts. In any event, the installation of the GPS device was reasonable because it was judicially authorized on probable cause (41:1-14). The state argued that the subsequent warranted search of the Valley Street residence was reasonable (41:15-22).

The trial court issued a written order denying the suppression motion April 16, 2006 (46).[2]

B. The installation of the GPS device on the undercarriage of Sveum's car did not violate the Fourth Amendment because there was no "search" of his car, its occupants or its contents.

As the proponent of the suppression motion, Sveum bore the burden of proof in the trial court that his Fourth Amendment rights were violated. *State v. LaCount*, 2008 WI 59, ¶37, __ Wis. 2d __, 750 N.W.2d 780. This court reviews *de novo* the trial court's determination that there was no Fourth Amendment violation. *Id.* at ¶34. Although review is *de novo*, this court does benefit from the trial court's analysis. *Id.*

Although police had probable cause, and obtained judicial authorization, they did not need either to attach the GPS device to Sveum's car.

The Seventh Circuit Court of Appeals, in a recent case arising out of Polk County, Wisconsin, explained why:

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[2]Sveum had also filed a petition in this court for leave to appeal the pretrial order denying his suppression motion. This court denied leave to appeal for failure to satisfy the criteria for a permissive appeal May 16, 2006.(50).

The defendant's contention that by attaching the memory tracking device the police seized his car is untenable. The device did not affect the car's driving qualities, did not draw power from the car's engine or battery, did not take up room that might otherwise have been occupied by passengers or packages, did not even alter the car's appearance, and in short did not "seize" the car in any intelligible sense of the word. But was there a search? The Supreme Court has held that the mere tracking of a vehicle on public streets by means of a similar though less sophisticated device (a beeper) is not a search. *United States v. Knotts*, 460 U.S. 276, 284-85, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983). But the Court left open the question whether installing the device in the vehicle converted the subsequent tracking into a search. *Id.* at 279 n.2, 103 S.Ct. 1081; see also *United States v. Karo*, 468 U.S. 705, 713-14, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984). The courts of appeals have divided over the question. Compare *United States v. McIver*, 186 F.3d 1119, 1127 (9th Cir.1999), and *United States v. Pretzinger*, 542 F.2d 517, 520 (9th Cir.1976) (per curiam), holding (and *United States v. Michael*, 645 F.2d 252, 256 and n. 11 (5th Cir.1981) (en banc), and *United States v. Bernard*, 625 F.2d 854, 860-61 (9th Cir.1980), intimating) that there is no search, with *United States v. Bailey*, 628 F.2d 938, 944-45 (6th Cir.1980); *United States v. Shovea*, 580 F.2d 1382, 1387-88 (10th Cir.1978), and *United States v. Moore*, 562 F.2d 106, 110-12 (1st Cir.1977), holding the contrary. Several of the cases actually take intermediate positions, such as requiring reasonable suspicion rather than probable cause (a possible interpretation of *Michael*), or probable cause but no warrant—*Shovea* and *Moore*. This court has not spoken to the issue.

If a listening device is attached to a person's phone, or to the phone line outside the premises on which the phone is located, and phone conversations are recorded, there is a search (and it is irrelevant that there is a trespass in the first case but not the second), and a warrant is required. But if police follow a car around, or observe its route by means of cameras mounted on lampposts or of satellite imaging as in Google Earth, there is no search. Well, but the tracking in this case *was* by satellite. Instead of transmitting images, the satellite transmitted geophysical coordinates. The only difference is that in

> the imaging case nothing touches the vehicle, while in the case at hand the tracking device does. But it is a distinction without any practical difference.
>
> There is a practical difference lurking here, however. It is the difference between, on the one hand, police trying to follow a car in their own car, and, on the other hand, using cameras (whether mounted on lampposts or in satellites) or GPS devices. In other words, it is the difference between the old technology—the technology of the internal combustion engine—and newer technologies (cameras are not new, of course, but coordinating the images recorded by thousands of such cameras is). But GPS tracking is on the same side of the divide with the surveillance cameras and the satellite imaging, and if what they do is not searching in Fourth Amendment terms, neither is GPS tracking.
>
> This cannot be the end of the analysis, however, because the Supreme Court has insisted, ever since *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), that the meaning of a Fourth Amendment search must change to keep pace with the march of science. So the use of a thermal imager to reveal details of the interior of a home that could not otherwise be discovered without a physical entry was held in *Kyllo v. United States*, 533 U.S. 27, 34, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001), to be a search within the meaning of the Fourth Amendment. But *Kyllo* does not help our defendant, because his case unlike *Kyllo* is not one in which technology provides a substitute for a form of search unequivocally governed by the Fourth Amendment. The substitute here is for an activity, namely following a car on a public street, that is unequivocally *not* a search within the meaning of the amendment.

United States v. Garcia, 474 F.3d 994, 996-97 (7th Cir. 2007) (emphasis in original).

> A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.

United States v. Knotts, 460 U.S. 276, 281 (1983).

The use of a GPS device to enhance the ability of police to observe the movements of a vehicle on the public highways does not violate the Fourth Amendment. *See United States v. Gbemisola*, 225 F.3d 753, 758-59 (D.C. Cir. 2000); *United States v. McIver*, 186 F.3d 1119, 1126-27 (9th Cir. 1999); *United States v. Moran*, 349 F. Supp. 2d 425, 467-68 (N.D.N.Y. 2005); *People v. Gant*, 802 N.Y.S.2d 839, 845-48 (Co. Ct. 2005); *Morton v. Nassau County Police Dept.*, No. 05-CV-4000, 2007 WL 4264569, at *3-*4 (E.D.N.Y. Nov. 27, 2007). *Also see United States v. Coleman*, No. 07-20357, 2008 WL 495323, at *2-*3 (E.D. Mich. Feb. 20, 2008) (holding that police use of a suspect vehicle's factory-installed "OnStar" system to track the vehicle's whereabouts did not violate the Fourth Amendment). *See* David Schuman, *Tracking Evidence with GPS Technology*, Wisconsin Lawyer, May 2004, at 9.

Police could have obtained the identical information, at great expense of time and resources, with constant visual surveillance of Sveum's vehicle. The Constitution did not require them to do so when there existed a technological device that allowed them to conduct that surveillance far more efficiently. The conduct of police here was eminently reasonable because it is plain that, like their counterparts in Polk County, Madison Police "are not engaged in mass surveillance." *United States v. Garcia*, 474 F.3d at 998.

> They do GPS tracking only when they have a suspect in their sights. They had, of course, abundant grounds for suspecting the defendant.

Id.

C. The installation of the GPS device did not violate Wisconsin's Electronic Surveillance Control Law.

Sveum insists that the GPS device was not a "tracking" device at all but was more akin to a device that intercepts electronic communications from one person to

another and, as such, unauthorized installation of a GPS device on his car violated Wisconsin's Electronic Surveillance Control Law (WESCL) at Wis. Stat. §§ 968.27-968.37.

There are three fundamental flaws in Sveum's argument: (1) the GPS device is quintessentially a "tracking" device; (2) the installation of the GPS device was judicially approved on probable cause; and (3) because Sveum had no reasonable expectation of privacy in the whereabouts of his car on the public highways of this state, there was no violation of WESCL.

Section 968.27(4) defines "electronic communication" governed by WESCL. It expressly excludes from that definition the following:

> (d) Any communication from a tracking device.

By its express terms, therefore, WESCL's definition of "electronic communication" does not include a GPS tracking device.

To get around this obvious roadblock, Sveum insists that a GPS device is not a "tracking" device. Sveum does not cite a single case for that novel proposition. As the Seventh Circuit Court of Appeals explained in *United States v. Garcia*, this is a technologically more sophisticated way of following a car. 474 F.3d at 997. *See* Wisconsin Lawyer at 9-11.

No one intercepted any "communication" here. This was not the classic case of a police officer using a device to listen to, or intercept, conversations thought by the suspect to be private. *See, e.g., State v. Maloney*, 2005 WI 74, ¶¶31-37, 281 Wis. 2d 595, 698 N.W.2d 583. Police used a satellite to "follow" Sveum's car just as, in olden days, police would have used their own feet, a motorcycle, or a squad car to follow Sveum's car around town. Or, later on, police might have used a "beeper" to

determine the whereabouts of Sveum's car. *See United States v. Knotts*, 460 U.S. at 284-85.

Finally, police did not violate WESCL because Sveum had no reasonable expectation of privacy in the whereabouts of his car on the public highways of this state whether or not the signals transmitted by the GPS device are deemed to be "electronic communications." *See State v. Duchow*, 2008 WI 57, ¶¶18-22, 41, __ Wis. 2d __, 749 N.W.2d 913.

In *Duchow*, the court ruled that recordings obtained from a listening device placed by parents surreptitiously into their child's backpack were not "oral communications" governed by WESCL, § 968.27(12), because the defendant, a school bus driver on a school bus with the child when the recording occurred, had no reasonable expectation of privacy in those recordings of threats he made against the child. *Id.* at ¶37. The same holds true here with respect to the alleged "electronic communication" between the GPS device and satellites in outer space. The information was obtained under circumstances where Sveum had no reasonable expectation of privacy.[3]

II. THE SEARCH OF THE CROSS PLAINS RESIDENCE WAS REASONABLE BECAUSE IT WAS BASED ON PROBABLE CAUSE AND PURSUANT TO A WARRANT ISSUED BY A JUDGE.

Sveum was taken into custody at his probation and parole agent's office May 27, 2003 (116:48). The same day, police obtained a search warrant for the residence on Valley Street in Cross Plains signed by Judge Higgin-

[3]Sveum glosses over the fact that the installation of the GPS device was judicially authorized on probable cause (40:25-26; A-Ap. 29-30). The judicial authorization on probable cause satisfied the Constitution here. For the same reason, the judicial authorization on probable cause rendered any violation of the WESCL technical in nature only and not reversible error. *See* Wis. Stat. § 971.26.

botham (*id.*; 40:48-49; A-Ap. 38-39). In her application for that warrant, Madison Detective Ricksecker spelled out in great detail the probable cause to support it (40:43-47; A-Ap. 33-37). Sveum insists that the warrant was defective because it was not supported by probable cause.

A. The applicable law and standard for review of challenges to the sufficiency of a search warrant.

Reviewing courts are to give "great deference" to a magistrate's probable cause determination; it must stand unless the defendant shows the facts are "clearly insufficient" to support the probable cause finding. *State v. Marquardt*, 2005 WI 157, ¶23, 286 Wis. 2d 204, 705 N.W.2d 878, citing *State v. Higginbotham*, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991).

In *State v. Schaefer*, 2003 WI App 164, 266 Wis. 2d 719, 668 N.W.2d 760, this court explained the role of the magistrate when deciding whether to issue a search warrant and the role of the reviewing court in deciding whether the magistrate properly issued a search warrant.

> When considering an application for a search warrant, the issuing magistrate is
>
> > to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.
>
> *Illinois v. Gates*, 462 U.S. 213, 238 (1983). We give great deference to the magistrate's determination that probable cause supports issuing a search warrant. *State v. Ward*, 2000 WI 3, ¶ 21, 231 Wis. 2d 723, 604 N.W.2d 517. We will uphold the determination of probable cause if there is a substantial basis for the warrant-issuing magistrate's decision. *Id.* This deferential standard of review "further[s] the Fourth Amendment's strong preference for searches con-

> ducted pursuant to a warrant." *State v. Kerr*, 181 Wis. 2d 372, 379, 511 N.W.2d 586 (1994) (citations omitted).

266 Wis. 2d 719, ¶4. *See State v. Lindgren*, 2004 WI App 159, ¶¶15-16, 19-20, 275 Wis. 2d 851, 687 N.W.2d 60.

The quantum of evidence needed to establish probable cause is less than that required for a bindover after a preliminary hearing. *State v. Lindgren*, 275 Wis. 2d 851, ¶20. The probable cause determination is made on a case-by-case basis after reviewing the totality of the circumstances. *State v. Schaefer*, 266 Wis. 2d 719, ¶17. The magistrate may draw reasonable inferences from the facts asserted in the affidavit. The inference drawn need not be the only reasonable one. *See State v. Ward*, 2000 WI 3, ¶30, 231 Wis. 2d 723, 604 N.W.2d 517; *State v. Jones*, 2002 WI App 196, ¶10, 257 Wis. 2d 319, 651 N.W.2d 305.

When giving deferential review in the close case, this court should resolve all doubts in favor of the magistrate's probable cause determination. *State v. Lindgren*, 275 Wis. 2d 851, ¶20.

B. In light of the deferential scope of review, Sveum has failed to meet his burden of proving the affidavit was insufficient to support Judge Higginbotham's decision to issue a search warrant for the Cross Plains residence.

It is plain from the detailed affidavit presented to him by Detective Ricksecker (40:43-47; A-Ap. 33-37), that Judge Higginbotham "made a practical, commonsense decision whether, given all of the circumstances set forth in the affidavit before him, there was a fair probability that contraband or evidence of a crime would be found at [the Cross Plains] residence." *State v. Lindgren*, 275 Wis. 2d 851, ¶20.

Noticeably absent from the discussion of "probable cause" at pages 10-13 of his brief, is any mention by Sveum of the most crucial evidence set forth in the affidavit: the fruits of the GPS tracking device which showed that Sveum was stalking Johnson repeatedly in April and May of 2003 (40:44-45; A-Ap. 34-35), and that, "on most days the vehicle would leave the residence of 2426 Valley St in the Village of Cross Plains" (40:45; A-Ap. 35).

Sveum complains that any allegations in the affidavit regarding his 1996 stalking conviction are "too stale to satisfy the probable cause standard." Sveum's brief at 12. This argument is meritless because Sveum spent six years in prison during that timeframe (40:43; A-Ap. 33). *See United States v. Marcello*, 531 F. Supp. 1113, 1121 (C.D. Cal. 1982) (the standard for determining staleness is a flexible one). If the search warrant affidavit recites activity involving protracted or continuous conduct, the passage of time is less significant. *See Commonwealth v. Vynorius*, 336 N.E.2d 898, 903 (Mass. 1975).

Sveum also neglects to mention in his discussion of "probable cause" that, at the time of his arrest, he was using an unauthorized vehicle (a motorcycle) in violation of the conditions of his probation, he lied to his probation and parole officer about where he was living at the time, and he was maintaining contact with Johnson in violation of the conditions of his probation and parole (40:43-45; A-Ap. 33-35). The probation and parole officer's search of Sveum's unauthorized motorcycle revealed a black knit ski mask stashed in a "lunch bag" on this late spring day (May 27) (40:45; A-Ap. 35).

C. This was not a prohibited "General Warrant."

1. The applicable law and standard for review of a challenge to the scope of a search warrant.

Sveum bears the burden of proving that this warrant violated the Fourth Amendment. *State v. LaCount*, 2008 WI 59, ¶37.

This warrant authorized the search of Sveum's residence on Valley Street in Cross Plains. As such, it was a "premises warrant." *Id.* at ¶38.

> This court has held that a premises warrant generally "authorizes the search of all items on the premises so long as those items are plausible receptacles of the objects of the search."

Id., quoting *State v. Andrews*, 201 Wis. 2d 383, 389, 549 N.W.2d 210 (1996).

The affidavit in support of the search warrant needed to be only as specific as it reasonably could be. *See State v. Petrone*, 161 Wis. 2d 530, 540-42, 468 N.W.2d 676 (1991); *State v. Noll*, 116 Wis. 2d 443, 450-51, 343 N.W.2d 391 (1984).

In *State v. DeSmidt*, 155 Wis. 2d 119, 454 N.W.2d 780 (1990), the warrant authorized the seizure of all of DeSmidt's dental and business records. The court upheld the warrant against a challenge that it was overly broad:

> "The search and seizure of large quantities of material is justified if the material is within the scope of probable cause underlying the warrant." *United States v. Hayes*, 794 F.2d 1348, 1355 (9th Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987); *see also United States v. American Investors of Pittsburgh, Inc.*, 879 F.2d 1087, 1106 (3rd Cir. 1989), *cert. denied*, 110 S. Ct. 368 (1959) [sic]. The United

> States Supreme Court has recognized that, in cases involving a complex scheme to defraud, a criminal investigation may require piecing together, like a jig-saw puzzle, a number of bits of evidence which if taken alone might show comparatively little. *Andresen*, 427 U.S. at 481 n.10. Where there is probable cause to believe that there exists a pervasive scheme to defraud, all the records of a business may be seized. *United States v. Brien*, 617 F.2d 299, 309 (1st Cir. 1980), *cert. denied*, 446 U.S. 919 (1980).

155 Wis. 2d at 133-34. *See State v. LaCount*, 2008 WI 59, ¶¶41-44.

In both *DeSmidt* and *LaCount*, the court upheld broad warrants, and broad searches authorized thereby, because both cases involved "pervasive scheme[s] to defraud." *Id.* at ¶43. In this case, Sveum engaged in a "pervasive scheme" to stalk Johnson for almost a decade.

2. The search warrant for the Valley Street residence was as reasonably specific as it could be.

The warrant was as specific as it reasonably could be because police knew at the time they applied for it that Sveum had stalked Johnson in every conceivable way: in his car, over the telephone, by mail, aided by binoculars, while wearing a ski mask, using calendars, going through Johnson's trash, etc. (40:45; A-Ap. 35). Police also had probable cause to believe the rather savvy Sveum might, as other stalkers are wont to do, use a computer to assist him in stalking Johnson (40:45-46; A-Ap. 35-36). The typical stalker often keeps "records, journals and other documents, memorializing their stalking behavior and exploits" (40:46; A-Ap. 36). The typical stalker "will also have evidence of obsession which includes shrines in the home, records, journals, diaries, calendars of the victim's activities and/or other family members, personal information and computer records, and generated computer documents. Collecting the victim's trash is one example

of trophy keeping and/or gaining access to personal information" (40:47; A-Ap. 37).

Someone committed to stalking one individual for such an extended period of time—someone who is so totally obsessed with one individual—in all probability would have some or all of these types of materials on hand. The probable cause allegations in the search warrant were all substantiated by the testimony at the suppression hearing (116:48, 50, 52-55). Detective Ricksecker also narrowed the scope of the search by advising the searching officers at the scene, based on her long experience with this case, precisely what items actually had evidentiary significance and what items did not (116:76, 77-79).

The warrant also properly authorized police to seize any items tending to establish Sveum's place of residence because they had probable cause to believe, in light of information obtained from the GPS tracking device, that Sveum was living in Cross Plains in violation of the rules of his probation and parole and had lied to his probation and parole officer that his residence was in Blue Mounds. An earlier search of the residence in Blue Mounds on May 27, 2003, turned up nothing to indicate that Sveum had ever lived there (116:48-49, 50, 56).

In conclusion, the warrant was as reasonably specific as it could possibly be under the circumstances. *State v. Petrone*. Police did not exceed the scope of that warrant in how they executed it. *See State v. LaCount*; *State v. DeSmidt*. The wide-ranging nature of Sveum's stalking of Johnson for almost a decade made virtually every document police found inside the Valley Street house relevant. Sveum essentially concedes this point when he acknowledges at page 10 of his brief that the fruits of the search "included approximately 90 documents *introduced at trial*" (emphasis added). Those 90 documents could not be introduced at trial unless they were relevant. The fact that police turned up 90 documents that

were introduced into evidence at trial shows that the warrant was not a "general warrant."

Sveum next complains that police should not have been allowed to seize his computer. Sveum's brief at 15. This argument is rendered frivolous by Sveum's concession that a subsequent search of "the seized computer and 16 computer disks" produced "no incriminating evidence." *Id.* at 15 n.8.

Finally, even assuming some items fell outside the scope of the warrant, all items that were properly seized within the scope of the warrant are not to be suppressed. *State v. Christensen*, 2007 WI App 170, ¶13, 304 Wis. 2d 147, 737 N.W.2d 38. *Also see Klingenstein v. State*, 624 A.2d 532, 536 (Md. 1993).

> The general rule is that items seized within the scope of the warrant need not be suppressed simply because other items outside the scope of the warrant also were seized, unless the entire search was conducted in "flagrant disregard for the limitations" of the warrant.

State v. Petrone, 161 Wis. 2d at 548 (footnote omitted). *Also see State v. Noll*, 116 Wis. 2d at 451-52, 460.

The most damning items of evidence recovered during this search were the letters seized from his sister's, Renee's, bedroom. These were letters written by Sveum to his sister from 2000 until just a few days before his release in July of 2002 (120:52-90), enlisting her assistance in his stalking of Johnson from his prison cell by obtaining personal information about her, her friends, her relatives, and her employers. These letters also directed Sveum's sister to vandalize Johnson's property as well as the property of her boyfriends. Sveum directed Renee to destroy these letters (fortunately she did not) and told her to describe Johnson and whomever Johnson was with in code rather than by their real names for fear of being discovered (120:58, 66-67, 73-74 [directing Renee to "[d]estroy this letter"]). In another letter, Sveum directed

Renee to have someone call Johnson at work from a pay phone and deliver derogatory information about her, and then hang up (120:67-69). Another letter told Renee to deliver derogatory information to Johnson's employer (120:74-75). Another letter told Renee, "[m]aybe I'll spot her [Johnson] again in no more than 232 days when I get home" (120:78-79), and telling Renee to get a copy of Johnson's driving record in order to get her new address (120:79-81). Yet another letter, dated January 14, 2002, gave Renee permission to "key" Johnson's new car, and stated that Johnson should be "warned ahead of time" that her employer will be provided derogatory "information" about Johnson if she is seeing anyone else when Sveum gets out of prison; the letter went on to state that Johnson had better be single and stay that way (120:85-86).

Police also recovered various letters that Renee wrote back to Sveum while he was in prison between 1999 and 2002. These letters chronicle her efforts to aid in his stalking of Johnson and the fruits thereof (120:92-106).

These letters were found by police during the search in a red folder inside a drawer in Renee's bedroom (120:156-79). Sveum had no reasonable expectation of privacy in these documents because (a) they belonged to his sister and (b) they were found in her bedroom in a house where he was not supposed to be. The damning information contained in these documents was all confirmed by his sister Renee's trial testimony (120:45-106).

Therefore, even if everything else obtained in the search was suppressed, these crucial documents were not suppressible because Sveum lacked any standing to challenge their seizure from his sister's bedroom.[4] Sveum had no reasonable expectation of privacy in his sister's papers in his sister's bedroom. *See State v. Whitrock*, 161 Wis. 2d 960, 972, 468 N.W.2d 696 (1991); *State v. Trecroci*, 2001

[4]Sveum does not challenge the search of his automobile which produced all sorts of incriminating evidence as well (121:79-83).

WI App 126, ¶¶26, 35-36, 246 Wis. 2d 261, 630 N.W.2d 555. *See generally State v. Bruski*, 2007 WI 25, ¶24, 299 Wis. 2d 177, 727 N.W.2d 503.

III. EVIDENCE OF SVEUM'S 1996 STALKING CONVICTION WAS PROPERLY ADMITTED BECAUSE IT WAS NEEDED TO PROVE ESSENTIAL ELEMENTS OF THIS STALKING OFFENSE.

The first element of stalking the state had to prove is that Sveum "intentionally engaged in a course of conduct" directed at Johnson. Wis. JI-Criminal 1284 (2004). To prove his intent, the state had to show that Sveum "acted with the purpose to engage in a course of conduct directed at [Johnson]." *Id.* (footnote omitted). To prove "course of conduct" the state had to show "a series of two or more acts carried out over time, however short or long, that show a continuity of purpose."

In conjunction with this latter element, the state had to prove that this course of conduct "would have caused a reasonable person" to fear bodily injury or death to herself; that Sveum's acts induced fear in Johnson of bodily injury or death to herself; and Sveum knew or should have known that at least one of the acts in his course of conduct would place Johnson in reasonable fear of bodily injury or death to herself. *Id. See generally State v. Sveum*, 220 Wis. 2d 396, 411-14, 584 N.W.2d 137 (Ct. App. 1998).

Finally, because this case involved the aggravated form of stalking under § 940.32(3)(b), the state also had to prove Sveum had a previous conviction for the crime of stalking, Johnson was the victim of that crime, and the crime in this case occurred within seven years of the previous conviction. Wis. JI-Criminal 1284A (2003).

It is beyond obvious that the 1996 conviction is at least relevant and admissible with respect to this latter element because it occurred within seven years of the offenses at issue here. That crime is also an essential part

of the "course of conduct" that induced fear in Johnson and would induce such fear in any reasonable person in her position. As were his similar acts leading up to the 1996 conviction, the state could reasonably argue that the course of conduct engaged in by Sveum both before and after that conviction was done "intentionally" and he acted with the "purpose" to engage in that conduct directed at Johnson in order to cause her to fear bodily injury or death, and it in fact did instill such fear in Johnson.

Because proof of the prior stalking conviction was essential to establish the elements of the offense under § 940.32(3)(b), it was properly received into evidence. *State v. Warbelton*, 2008 WI App 42, ¶¶14-24, __ Wis. 2d __, 747 N.W.2d 717 (review granted June 10, 2008).

Sveum relies upon *State v. Alexander*, 214 Wis. 2d 628, 571 N.W.2d 662 (1997), to support his claim that the 1996 stalking conviction was not admissible. This court in *Warbelton* distinguished *State v. Alexander*, which dealt with a status offense, from the situation, such as here, where the prior conviction was used to prove elements of the offense. In this case, it proved Sveum's course of conduct, his intent, and his repeated conduct directed at this specific victim in the requisite period of time. *See Warbelton*, 2008 WI App 42, ¶¶25-34.

In fact, the prior conviction is not "other acts" evidence at all. *See State v. Bauer*, 2000 WI App 206, ¶7 n.2, 238 Wis. 2d 687, 617 N.W.2d 902. This evidence was not introduced merely to show similarity between the prior conviction and the charged offense, but to prove essential elements of the offense. As such, it is "inextricably intertwined with the crime." *State v. Dukes*, 2007 WI App 175, ¶28, 303 Wis. 2d 208, 736 N.W.2d 515 (evidence of a prior act was introduced to show that defendant's house was a "drug house"—an essential element of the offense, *id.* at ¶30).

IV. THE TRIAL COURT PROPERLY REJECTED SVEUM'S INEFFECTIVE ASSISTANCE OF COUNSEL CHALLENGE BECAUSE SVEUM FAILED TO PROVE THAT TRIAL COUNSEL'S PERFORMANCE WAS BOTH DEFICIENT AND PREJUDICIAL IN ANY RESPECT.

A. The applicable law and standard for review.

To establish the denial of his constitutional right to the effective assistance of counsel at trial, a defendant must meet the burden of proving both that counsel's performance was deficient and, if so, that such performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

On review of an ineffective assistance of counsel claim, this court is presented with a mixed question of law and fact. The trial court's findings of historical fact will not be disturbed unless they are clearly erroneous. The ultimate determinations based upon those findings of whether counsel's performance was constitutionally deficient and prejudicial are questions of law subject to independent review in this court. *State v. Trawitzki,* 2001 WI 77, ¶19, 244 Wis. 2d 523, 628 N.W.2d 801; *State v. Johnson*, 153 Wis. 2d at 127-28. *See also State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985); *State v. Wright*, 2003 WI App 252, ¶30, 268 Wis. 2d 694, 673 N.W.2d 386.

1. Deficient performance.

To establish deficient performance, the defendant must prove that counsel's errors were so serious he was not functioning as the "counsel" guaranteed by the Sixth Amendment to the United States Constitution. *See State*

v. Johnson, 153 Wis. 2d at 127, citing *Strickland v. Washington*, 466 U.S. at 687. Judicial review of counsel's performance is highly deferential. The case is to be reviewed from counsel's perspective at the time of trial, not in hindsight, and the defendant bears the burden of overcoming a strong presumption that counsel acted reasonably within professional norms. *See Trawitzki,* 244 Wis. 2d 523, ¶40; *State v. Johnson*, 153 Wis. 2d at 127, citing *Strickland v. Washington*, 466 U.S. at 687.

A defendant is not constitutionally entitled to error-free representation. Counsel need not even be very good to be considered constitutionally adequate. *State v. Wright*, 268 Wis. 2d 694, ¶28; *State v. Mosley,* 201 Wis. 2d 36, 49, 547 N.W.2d 806 (Ct. App. 1996); *Dean v. Young,* 777 F.2d 1239, 1245 (7th Cir. 1985), *cert. denied*, 475 U.S. 1142 (1986). Ordinarily, a defendant does not prove deficient performance unless he shows that counsel's deficiencies sunk to the level of professional malpractice. *See State v. Maloney*, 281 Wis. 2d 595, ¶23 n.11.

2. Prejudice.

Once the defendant proves deficient performance, he must next prove prejudice. The defendant must prove that counsel's errors were so serious they deprived him of a fair trial, a trial whose result is reliable. *See State v. Johnson*, 153 Wis. 2d at 127, citing *Strickland v. Washington*, 466 U.S. at 687. The defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. A reasonable probability is one sufficient to undermine confidence in the outcome. *State v. Trawitzki,* 244 Wis. 2d 523, ¶40; *State v. Johnson*, 153 Wis. 2d at 129, citing *Strickland v. Washington*, 466 U.S. at 694.

This court may abandon review of the deficient performance issue if it is easier to dispose of the ineffective assistance claim by holding that there was a lack of prejudice even assuming deficient performance. *See State*

v. Moats, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990). This is, indeed, considered to be the more "prudent approach." *Taylor v. Bradley*, 448 F.3d 942, 949 (7th Cir. 2006). *See State v. Wright*, 268 Wis. 2d 694, ¶27.

B. Sveum is unable to prove a reasonable probability of a different outcome no matter how poorly counsel performed.

Sveum presents a laundry list of deficiencies but offers no proof of prejudice.

Perhaps the most damning testimony came from Sveum's sister. Renee described in great detail how she aided and abetted—indeed conspired with—Sveum to stalk Johnson from his prison cell between 1999 and early 2002 (120:41-106). Renee described at trial the letters Sveum sent her from prison instructing her how to obtain information on Johnson, her relatives, friends and employers; how to harass Johnson, her relatives and friends; and how to provide derogatory information on Johnson to her relatives, friends and employers (120:52-86). Renee then testified about the various letters she wrote back to Sveum describing her efforts to assist him in stalking Johnson, and the fruits thereof (120:92-106). These letters were all uncovered by police in the search of Renee's bedroom. Much of this information was corroborated by other witnesses (121:22-30, 38-39, 41-44, 52-86).

Police installed a "trace" on Johnson's telephone in early April of 2003 (120:194), and obtained a pen register on Sveum's phone in 2003 (121:18-19). Information obtained from this activity showed that Sveum made a number of telephone calls from various phones in various locations near Johnson's house and also near Sveum's place of employment between March and late May of 2003 (120:115-20, 121-27). This was all corroborated by information obtained from the GPS device installed on Sveum's car for part of that time (120:133-34, 140-50).

Particularly damning were the various documents recovered by police from a folder found in Renee's bedroom (120:178-79), which fully corroborated all of her testimony and directly implicated Sveum (along with herself) (120:152, 155-79). Police also obtained documentary evidence from another part of the house directly implicating Sveum (120:179-86).

The state introduced proof that Sveum lied to his probation and parole officer about his residence after his release in July of 2002 (121:8-9, 12), he was subject to a "no contact" order with regard to Johnson (121:12), was not to use the internet or go to a library without prior approval (121:13), and was not to deviate from a certain route to and from work (121:14). As the GPS information and the search of Sveum's residence showed, Sveum violated all of those conditions as soon as he was taken off electronic monitoring February 11, 2003 (121:14). When his agent took Sveum into custody at his office May 27, 2003, a search of Sveum's motorcycle turned up a ski mask on that late May day (121:19-20). A search of Sveum's Chevy Beretta produced another ski mask, binoculars, a winter parka, camouflage gloves, two flashlights and, in the glove compartment, a list of Madison public libraries and their hours (121:79-83). Sveum made some of his hang-up calls to Johnson from the Meadowridge Public Library which was one of the libraries listed (*id.*).

With this as the backdrop, Johnson's trial testimony chronicling Sveum's stalking of her for almost a decade was virtually unchallengeable because it was so strongly corroborated (121:111-62). There is, then, no reasonable probability of a different outcome no matter how counsel performed because this evidence of Sveum's guilt would be unshaken.

Sveum never denied stalking Johnson from 1994 until 2003. His only defense at trial was that no reasonable person in Johnson's position would fear for her life; he was merely harassing her (122:50-57). That is the only defense counsel could concoct because Sveum did not

take the stand. Perfect defense representation would not have saved Sveum here.

C. Counsel's performance was not deficient in any respect.

1. *Voir dire.*

Sveum complains that counsel should have asked prospective jurors about the impact of his 1996 stalking conviction on their impartiality. At the outset of *voir dire,* the court instructed the jury that the state would have to prove all of the elements of stalking beyond a reasonable doubt, including the element that Sveum had a prior stalking conviction within seven years involving the same victim (119:20-21). Sveum's attorney questioned the jurors about any involvement they might have had in difficult domestic relationships (119:51-52), or any "unwanted attention" from someone where police were called (119:53-54). He asked whether that experience would make it difficult for the individual to be fair and impartial in a stalking trial (119:54-55). He then asked whether any of them had ever said something in anger they later regretted and really did not mean (119:55). This laid the groundwork for the defense that, while Sveum at one time threatened Johnson, it was an "empty" threat and his more recent conduct was nothing more than "unwanted attention" or harassment rather than a threat to injure or kill (*see* 122:52-54).

At trial, defense counsel stipulated to Sveum's prior conviction (120:38, 81-82). Counsel then used this to his client's advantage by showing that his behavior and tactics had changed significantly since 1996 and he was no longer a threat to Johnson's safety, assuming he ever was (120:33-37; 122:52-54). Sveum fails to explain how any questions about the prior conviction would have made a difference or diminished the impact of the overwhelming evidence of his guilt. As the trial court concluded, this was nothing more than a disagreement between Sveum

and his attorney over strategy, a matter not reviewable under *Strickland* (113:4; A-Ap. at 12). *See United States v. Cieslowski*, 410 F.3d 353, 361 (7th Cir. 2005) (decisions that fall "squarely within the realm of strategic choice" will not support a *Strickland* challenge).

2. Curative instructions for the prior stalking conviction.

Sveum wanted some sort of jury instruction to the effect that the prior stalking conviction was introduced "solely because it bears upon the elements of the offense charged." Sveum's brief at 23. As noted above, there were several elements for which the 1996 conviction was properly admitted. A curative instruction to the effect that it was relevant and admissible "only" to prove those elements would have had little favorable impact. The jury was already instructed on what those elements were, including the requirement that the state had to prove beyond a reasonable doubt that Sveum was convicted of stalking Johnson within seven years.

3. Evidence of a pending appeal.

Sveum argues that counsel should have told the jury there was an appeal pending in a habeas corpus action he had filed apparently challenging his 1996 conviction. This was not an "appeal" at all from that conviction. That appeal ended when this court affirmed the judgment of conviction in 1998. *State v. Sveum*, 220 Wis. 2d 396, 584 N.W.2d 137 (Ct. App. 1998). Rather, this was a separate civil action for habeas corpus relief under Chapter 782 (105:7-8, 17-19).

Under Wis. Stat. §.906.09(5), evidence of the "pendency of an *appeal*" of a prior conviction is admissible in evidence. As the habeas action was not an "appeal" at all, but only a collateral challenge to a conviction after the prior appeal had failed, it would not have even been admissible. It was reasonable for counsel not to try to

introduce proof of the habeas action because the state would simply have countered with proof that Sveum unsuccessfully appealed his 1996 conviction years earlier.

4. Cross-examination of Jamie Johnson.

Sveum now claims for the very first time that he never threatened Johnson. Sveum's brief at 25. Sveum now claims he always wanted counsel to challenge on cross-examination Johnson's assertion that he had threatened to kill her in 1994. Sveum offers nothing to show that such a credibility challenge would have done anything but backfire. Johnson would have insisted that it was a real threat to kill and counsel would have been forced to accept her answer. The extrinsic evidence on this collateral matter that Sveum now offers would have been inadmissible (93:21-24; A-Ap. 44-47). Wis. Stat. § 906.08(2). *See State v. Sonnenberg*, 117 Wis. 2d 159, 174-75, 344 N.W.2d 95 (1984). Moreover, the letter from Johnson Sveum insists counsel should have introduced (93:23; A-Ap. 44) only further confirms Johnson's testimony that he was inflicting psychological torture on her. The letter from a Susan Applebaum (93:21-22; A-Ap. 45-46) would have been inadmissible hearsay. Wis. Stat. §§ 908.01(3) and 908.03. Evidence regarding title to an automobile (93:24; A-Ap. 47) would have been relevant to nothing as it had no tendency to prove the existence of any fact that is of consequence to this case. Wis. Stat. § 904.01. Sveum offers nothing to show how any of this extraneous information is relevant to whether or not he threatened to kill Johnson in 1994. Because he chose not to testify, none of this became relevant.

Finally, Sveum has not produced the "police reports" which he claims show that Johnson had voluntary contact with him in 1995. Even so, this proves nothing with regard to whether her contact with him years later was voluntary or whether he threatened to kill her in 1994.

Johnson's testimony was so strongly corroborated by the testimony of others and the documentary evidence obtained by police that any attack on her credibility would have been foolhardy. Counsel was left with the flimsy defense that any threats his client made were empty ones. Counsel backed this up with cross-examination of Johnson that she never saw Sveum with a gun (121:170), and that Sveum's conduct has changed significantly since 1994 when he threatened to kill her; now, most of his contacts consisted of only hang-up phone calls (121:174-80). Sveum introduced the testimony of his sister Renee that she believed he would never physically hurt Johnson (120:109-10), and that police never recovered a gun or any other weapon during their searches (120:196-97). Counsel also introduced proof that Sveum had sent a letter to Johnson telling her she would have a "long and lonely life," which should have led her to believe that he would not kill her (120:197).

Even in the unlikely event that Johnson would testify Sveum never threatened her, the state would counter on rebuttal with proof that she testified under oath in the 1996 trial that he had threatened to kill her. *See State v. Sveum*, 220 Wis. 2d at 410. Once again, as the trial court correctly determined, this was just another disagreement over strategy which is virtually non-reviewable under *Strickland* (113:10-11; A-Ap. at 18-19).

5. Failure to object to questions put to Renee Sveum by the state on rebuttal.

Renee Sveum testified, in response to questions by defense counsel, that when she assisted Sveum, she did so believing he would never hurt Johnson (120:109-10). On rebuttal, without objection by the defense, the prosecutor asked whether Renee knew about the 1994 threat. Renee said she did not (120:110). On re-cross, defense counsel got Renee to testify that she did not know whether Sveum had ever threatened Johnson (120:111).

Defense counsel clearly "opened the door" to the state's rebuttal when he asked whether Renee thought Sveum would harm Johnson. This is analogous to proof of a pertinent trait of character of an accused which is admissible when offered by the accused but also "by the prosecutor to rebut the same." Wis. Stat. § 904.04(1)(a). The "trait" in question is Sveum's propensity for violence in general, and violence towards Johnson in particular. Sveum introduced this evidence and the state was free to rebut it. *Id.* It was not unreasonable for defense counsel to delve into this area of inquiry because, even with the state's rebuttal, he could use Renee's testimony to further support his argument that any threat his client made against Johnson was an empty one (122:50-57).

Sveum seems to be arguing that counsel's error was in letting the state introduce this rebuttal testimony out of order; he argues that the state could not question Renee about her knowledge of this threat until after proof of the threat was introduced. Sveum's brief at 28. If counsel had so objected, this would have easily been remedied by the state; Renee would have been called back to the stand after Johnson testified about the threat. The testimony would have been the same. Finally, the trial court could have allowed the rebuttal testimony to come in just as it did because the trial court has broad discretion to control the order of witnesses and the presentation of evidence. Wis. Stat. § 906.11(1). *See State v. James*, 2005 WI App 188, ¶8, 285 Wis. 2d 783, 703 N.W.2d 727.

6. Failure to request curative instructions regarding other-acts evidence.

For the reasons explained above, evidence of the 1996 stalking conviction was admissible to establish several elements of this offense and, so, a "curative" instruction was not needed or even appropriate here. Moreover, as explained above, this was not even "other acts" evidence at all; it was needed to prove Sveum's "course of conduct," its continuing impact on the victim in assessing

the reasonableness of her fear for her safety, and to establish that he satisfied the requirements of § 940.32(3)(b) as one who was convicted of stalking the same victim within seven years.

At this point, Sveum presents arguments regarding double jeopardy, the statute of limitations, equal protection and due process. Sveum's brief at 30-31. The state will not respond to those claims because they are not developed at all; they are improper appellate argument. *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). They also have nothing to do with whether counsel performed reasonably in not requesting a curative instruction here.

In conclusion, counsel's alleged errors, whether considered individually or in the aggregate, fall well short of proving both deficient performance and prejudice. *See State v. Thiel*, 2003 WI 111, ¶61, 264 Wis. 2d 571, 665 N.W.2d 305.

V. ANY ERROR IN THE INSTRUCTION TO THE JURY REGARDING THE "COURSE OF CONDUCT" ELEMENT WAS HARMLESS.

Sveum contends that the trial court erred in its instructions to the jury regarding the various ways one can engage in a "course of conduct" of stalking set forth in Wis. Stat. § 940.32(1)(a)1.-10. The trial court agreed that the instructions were erroneous (113:12-14; A-Ap. 20-22).

As it is presently worded, Wis. Stat. § 940.32(1)(a) provides ten alternative ways (actually eleven with sub. (6m) added in) by which one may stalk a victim.

There is no dispute that the first two were properly submitted to the jury at trial: (1) maintaining visual or physical proximity to the victim; and (2) approaching or confronting the victim. The jury was also instructed on the tenth alternative which is: "[c]ausing a person to en-

gage in any of the acts described in subds. 1. to 9." *See* Wis. JI-Criminal 1284.

As discussed at length above, the state introduced ample proof at trial that Sveum satisfied the first two conditions (visual or physical proximity and approaching or confronting) on his own, and also argued that he was guilty of the tenth alternative in that he caused his sister Renee to do those acts as well as some of the others such as subs. 7. (sending material to the victim); 8. (placing an object or delivering an object to property owned or occupied by the victim); and 9. (delivering an object to a member of the victim's family, an employer, friend, etc.). Renee's trial testimony established beyond doubt that she in fact engaged in all of those behaviors at Sveum's insistence (*see* 113:13; A-Ap. at 21).

While sub. (1)(a)1.-10. was created by 2001 Wisconsin Act 109, effective February 1, 2003, before Sveum was charged, a subsequent change to sub. (1)(a)10. by 2003 Wisconsin Act 222, effective April 27, 2004, shows that only after that effective date did sub. (1)(a)10. apply to all of subs. 1.-9., instead of just 7.-9. *See* Wis. Stats. Annot. § 940.32, Historical and Statutory Notes (West 2005).

The jury was instructed that Sveum could be found guilty of engaging in a "course of conduct" if they found that he maintained visual or physical proximity to Johnson, contacted Johnson by telephone or caused Johnson's telephone or any other person's telephone to ring repeatedly or continuously, and caused any person (i.e., Renee) to engage in either of those acts (122:23; 113:13; A-Ap. at 21).

The jury should have been instructed that Sveum could be found guilty of causing another person to engage only in the acts enumerated in subs. 7.-9.: sending materials to the victim or disseminating information about the victim, placing an object or delivering an object to property owned or occupied by the victim, and/or deliver-

ing an object to a member of the victim's family or household or employer or friend. The jury should not have been instructed that Sveum could be found guilty of causing Renee to engage in the acts enumerated in subs. 1. and 2.

If it was error to instruct the jury in the fashion that it did, the trial court was correct in concluding that any error was harmless beyond a reasonable doubt. There is no reasonable doubt that the verdict would have remained the same even if the jury had been instructed that causing a third person (Renee) to engage in a course of conduct only involved the activities set out at subs. 7.-9. *See State v. Harvey*, 2002 WI 93, ¶44, 254 Wis. 2d 442, 647 N.W.2d 189.

Sveum was charged with his sister, Renee, as parties to the crime under § 939.05. If the jury was satisfied that he and Renee aided and abetted each other, or conspired with each other, to stalk Johnson as Renee testified from 1999 through 2002, then he would have been guilty for whatever acts she engaged in under § 939.05 regardless whether her actions also satisfied any subsection of § 940.32(1)(a)1.-10. If Renee participated with Sveum in stalking Johnson as co-conspirator or aider and abettor, then she and Sveum are responsible for each other's conduct as "principals" under § 939.05.

Moreover, there was overwhelming evidence introduced by the state that (1) Sveum maintained visual or physical proximity to Johnson many times between 1994 and 2003 regardless what his sister did, and Sveum contacted Johnson by telephone and caused her phone (and the phones of others) to ring repeatedly regardless whether a conversation ensued. Wis. Stat. § 940.32(1)(a)1.-2. (122:23; 113:13; A-Ap. 21). Renee's testimony provided ample proof that she engaged in the conduct described at subs. 7.-9. at Sveum's behest for the various purposes described therein. There is overwhelming evidence that Sveum acted on his own when he made the various hang-up calls to Johnson in 2003, and when he made the

various contacts with Johnson between 1994 and 1999. Renee's testimony described her complicity in Sveum's stalking between 1999 and shortly before Sveum's release from prison in July of 2002. None of that testimony would have changed had the instruction been worded differently. There was overwhelming evidence of Sveum's own "course of conduct" in violation of several of the statutory alternatives, and there was still overwhelming evidence that Renee engaged at his behest in the violation of subs. 7.-9. Any error was harmless.[5]

CONCLUSION

Therefore, for all of the above-stated reasons, the plaintiff-respondent, State of Wisconsin, respectfully requests that the judgment of conviction and order denying postconviction relief be affirmed.

Dated this 28th day of July, 2008.

Respectfully submitted,

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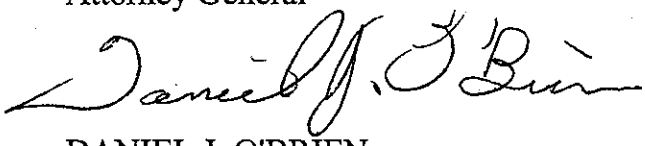

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[5]The trial court also held that Sveum waived any objection to this instruction (113:14-15; A-Ap. 22-23). While defense counsel did not object at the precise moment the instruction was read (122:23), he did raise the issue on the second day of trial (120:5-13) and specifically objected at that time to the instruction the trial court eventually gave (120:13; *see* 120:21-24). The state does not, therefore, rely on waiver.

CERTIFICATION

I certify that this brief meets the requirements of the Rules of Appellate Procedure for a document printed in a proportional font. The brief contains 10,119 words.

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