APPENDIX A

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted November 11, 2021
Decided March 7, 2022

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

No. 21-2240

KORRY L. ARDELL, *Petitioner-Appellant*,	Appeal from the United States District Court for the Eastern District of Wisconsin.
v.	No. 19-cv-1097
JOSHUA L. KAUL, *Respondent-Appellee*.	William E. Duffin, *Magistrate Judge*.

ORDER

Korry Ardell seeks a certificate of appealability to challenge the district court's denial of his petition under 28 U.S.C. § 2254. We have reviewed the order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is denied.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

KORRY L. ARDELL,

Petitioner,

v. **Case No. 19-CV-1097**

JOSH KAUL,
Wisconsin Attorney General,

Respondent.

DECISION AND ORDER

(Filed May 14, 2021)

1. Background

Korry Ardell insists he is an innocent man just trying to clear his name. But the state contends he is an obsessive ex-boyfriend bent on destroying the life of a woman who dumped him.

Ardell and N.T. briefly dated in 2007. *State v. Ardell*, 2018 WI App 28, ¶ 1, 381 Wis. 2d 471, 915 N.W.2d 455, 2018 Wisc. App. LEXIS 281 (unpublished). When N.T. broke off the relationship, Ardell continued to contact her and monitor her emails despite N.T.'s pleas to be left alone. *Ardell v. Thomas*, 2010 WI App 71, ¶ 2, 325 Wis. 2d 400, 786 N.W.2d 488, 2010 Wisc. App. LEXIS 253 (unpublished).

When N.T. booked a flight, Ardell fabricated communications, purportedly from a travel website, to lead N.T. to believe that her flight had been rescheduled. *Id*. When N.T. missed her flight and incurred additional expenses as a result, she demanded that Ardell reimburse her. *Id.* at ¶ 3. After Ardell showed up at N.T.'s home, ostensibly to reimburse her, a confrontation resulted, which led to each of them seeking restraining orders against the other. *Id.* at ¶¶ 3-4. The circuit court granted N.T.'s request in July of 2008 but denied Ardell's. *Id.* at ¶ 4.

Ardell appealed. The court of appeals affirmed, 2010 WI App 71, and the Wisconsin Supreme Court denied Ardell's petition for review, *Ardell v. Thomas*, 2010 WI 125, 329 Wis. 2d 372, 791 N.W.2d 381, 2010 Wisc. LEXIS 522.

Ardell violated the restraining order by sending N.T. text messages on October 30, 2008. *State v. Ardell*, 2012 WI App 27, ¶ 2, 339 Wis. 2d 492, 809 N.W.2d 901, 2012 Wisc. App. LEXIS 1 (unpublished). Ardell pled guilty in November of 2009. Following the plea hearing, N.T. submitted a victim impact statement referring to several emails that she believed Ardell had sent within the last two weeks to her coworkers and a newspaper, accusing her of being a drug addict as well as accusing her of what she described as "various horrible things." *Id.* at ¶ 5.

After he was sentenced to 90 days in jail and two years of probation, Ardell sought to withdraw his guilty plea. *Id.* at ¶¶ 9-10. The circuit court denied the

motion, the court of appeals affirmed, 2012 WI App 27, and the Wisconsin Supreme Court denied review, *State v. Ardell*, 2012 WI 45, 340 Wis. 2d 545, 811 N.W.2d 820, 2012 Wisc. LEXIS 282.

On November 4, 2012, Ardell sent a letter to the human resources director of the school district where N.T. worked as a teacher, accusing N.T. of prostitution. (ECF No. 14-4 at 20.) Later that month Ardell submitted an open records request to N.T.'s employer, requesting N.T.'s personnel file. (ECF No. 14-4 at 21); *State ex rel. Ardell v. Milwaukee Bd. of Sch. Dirs.*, 2014 WI App 66, ¶ 2, 354 Wis. 2d 471, 849 N.W.2d 894. Following up on his open-records request in a December 2012 letter to N.T.'s employer, Ardell again accused N.T. of prostitution. (ECF No. 14-4 at 22.) The employer denied the open records request, as did the circuit court, *see Ardell v. Milwaukee Board of School Directors*, Milwaukee Cnty. Cir. Ct. Case No. 2013CV002202 (available at https://wcca.wicourts.gov/), and the court of appeals, *Ardell*, 2014 WI App 66, ¶ 2. The Wisconsin Supreme Court denied Ardell's request for review. *Ardell v. Milwaukee Bd. of Sch. Dirs.*, 2014 WI 122, 358 Wis. 2d 606, 855 N.W.2d 696, 2014 Wisc. LEXIS 913.

On May 23, 2013, the day the circuit court denied Ardell's petition for access to N.T.'s personnel file, Ardell allegedly called N.T. and threatened to kill her. *Thomas v. Ardell*, 2015 WI App 1, ¶ 2, 359 Wis. 2d 270, 857 N.W.2d 487, 2014 Wisc. App. LEXIS 932 (unpublished). N.T. also alleged that the next morning Ardell was parked outside her house. *Id.* at ¶ 2. These events, with the encouragement of her principal, prompted

N.T. to obtain a new restraining order against Ardell. *See* Milwaukee Cnty. Cir. Ct. Case No. 2013FA003711 (available at https://wcca.wicourts.gov/); *Thomas*, 2015 WI App 1, ¶ 2. After the circuit court granted the injunction, Ardell appealed, and the court of appeals affirmed. *Thomas*, 2015 WI App 1.

On July 4, 2014, Ardell sent four emails to N.T.'s now former principal (the principal having begun working in a new district). (ECF No. 14-4 at 12-13; 14; 15; 16.) In the first email Ardell stated that he believes the principal was N.T.'s former supervisor and asserted that N.T. "has filed two frivolous restraining orders against me in the past." (ECF No. 14-4 at 12.) He attached various documents related to the injunction hearing and requested that the principal respond to him, apparently to let him know whether she had recommended that N.T. obtain a restraining order, as N.T. testified to at a hearing.

On July 23, 2014, Ardell again emailed N.T.'s former principal. He stated that he "became aware that you are possibly still conspiring with [N.T.] on the last frivolous restraining order that she filed against me." (ECF No. 14-4 at 17.) He referred to having called and spoken with the principal about a week earlier. (ECF No. 14-4 at 17.) He threatened to have organized protests outside the school where the principal now worked and to take out a radio ad. (ECF No. 14-4 at 17.) Ardell stated that he would be filing a lawsuit against the principal and her school board. (ECF No. 14-4 at 17.) After expressing his frustration about having allegedly been the subject of false allegations that

led to a restraining order, he stated, "Perhaps you being new to the Fond Du Lac area, didn't hear about the last police officer that was killed there? Well anyways long story short from what I gather this stemmed from a woman from what I heard filed a false police report that she was assaulted by the shooter who killed these officers." (ECF No. 14-4 at 18.) He later stated, "I will not anymore deal with this at anymore [sic] at any cost. I will get this restraining order and the first restraining order investigated one way or another." (ECF No. 14-4 at 18.)

Based on Ardell's contact with N.T.'s school district and her former principal, as well as N.T.'s allegations that Ardell had contacted her and was outside her house, Ardell was charged with stalking and violating a restraining order. At trial Ardell introduced evidence that he was working far away from N.T.'s home when she alleged he was outside, as well as phone records undercutting N.T.'s allegations that Ardell had contacted her. Thus, Ardell's communications with the school district, and especially with N.T.'s former principal, became central to the state's case.

Ardell's theory was that he was merely trying to investigate N.T. and prove that she lied to obtain the restraining order against him. (*See*, *e.g.*, ECF No. 12-11 at 14.) In other words, he did not act with the requisite intent to stalk her.

The jury found him guilty of both the stalking and violation of injunction charges. (ECF No. 12-18 at 8.) Following the verdict, the state moved to dismiss the

charge related to violation of the injunction. (ECF No. 12-18 at 11.) The court granted the motion and entered judgment on the stalking charge. (ECF No. 12-18 at 11-15.) The court sentenced Ardell to two years in prison, followed by three years of extended supervision, as well as a $7,500 fine. (ECF No. 12-1 at 2.)

Ardell unsuccessfully moved for post-conviction relief in the circuit court (ECF No. 14-7) and then appealed his conviction and the circuit court's denial of his motion for post-conviction relief (ECF No. 12-2). The Wisconsin Court of Appeals affirmed the decision of the circuit court and Ardell's conviction. (ECF No. 12-5; *Ardell*, 2018 WI App 28, ¶ 1.) Ardell moved the court of appeals to reconsider its decision (ECF No. 12-6), which motion it denied (ECF No. 12-7). The Wisconsin Supreme Court denied Ardell's petition for review. (ECF Nos. 12-8; 12-10.)

Ardell then filed the present petition for a writ of habeas corpus in this court. (ECF No. 1.) The briefing on the petition is complete and the matter is ready for resolution. All parties have consented to the full jurisdiction of this court pursuant to 28 U.S.C. § 636(c). (ECF Nos. 4, 9.)

2. Applicable Law

A federal court may consider habeas relief for a petitioner in state custody "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §2254(a). Following the passage of the Antiterrorism and Effective

Death Penalty Act (AEDPA), a federal court is permitted to grant relief to a state petition under 28 U.S.C. § 2254 only if the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2). This is a "stiff burden." *Jean-Paul v. Douma*, 809 F.3d 354, 359 (7th Cir. 2015). "The state court's ruling must be 'so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Id.* (quoting *Carter v. Douma*, 796 F.3d 726, 733 (7th Cir. 2015)); *see also Harrington v. Richter*, 562 U.S. 86, 102 (2011).

"Clearly established federal law" refers to a holding "of the United States Supreme Court that existed at the time of the relevant state court adjudication on the merits." *Caffey v. Butler*, 802 F.3d 884, 894 (7th Cir. 2015) (citing *Greene v. Fisher*, 132 S. Ct. 38, 44 (2011); *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). "A decision is 'contrary to' federal law if the state court applied an incorrect rule – *i.e.*, one that 'contradicts the governing law' established by the Supreme Court – or reached an outcome different from the Supreme Court's conclusion in a case with 'materially indistinguishable' facts." *Id.* (quoting *Williams*, 529 U.S. at 405-06). A decision involves an unreasonable application of federal law if the state court identified the

correct governing principle but applied that principle in a manner with which no reasonable jurist would agree. *Id.*; *see also Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003). "A court's application of Supreme Court precedent is reasonable as long as it is 'minimally consistent with the facts and circumstances of the case.'" *Williams v. Thurmer*, 561 F.3d 740, 743 (7th Cir. 2009) (quoting *Schaff v. Snyder*, 190 F.3d 513, 523 (7th Cir. 1999)).

"Even a clearly erroneous state court decision is not necessarily an unreasonable one." *Miller v. Smith*, 765 F.3d 754, 760 (7th Cir. 2014). Thus, a federal court could have the "firm conviction" that a state court's decision was incorrect but, provided that error is not objectively unreasonable, nonetheless be required to deny the petitioner relief. *Lockyer*, 538 U.S. at 75-76.

3. Custody and Jurisdiction

In a footnote in his amended memorandum in support of his petition Ardell states that he remains in custody because he is on extended supervision. Extended supervision, which is Wisconsin's version of parole, *United States v. Caya*, 956 F.3d 498, 503 (7th Cir. 2020), constitutes custody under 28 U.S.C. § 2254(a), *Jones v. Cunningham*, 371 U.S. 236, 240-43 (1963). However, according to online records of the Wisconsin Department of Corrections, Ardell has since completed his term of extended supervision. Having said that, Ardell's petition is not moot simply because he is no longer in custody; it is sufficient that he was in custody

when he filed it. *See Spencer v. Kemna*, 523 U.S. 1, 7 (1998); *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968).

But that does not necessarily mean that the court retains jurisdiction to adjudicate the petition. There still must be a case or controversy under Article III, § 2 of the Constitution. *Spencer*, 523 U.S. at 7. The fact that any criminal conviction may result in a variety of future collateral consequences is ordinarily sufficient to sustain a live case or controversy. *Id.* at 8 (citing *Sibron* v. *New York*, 392 U.S. 40, 55-56 (1968)).

The respondent does not argue that Ardell's petition ceases to present a case or controversy. Therefore, the court finds that it has jurisdiction to resolve the petition. However, because Ardell is not currently in the custody of any official, the respondent in this matter is changed to the Attorney General of the State of Wisconsin.

4. Analysis

Wisconsin's stalking statute states, in relevant part,

> 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 suffer serious emotional distress or to fear bodily injury to or the death of himself or herself or a member of his or her family or household.

> (b) The actor knows or should know that at least one of the acts that constitute the course of conduct will cause the specific person to suffer serious emotional distress or place the specific person in reasonable fear of bodily injury to or the death of himself or herself or a member of his or her family or household.
>
> (c) The actor's acts cause the specific person to suffer serious emotional distress or induce fear in the specific person of bodily injury to or the death of himself or herself or a member of his or her family or household.

Wis. Stat. § 940.32(2) (2015-16).

Ardell argues that the jury instructions failed to require the jury to find beyond a reasonable doubt all facts necessary to convict him of stalking. (ECF No. 15-1 at 11-26.) He points to three alleged errors. First, the instructions did not inform the jury that, for a course of conduct to be "directed at a specific person," the actor must have "either intended the substance of those communications to be relayed to her or used to harass her, and not merely be about her." (ECF No. 15-1 at 11.) Second, the jury was not instructed that it needed to find beyond a reasonable doubt "[t]hat Ardell's course of conduct was pursued with the subjective intent or purpose that his actions would cause a reasonable person serious emotional distress or fear of bodily injury." (ECF No. 15-1 at 11.) Third, the court mis-instructed the jury when it stated that it need find only that Ardell knew or should have known that at least one of the acts "could" (as opposed to "would") place N.T. in

reasonable fear of bodily injury or death. (ECF No. 15-1 at 11.)

He also argues that the state courts' interpretation of "directed at" was "unforeseeable and indefensible" so as to violate due process when retroactively applied to him. (ECF No. 15-1 at 14.) Finally, he argues that the state courts' interpretation of the stalking statute violated the First Amendment by criminalizing protected conduct.

Under Wisconsin law, claims of constitutional error and objections to the adequacy of jury instructions ordinarily must be properly raised in the trial court. *State v. Huebner*, 2000 WI 59, 235 Wis. 2d 486, 492, 611 N.W.2d 727, 730 ("It is a fundamental principle of appellate review that issues must be preserved at the circuit court. Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal."). Raising an issue in a motion for post-conviction relief in the circuit court is not enough. *Cf. Huebner*, 2000 WI 59, ¶ 83 (Abrahamson, C.J., dissenting) (asserting in dissent that the majority should have accepted defendant's motion for post-conviction relief in the circuit court as sufficient to preserve the issue for appeal). Issues that are not properly preserved are waived.

The court of appeals found that the only issue Ardell properly preserved for appeal was his claim that the circuit court, relying on what Ardell argued was an improper interpretation of "directed at" in the statute, admitted the emails Ardell sent to N.T.'s former

principal. *Ardell*, 2018 WI App 28, ¶¶ 24-40. That claim, however, is solely a matter of state law and, therefore, is beyond the scope of a federal habeas petition. *See Lewis v. Jeffers*, 497 U.S. 764, 780, 110 S. Ct. 3092, 3102 (1990).

The court of appeals concluded that Ardell had waived all other claims by failing to properly present them to the circuit court. *Ardell*, 2018 WI App 28, ¶ 41. Therefore, as to the claims Ardell presents to this court, the court of appeals considered his due process, First Amendment, and jury instruction claims "under the rubric of ineffective assistance of counsel." *Id.* at ¶ 42

Because the court of appeals relied on adequate and independent state law grounds (*i.e.*, Wisconsin's requirement that constitutional and jury instruction challenges must be raised prior to conviction) to decline to directly consider the merits of the claims Ardell presents in his petition, *see Promotor v. Pollard*, 628 F.3d 878, 886-87 (7th Cir. 2010), this court likewise must consider the claims only through the lens of a claim of ineffective assistance of counsel. Although Ardell argues that the court of appeals erred in finding that he waived these arguments, this court cannot review such questions of state law. *See Oaks v. Pfister*, 863 F.3d 723, 727 (7th Cir. 2017).

Claims of ineffective assistance of counsel are governed by the well-established two-prong approach set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Hicks v. Hepp*, 871 F.3d 513, 525 (7th Cir. 2017). A

petitioner must demonstrate both that his attorney's performance was deficient and that he was prejudiced as a result. *Id.* at 525-26. The first prong "requires that the petitioner demonstrate that counsel's representation fell below an objective standard of reasonableness." *Id.* at 525. "What is objectively reasonable is determined by the prevailing professional norms." *Id.* But there is a wide range of permissible conduct, and "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (quoting *Strickland*, 466 U.S. at 690). The prejudice prong "requires the petitioner to demonstrate a 'reasonable probability that, but for counsel's unprofessional errors,' the outcome would have been different." *Id.* at 526 (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 127 (2009)).

When a claim of ineffective assistance of counsel is presented in a habeas petition, the petitioner faces "a high hurdle." *Hicks*, 871 F.3d at 525. "The Supreme Court has instructed that under these circumstances, [the federal court] must employ a 'doubly deferential' standard, one which 'gives both the state court and the defense attorney the benefit of the doubt.' " *Id.* (quoting *Burt v. Titlow*, 571 U.S. 12, 15 (2013)).

In addressing the reasonableness prong in Ardell's case the court of appeals stated, "It is well established that a defendant cannot satisfy the deficient performance prong where the claimed deficiency is failure to raise an issue on a point that has not been addressed in the law." *Ardell*, 2018 WI App 28, ¶ 43 (citing *Ronald*

J.R. v. Alexis L.A., 2013 WI App 79, ¶ 11 n.5, 348 Wis. 2d 552, 834 N.W.2d 437 (counsel not ineffective for failing to pursue novel arguments); *State v. Jackson*, 2011 WI App 63, ¶ 10, 333 Wis. 2d 665, 799 N.W.2d 461 ("When the law is unsettled, the failure to raise an issue is objectively reasonable and therefore not deficient performance.")). Because

> no Wisconsin court has ever interpreted the statute as he does[,] [t]hat ends the deficient-performance analysis. Likewise, no Wisconsin court has ruled on the constitutional challenges he now raises. Regardless of the merits of those arguments, the fact that they were raised for the first time on appeal is fatal because under these circumstances, they do not rise to an ineffective assistance of counsel claim.

Ardell, 2018 WI App 28, ¶ 44.

The court of appeals perhaps oversimplified its own precedents and *Strickland* with its articulation of the law. It is accurate to say, "[F]ailure to raise arguments that require the resolution of unsettled legal questions *generally* does not render a lawyer's services outside the wide range of professionally competent assistance sufficient to satisfy the Sixth Amendment." *State v. Lemberger*, 2017 WI 39, ¶18, 374 Wis. 2d 617, 629, 893 N.W.2d 232, 238 (emphasis added; quotation marks omitted) (quoting *New v. United States*, 652 F.3d 949, 952 (8th Cir. 2011)). But novel issues are not inherently beyond the scope of an ineffective assistance of counsel claim. *Bridges v. United States*, 991 F.3d 793,

804 (7th Cir. 2021). "[T]here are some circumstances where [defense counsel] may be obliged to make, or at least to evaluate, an argument that is sufficiently foreshadowed in existing case law." *Id.* (citing *Shaw v. Wilson*, 721 F.3d 908, 917 (7th Cir. 2013); *United States v. Carthorne*, 878 F.3d 458, 465-66 (4th Cir. 2017); *Ramirez v. United States*, 799 F.3d 845, 855 (7th Cir. 2015)).

Ardell argues that the court of appeals' imprecision in articulating the proper standard means that this court must review *de novo* his claim of ineffective assistance of counsel. But that is incorrect. *See Fischer v. Van Hollen*, 741 F. Supp. 2d 944, 965 (E.D. Wis. 2011). It is not the state court's reasoning but rather its result to which a federal court owes deference. *Id.* at 965-66 (citing *Holder v. Palmer*, 588 F.3d 328, 341 (6th Cir. 2009); *Lopez v. Thurmer*, 573 F.3d 484 (7th Cir. 2009); *RaShad v. Walsh*, 300 F.3d 27, 45 (1st Cir. 2002); Fed. Habeas Man. § 3:70). Thus, the court turns to the merits of Ardell's claims – specifically, whether the court of appeals unreasonably concluded that Ardell was not deprived of the effective assistance of counsel.

4.1. Due Process

"If a judicial construction of a criminal statute is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue, it must not be given retroactive effect." *Bouie v. Columbia*, 378 U.S. 347, 354 (1964) (internal quotation marks omitted).

4.1.1. "Directed At"

Ardell argues that it was "unexpected and indefensible" that the state courts would interpret the "directed at" provision in Wisconsin's stalking statute as applying to communications that were not intended to be relayed to the victim. Therefore, it violated due process for the courts to apply this new interpretation to his case, and it was unreasonable for his trial counsel to not make this due process argument at trial.

Although Ardell points to some other states that have interpreted their own similar laws differently than the Wisconsin courts did here (ECF No. 15-1 at 19-21), the Wisconsin courts' interpretation was not "unexpected and indefensible" so as to deprive Ardell of due process.

Ardell is wrong when he asserts, "Wis. Stat. §940.32(1)(a) defines 'course of conduct' in terms of specific actions, all of which directly or indirectly involve actual or intended contacts with or communications to the alleged victim." (ECF No. 15-1 at 17.) As the court of appeals noted, Wisconsin's stalking statute states that a "course of conduct" includes certain conduct that does not involve communicating with the victim. *Ardell*, 2018 WI App 28, ¶ 45. For example, a "course of conduct" includes "contacting the victim's employer or coworkers," Wis. Stat. § 940.32(1)(a)3 (2015-16), and "contacting the victim's neighbors," Wis. Stat. § 940.32(1)(a)4 (2015-16).

The state courts' interpretation of "directed act" as not requiring proof that the actor intended the

communication be relayed to the victim was consistent with the specific actions that the legislature proscribed in defining "course of conduct" in the statute. When the legislature has expressly proscribed conduct that need not be communicated to the victim, it is hardly "unexpected and indefensible" that a court would interpret another provision of the statute so as to give effect to the legislature's proscriptions.

Consequently, it was not unreasonable for the court of appeals to conclude that Ardell was not deprived of the effective assistance of counsel by trial counsel's failure to timely make this due process argument.

4.1.2. Intent

The court of appeals held that "Ardell's argument conflates the requirement that he 'intentionally engaged in a course of conduct' with the requirement that the course of conduct be 'directed at' N. The requirements are distinct." *Ardell*, 2018 WI App 28, ¶ 36. It concluded that the "intent" component applied only to the "course of conduct," and noted, "There is no question that Ardell intentionally sent the emails." *Id.* at ¶ 35.

Ardell argues that this interpretation of the statute was likewise unexpected and indefensible because, under Wisconsin law, when a statute uses "intentionally" it generally applies to every element that follows. (ECF No. 15-1 at 18 (quoting Wis. Stat. § 939.23(3).) Thus, he argues the jury was required to be instructed

that he intended to "cause a reasonable person under the same circumstances to suffer serious emotional distress or to fear bodily injury to or the death of himself or herself or a member of his or her family or household." Wis. Stat. § 940.32(2)(a).

However, the court of appeals' interpretation of Wisconsin's stalking statute was far from unexpected: it was reflected in Wisconsin's pattern stalking jury instruction. *See* Wis. JI-Crim. 1284; (ECF No. 21-1 at 2.) It was hardly unreasonable for trial counsel not to argue that the circuit court's interpretation of the statute was "unexpected and indefensible" when the court relied on a published pattern jury instruction.

Substantively, it was reasonable for the state courts to conclude that the state was required to prove only that Ardell intended to engage in the course of conduct. That the course of conduct "would cause a reasonable person under the same circumstances to suffer serious emotional distress or to fear bodily injury to or the death of himself or herself or a member of his or her family or household" could be reasonably interpreted as merely a description of the consequence of the course of conduct, and not also requiring proof of intent. *Cf. State v. Moreno-Acosta*, 2014 WI App 122, 359 Wis. 2d 233, 857 N.W.2d 908 (discussing the knowledge and intent elements under Wisconsin's identity theft statute).

Consequently, it was not unreasonable for the court of appeals to conclude that Ardell was not deprived of the effective assistance of counsel by his trial

counsel's failure to timely make this due process argument.

4.2. First Amendment

With respect to his claim that it was unreasonable for trial counsel to not make a First Amendment argument, Ardell's entire argument is: "Likewise, such an attorney would have easily discovered long-established Supreme Court authority under the First Amendment to the effect that such actions are constitutionally protected as long as they are not communicated or intended to be communicated to the alleged victim." (ECF No. 15-1 at 28.)

The cases Ardell cites in support of this assertion – *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), and *Rowan v. United States Post Office Department*, 397 U.S. 728, 737, 738 (1970) – fail to demonstrate that the First Amendment claim Ardell now makes was "sufficiently foreshadowed in existing case law," *Bridges*, 991 F.3d at 804, such that it was unreasonable for counsel to not make it. To the contrary, these cases were legally and factually far afield.

In *Rowan* the Court found that a statute allowing people to opt-out of receiving certain junk mail did not violate the First Amendment rights of those seeking to send those unwanted solicitations. *Rowan*, 397 U.S. at 738. In *Keefe*, the Court struck down an injunction that had barred a community organization from distributing information about a real estate agent's alleged racial "blockbusting" practices. *Keefe*, 402 U.S. at

419-20. Neither case holds, as Ardell states, that "actions are constitutionally protected as long as they are not communicated or intended to be communicated to the alleged victim," (ECF No. 15-1 at 28). Neither case sufficiently foreshadows that Wisconsin's stalking statute – which prohibits a person from (1) intentionally engaging in a course of conduct that would cause a reasonable person to fear bodily injury or death (2) when the actor knew or should have known an act would cause the victim to fear bodily injury or death, and (3) the victim actually did fear bodily injury or death – would be unconstitutional. To the contrary, central to the Court's conclusion in *Keefe* was the fact that the pamphleteers were peaceful. *Keefe*, 402 U.S. at 419.

Rather than presenting his argument through the lens of ineffective assistance of counsel, Ardell devotes much of his discussion of the First Amendment claim to directly arguing its merits. Even considering these arguments insofar as they might be relevant to a claim that trial counsel was unreasonable, Ardell's ineffective assistance claim fails.

In arguing the merits of his First Amendment claim Ardell points to a handful of cases from other states that he argues support the conclusion that Wisconsin's stalking statute, as construed by the court of appeals, is unconstitutional. The most relevant authority Ardell points to is a decision of the Illinois Supreme Court in *People v. Relerford*, 2017 IL 121094, 422 Ill. Dec. 774, 104 N.E.3d 341, where the court found that a similar Illinois stalking statute infringed on protected

speech. But *Relerford* was decided more than two years after Ardell's conviction, and thus could not have served to alert Ardell's trial counsel of any potential constitutional infirmity with respect to Wisconsin's statute.

Ardell identifies only two purportedly similar cases that predated his conviction. In *People v. Marquan M.*, 2014 NY Slip Op 4881, ¶ 6, 24 N.Y.3d 1, 9, 994 N.Y.S.2d 554, 560, 19 N.E.3d 480, 486, the court struck down a local law that "in its broadest sense criminalize[d] 'any act of communicating . . . by mechanical or electronic means . . . with no legitimate . . . personal . . . purpose, with the intent to harass [or] annoy . . . another person." Similarly, in *State v. Machholz*, 574 N.W.2d 415, 420 (Minn. 1998), the court struck down a statute that "criminalize[d] *any and all* intentional conduct causing a reasonable person to feel oppressed, persecuted, or intimidated, if that conduct interferes with the person's privacy or liberty." *Id.* (emphasis in original).

These cases are distinguishable in that the scope of both of the underlying statutes was far broader in their proscriptions than Wisconsin's stalking statute. Consequently, it would not be unreasonable for even an attorney who had thoroughly reviewed these cases to not see them as suggesting a basis for challenging Wisconsin's stalking statute.

In sum, Ardell falls far short of demonstrating that, under existing case law, a reasonable attorney would have concluded it was necessary to raise a First

Amendment challenge to Wisconsin's stalking statute. The Wisconsin Court of Appeals did not unreasonably conclude that Ardell was not deprived of the effective assistance of counsel for not raising such a challenge.

4.3. "Would" vs. "Could"

Ardell also argues that the jury was mis-instructed as to the element that "[t]he actor knows or should know that at least one of the acts that constitute the course of conduct *will* cause the specific person to suffer serious emotional distress or place the specific person in reasonable fear of bodily injury to or the death of himself or herself or a member of his or her family or household." Wis. Stat. § 940.32(2)(b) (emphasis added). Although Ardell addresses this issue at various points, he generally does not develop much of an argument. (ECF No. 15-1 at 10, 11, 25.)

The transcript of the court's reading of the jury instructions reflects that the court instructed the jury:

> The defendant's acts induced fear in [N.T.] of bodily injury or death to herself or a member of her family, for the defendant knew or should have known that at least one of the acts constituting the course of conduct *could* place [N.T.] in reasonable fear of bodily injury or death to herself or to a member of her family.

(ECF No. 12-17 at 45 (emphasis added).)

It is unclear if the court misspoke, if the court reporter misheard, or if "could" is a typo. Supporting the conclusion that the error was the court reporter's is the fact that there are other errors in the transcript in close proximity. For example, instead of "Two, the course of conduct . . . " and, "Four, the defendant knew or should have known . . . " the court reporter wrote, "To the course of conduct, . . . " and " . . . for the defendant knew or should have known . . . " (*Compare* ECF No. 12-17 at 45 *with* ECF No. 21-1 at 2, 3.)

In any event, the written instructions that the circuit court provided to the jury for its deliberations (ECF No. 12-17 at 91) correctly articulated the fourth element of the stalking offense as, "The defendant knew or should have known that at least one of the acts constituting the course of conduct *would* place [N.T.] in reasonable fear of bodily injury or death to herself or a member of her family." (ECF No. 21-1 at 3 (emphasis added).) Moreover, in reiterating and walking the jury through the instructions in his closing argument, the prosecutor correctly recounted this element. (ECF No. 12-17 at 58.) So, too, did Ardell's attorney in closing. (ECF No. 12-17 at 77.) Thus, presuming the court actually did misspeak, it was neither unreasonable nor prejudicial for trial counsel to not timely challenge the court's error.

5. Conclusion

Because the court of appeals concluded that Ardell's trial counsel failed to properly raise the claims

Ardell presents to this court, the court must consider these claims through the doubly deferential standard of ineffective assistance of counsel. The court of appeals reasonably concluded that Ardell's trial counsel was not ineffective for failing to timely raise the arguments Ardell now makes.

The state courts' interpretation of the stalking statute was not unexpected and indefensible. The courts' construction of "directed at" was consistent with other aspects of the statute. And their application of the intent element was reflected in Wisconsin's published pattern jury instructions. Nor was it unreasonable for counsel to not have raised a First Amendment challenge because, at a minimum, the claim was not sufficiently foreshadowed in existing case law. And, finally, to the extent the court misspoke and said "could" instead of "would" when reading the jury instructions, trial counsel was not ineffective for failing to raise an objection because any error was harmless. The jury was accurately informed of the law in the written instructions it received and in both sides' closing arguments. Accordingly, the court must deny Ardell's petition for a writ of habeas corpus.

Having denied Ardell's petition, the court must determine whether to grant Ardell a certificate of appealability. *See* 28 U.S.C. § 2253(c)(2); Rule 11 of the Rules Governing Section 2254 Cases. "An unsuccessful habeas petitioner has no right to appeal the denial of his petition." *Limehouse v. Thurmer*, No. 09-C-0071, 2012 U.S. Dist. LEXIS 43420, at *27 (E.D. Wis. Mar. 29, 2012) (citing *Miller-El v. Cockrell*, 537 U.S. 322, 327,

335 (2003)). The court may issue a certificate of appealability, thus permitting the petitioner's appeal, only if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327. Ardell has not satisfied this standard, and accordingly the court denies a certificate of appealability.

IT IS THEREFORE ORDERED that Ardell's petition for a writ of habeas corpus is denied and this action is dismissed with prejudice. The court denies Ardell a certificate of appealability. The Clerk shall enter judgment accordingly.

Dated at Milwaukee, Wisconsin this 14th day of May, 2021.

/s/ William E. Duffin
WILLIAM E. DUFFIN
U.S. Magistrate Judge

APPENDIX C

United States District Court
Eastern District of Wisconsin

JUDGMENT IN A CIVIL ACTION

KORRY L. ARDELL,

Petitioner,

v. Case No. 19-CV-1097

JOSH KAUL,
Wisconsin Attorney General,

Respondent.

☒ **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS THEREFORE ORDERED that the petitioner's petition for a writ of habeas corpus (ECF No. 1) is **DENIED**;

IT IS FURTHER ORDERED the certificate of appealability is **DENIED**. **IT IS FURTHER ORDERED** this case is **DISMISSED**.

Date: May 17, 2021.

Gina M. Colletti, Clerk of Court
EASTERN DISTRICT OF WISCONSIN
(By) Deputy Clerk, s/Mary Murawski
Approved this 17th day of May, 2021.

/s/ William E. Duffin
WILLIAM E. DUFFIN
United States Magistrate Judge

APPENDIX D

Activity in Case 2:19-cv-01097-WED Ardell v. Wiersma Order on Motion for Reconsideration

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From: ecfmaster@wied.uscourts.gov (ecfmaster@wied.uscourts.gov)

To: ecfmaster@wied.uscourts.gov

Date: Monday, June 14, 2021, 1:24 PM CDT

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.

*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

D:2

United States District Court Eastern

District of Wisconsin

Notice of Electronic Filing

The following transaction was entered on 6/14/2021 at 1:24 PM CDT and filed on 6/14/2021

Case Name: Ardell v. Wiersma
Case Number: 2:19-cv-01097-WED
Filer:
WARNING: CASE CLOSED on 05/17/2021
Document Number: 29(No document attached)

Docket Text:
TEXT ONLY ORDER: The court having reviewed the petitioner's motion (ECF No. [28]) finds no basis to reconsider its decisions to deny the petition for a writ of habeas corpus and to deny the petitioner a certificate of appealability. Accordingly, the motion for reconsideration is denied. Signed by Magistrate Judge William E Duffin on 6/14/2021. (cc: all counsel)(mlm)

2:19-cv-01097-WED Notice has been electronically mailed to:

Robert R Henak henaklaw@sbcglobal.net

Sarah L Burgundy burgundysl@doj.state.wi.us, mcafeeleonardil@doj.state.wi.us

2:19-cv-01097-WED Notice has been delivered by other means to:

APPENDIX E

OFFICE OF THE CLERK

Supreme Court of Wisconsin

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WI 53701-1688

[SEAL]

TELEPHONE (608) 2664880
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July 10, 2018

To:

Hon. Jeffrey A. Wagner
Milwaukee County
Circuit Court Judge
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You are hereby notified that the Court has entered the following order:

No. 2017AP381-CR State v. Ardell L.C.#2014CF3516

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, Korry L. Ardell, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

Sheila T. Reiff
Clerk of Supreme Court

APPENDIX F

COURT OF APPEALS DECISION DATED AND FILED

March 6, 2018

Sheila T. Reiff Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP381-CR Cir. Ct. No. 2014CF3516

STATE OF WISCONSIN IN COURT OF APPEALS DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KORRY L. ARDELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Brennan, P.J., Kessler and Brash, JJ.

¶1 BRENNAN, P.J. Korry L. Ardell appeals a judgment of conviction for one count of stalking and an order denying his motion for postconviction relief. The stalking charge was based on Ardell's conduct toward N., a woman who went on three dates with him after they met in 2007 on an online dating site. Ardell argues that the circuit court erred when it ruled that specific emails Ardell sent in 2014 to a principal for whom N. had worked were admissible to prove that Ardell violated the stalking statute when he "intentionally engage[d]" in a "course of conduct directed at [N.]," specifically "[s]ending material . . . for the purpose of obtaining information about, disseminating information about, or communicating with the victim, to . . . an employer, coworker, or friend of the victim."[1] Ardell argues first that those emails were irrelevant and inadmissible because they were not "directed at" N. and because the State produced no evidence that he sent them with the subjective intention of making N. fear bodily injury. He makes the same arguments with regard to the jury instructions—that they failed to state the law correctly on the "directed at" issue and the intent issue—and he argues that he is entitled to a new trial because failure to preserve this issue constituted ineffective assistance of counsel. Finally, he argues that he is entitled to a new trial in the interest of justice under WIS. STAT. § 752.35.

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[1] WISCONSIN STAT. § 940.32(1)(a)7. (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶2 Giving effect to the plain meaning of the statute, we conclude that the circuit court's evidentiary ruling applied the correct legal standard. A jury could find that the act of sending the emails to the principal was a course of conduct Ardell "intentionally engage[d] in" that was "directed at" N. Contrary to Ardell's interpretation, the words "directed at" do not require the State to prove that the defendant actually intended for the communications to reach the victim. The statute expressly encompasses communications to a third party, and we decline to interpret the statute so strictly that its purpose is defeated.[2] The unpreserved issues are reviewed under the ineffective assistance rubric, and we reject the argument that trial counsel performed deficiently by failing to raise the arguments raised here because as Ardell acknowledges, no Wisconsin court has held that the statute is interpreted as having the heightened requirements he advocates, and it is well established that it is not deficient performance when counsel fails to make an argument based on a legal interpretation no court has adopted.[3] Finally,

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[2] *See* ***McCarthy v. Steinkellner***, 223 Wis. 605, 614, 270 N.W. 551 (1936) (a statute's "purpose, object, and idea are not to be defeated by an interpretation"). *See also* ***State ex rel. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Railroad Comm.***, 137 Wis. 80, 85-86, 117 N.W. 846 (1908) (a statute should be construed to give effect to its "leading idea" and "if reasonably practicable, brought into harmony with such idea").

[3] *See* ***Ronald J.R. v. Alexis L.A.***, 2013 WI App 79, ¶11 n.5, 348 Wis. 2d 552, 834 N.W.2d 437 (counsel not ineffective for failing to pursue novel arguments); *see also* ***State v. Jackson***, 2011 WI App 63, ¶10, 333 Wis. 2d 665, 799 N.W.2d 461 ("When the law

this is not the rare or extraordinary case that is appropriate for employing our discretionary reversal powers. We therefore affirm.

BACKGROUND

The 2008 injunction, Ardell's communications with N.'s employer, and his attempt to obtain N.'s personnel records.

¶3 N. met Ardell online and went on three dates with him in 2007. N. then sent him a message asking him not to contact her again. In 2008, N. sought and was granted an injunction prohibiting Ardell from contacting her; it was valid through 2012. In 2008, Ardell was convicted of violating the injunction. The facts underlying the 2008 injunction and the conviction for violating it are not in this record and were excluded from the trial in this matter.[4]

¶4 On November 4, 2012, Ardell sent a letter to N.'s employer, Milwaukee Public Schools (MPS), asking whether it had informed law enforcement of the time in August 2008 when he "provided computer printouts" to an MPS staff member regarding his claim that N. "was involved in prostitution."

---

is unsettled, the failure to raise an issue is objectively reasonable and therefore not deficient performance.").

[4] At Ardell's sentencing hearing, N. described the fear, expense, and inconvenience caused by a pattern of harassment beginning in 2007 when Ardell installed spyware on her computer and gained access to her bank account and email account.

¶5 Later that month, Ardell filed a WIS. STAT. § 19.35 open records request with MPS for N.'s personnel records. In December 2012, Ardell sent a letter to MPS inquiring as to the status of his open records request and repeating the allegation that he had given MPS "documentation showing that [N.] was involved in prostitution."

¶6 In February and March 2013, Ardell sent additional letters to MPS; these letters included accusations that N. "may have lied in a [case] involving a child that was sexually assaulted." He alluded to the "severe distress" that the release of personnel records might cause and said that anyone who would experience distress "should not be someone who should be working with children" and that N. "seems rather mentally unstable."

¶7 N. did not give permission for the records to be released, and MPS denied the request. Ardell pursued the denial of the open records request in the circuit court, and the circuit court dismissed the case on May 23, 2013. The record in that case is not before this court.

The involvement of N.'s principal, the 2013 injunction, and Ardell's continued contacts.

¶8 On the day the circuit court dismissed the case, ending his open records attempt, Ardell contacted N. and threatened to kill her and then showed up at her home the following morning.

¶9 On May 24, 2013, N., who is an elementary school teacher, went to speak to her principal that morning to update her on what had happened. According to the principal's trial testimony, N. was "shaking, visibly upset and crying" when she told her that Ardell had followed her to school and had threatened her. The principal conferred with her supervisor and released N. from work for the day with "encourage[ment] to get a restraining order for her safety."

¶10 N. applied for a new injunction against Ardell that day. *See* ***Petitioner v. Ardell***, No. 2014AP295, unpublished slip op. ¶¶1, 3-6 (WI App Nov. 13, 2014). A court commissioner granted the injunction. ***Id.***, ¶3. Ardell moved for a *de novo* hearing before the circuit court. ***Id.*** N. and Ardell both testified at the *de novo* hearing. ***Id.***, ¶¶4-5. The circuit court made credibility findings in N.'s favor and issued a final order upholding the injunction on December 10, 2013. ***Id.***, ¶6. Ardell appealed and this court ultimately upheld the final order.[5]

Ardell's contacts with the principal in 2014 and the stalking charge in this case.

¶11 On July 4 and again on July 23, 2014, Ardell sent emails about the 2013 injunction to the principal

[5] This court ultimately affirmed the circuit court's final order. ***Petitioner v. Ardell***, No. 2014AP295, unpublished slip op. ¶¶1, 3-6 (WI App Nov. 13, 2014). Ardell's appeal of the 2013 injunction was pending during the time of the events relevant to this appeal.

N. had met with in May 2013; he alleged that N. had lied to obtain it. These emails are the evidence Ardell unsuccessfully challenged at trial.

¶ 12 The July 4, 2014 email told the principal that N. had filed "frivolous restraining orders" against him based on "completely false" statements. It included the following statement:

> I was writing to inquir[e] about a former teacher that *I believe you were her direct boss* in the role of principal at Alexander Mitchell Elementary School in Milwaukee.
>
> . . . .
>
> The reason why I am writing you [is] I believe *you would [have] been her principal on May 24, 2013*. . . . In the hearing on [ ] June 7, 2013 for this restraining order she states *her boss sent her home* [to] file the petition for injunction on page 36 of the transcript which I have attached. . . .

(Emphasis added.)

¶13 The July 23, 2014 email to the principal stated in part that Ardell "became aware" that the principal was "possibly still conspiring with [N.]" on the restraining order. He stated that when he realized this, he felt like it "was the end of the rope." In the email, Ardell also references a phone conversation he had a few days earlier with the principal: "[Y]ou would not tell me if you told [N.] to file a restraining order against me when I called and spoke with you last Tuesday[.]"

¶14 In the same email, Ardell also directly threatened "organized protests" at the principal's school and a lawsuit against her and the school board. He personally attacked the principal in various ways. He stated that a "good principal" would not merely advise an employee to get a restraining order in response to a death threat but would insist that the person making the threat be arrested, in light of the fact that the employee is "around all these children." He said this proved she was a "terrible principal": "But no you being the terrible principal that you are do not call the authorities to have this immediately investigated." He attached a report of a state evaluation of the principal's prior school and threatened to "maybe see about having a radio ad for this information[.]"

¶15 It closed with a reference to a local police officer killing that he claimed "stemmed from *a woman . . . [who] filed a false police report*"—the thing he claimed N. and the principal had conspired to do—and stated his intention to pursue the issue "at any cost" and to get the two restraining orders that were granted against him "investigated one way or another." (Emphasis added.)

¶16 Ardell was subsequently charged with stalking[6] with a previous conviction within seven years. As

[6] Ardell was also charged with violating a temporary restraining order and harboring or aiding a felon by destruction of evidence. He was convicted only of the stalking charge, and that conviction is the sole focus of this appeal. Prior to trial, the circuit court ordered that domestic abuse and domestic abuse repeater enhancers be stricken in accordance with an agreement reached

relevant to this appeal, the 2014 charge was based in part on Ardell's communications with the principal.

The trial.

¶17 The case proceeded to trial. Ardell moved *in limine* to exclude the emails to the principal on two grounds.

¶18 The first was that the principal "was no longer working with [N.]" due to a job change, that she "was no longer a coworker or employer of [N.] when [Ardell] sent her these emails," and that communications with her therefore did not fall into "any of the categories [in the stalking statute]."

¶19 The second was that "these emails are not part of any course of conduct directed at [N.], nor is there any evidence to suggest that [Ardell] knew or should have known that sending these emails would cause [N.] to suffer serious emotional distress[.]" The circuit court rejected both arguments and denied the motion to exclude the emails to the principal. When the principal testified, she was asked on direct examination about the emails. Trial counsel objected on the grounds of relevance: "This is an email that's directed

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by the parties. However, contrary to that order, the judgment of conviction lists the domestic abuse enhancers to the stalking conviction. We direct the clerk of court to enter a judgment of conviction amended in accordance with the circuit court's order. *See* ***State v. Prihoda***, 2000 WI 123, ¶17, 239 Wis. 2d 244, 618 N.W.2d 857 (stating that appellate court has authority to correct clerical errors).

to a former employer. So the stalking allegation is directed at the alleged victim, [N.]" The circuit court overruled the objection.

¶20 In her testimony, the principal told the jury she had known N. for nine years. She testified that prior to May 23, 2013, she had been aware of the "ongoing situation" with Ardell and had been keeping her own supervisor "in the loop" regarding Ardell's communication with N. She testified that she had a discussion with N. on that day about getting a restraining order. And she testified that after receiving the July 23, 2014 email she notified her school's health director and the school resource officer. She also testified that she "called N. to let her know" about the July 2014 contacts from Ardell.

¶21 The jury convicted Ardell of the stalking charge and the charge of violating a restraining order. Following the verdict, the circuit court dismissed the restraining order count on the State's motion. On the stalking charge, the sole charge for which Ardell was sentenced, the circuit court imposed two years' confinement and three years' extended supervision.

¶22 Ardell brought a postconviction motion seeking a new trial, arguing that the evidence of the emails to the principal was improperly admitted because the principal was not N.'s employer at the time the communication was made and because the act of sending the communication was not "directed at" N. as it must be to support a stalking conviction. The postconviction motion also argued that trial counsel's failure to timely

object to certain jury instructions (on the grounds that the statute requires proof that Ardell subjectively intended the communication to the principal to cause N. to fear bodily injury) constituted ineffective assistance of counsel. It further asserted the right to a new trial in the interest of justice.

¶23 The circuit court denied the motion, and Ardell appeals.

DISCUSSION

I. The circuit court applied the correct standard of law when it admitted Ardell's emails to the principal because communications to a third party can constitute a course of conduct "directed at" N. regardless of whether there is evidence that Ardell subjectively intended the messages to be relayed to N. or to make N. fear bodily injury.

Standard of review.

¶24 Ardell asserts that the circuit court erred when it admitted evidence of his emails to the principal based on an incorrect interpretation of the stalking statute. It is well established that a circuit court's evidentiary rulings are reviewed for erroneous exercise of discretion: "The question on appeal is not whether this court, ruling initially on the admissibility of the evidence, would have permitted it to come in, but whether the trial court exercised its discretion in accordance with accepted legal standards and in accordance with

the facts of record." ***State v. Wollman***, 86 Wis. 2d 459, 464, 273 N.W.2d 225 (1979). An appellate court decides questions of law that arise during its review of an exercise of discretion independently of the circuit court. ***State v. St. George***, 2002 WI 50, ¶37, 252 Wis. 2d 499, 643 N.W.2d 777. The issue presented here is whether the circuit court applied "accepted legal standards" to the facts of record. *See* ***Wollman***, 86 Wis. 2d at 464.

¶25 "We are cognizant that any penal statute must be construed strictly in favor of the defendant." ***State v. Clausen*****,** 105 Wis. 2d 231, 239, 313 N.W.2d 819 (1982). "A statute must be construed, however, in light of its manifest object, the evil sought to be remedied." ***Id.*** Our supreme court has stated, "Although we recognize the general rule . . . that penal statutes are to be strictly construed in favor of the accused, it is equally true that this rule of construction does not mean that only the narrowest possible construction must be adopted in disregard of the purpose of the statute." ***State v. Tronca***, 84 Wis. 2d 68, 80, 267 N.W.2d 216 (1978). A statute's "purpose, object, and idea are not to be defeated by an interpretation[.]" ***McCarthy v. Steinkellner***, 223 Wis. 605, 614, 270 N.W. 551, (1936). A statute should be construed to give effect to its "leading idea" and "if reasonably practicable, brought into harmony with such idea[.]" ***State ex rel. Minneapolis, St. Paul & Sault Sainte Marie Ry. Co. v. Railroad Comm.***, 137 Wis. 80, 85-86, 117 N.W. 846 (1908). "The dominant rule in the construction of statutes is to discover and give effect to the legislative purpose." ***McCarthy***, 223 Wis. at 615. "[W]ords that are

not defined in a statute are to be given their ordinary meanings." ***Spiegelberg v. State***, 2006 WI 75, ¶19, 291 Wis. 2d 601, 717 N.W.2d 641. In determining the ordinary meaning of undefined words, "[w]e may consult a dictionary to aid in statutory construction." ***Id.***

¶26 "[I]f the meaning of the statute appears to be plain but that meaning produces absurd results, we may also consult legislative history." ***Teschendorf v. State Farm Ins. Cos.***, 2006 WI 89, ¶15, 293 Wis. 2d 123, 717 N.W.2d 258. "The purpose in this situation is to verify that the legislature did not intend these unreasonable or unthinkable results." ***Id.***

The stalking statute elements.

¶27 "Wisconsin is one of many states that has enacted a stalking law." ***State v. Ruesch***, 214 Wis. 2d 548, 559, 571 N.W.2d 898 (Ct. App. 1997). "It serves significant and substantial state interests by providing law enforcement officials with a means of intervention in potentially dangerous situations before actual violence occurs, and it enables citizens to protect themselves from recurring intimidation, fear-provoking conduct and physical violence." ***Id.***

¶28 The elements of the stalking crime Ardell was charged[7] with are stated as follows in WIS. STAT. § 940.32(2):

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[7] Ardell was also charged with the following enhancer from WIS. STAT. § 940.32, which states, "[w]hoever violates sub. (2) is guilty of a Class H felony if . . . [t]he actor has a previous conviction

> (a) The actor *intentionally engages* in a course of conduct *directed at a specific person* that would cause a reasonable person . . . to suffer serious emotional distress or to fear bodily injury . . . or . . . death. . . .
>
> (b) The actor knows or should know that at least one of the acts that constitute the course of conduct will cause the specific person to suffer serious emotional distress or place the specific person in reasonable fear of bodily injury . . . or . . . death. . . .
>
> (c) The actor's acts cause the specific person to suffer serious emotional distress or induce fear in the specific person of bodily injury . . . or death. . . .

(Emphasis added.) Section 940.32(1)(a)7. contains the definition of "course of conduct" that is relevant to this case:

> "Course of conduct" means a series of 2 or more acts carried out over time, however short or long, that show a continuity of purpose, including . . . *[s]ending material* by any means to the victim or, *for the purpose of obtaining information about, disseminating information about*, or communicating with the victim, to a member of the victim's family or household or *an employer, coworker*, or friend of the victim.

(Emphasis added.)

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for a crime, the victim of that crime is the victim of the present violation of sub. (2), and the present violation occurs within 7 years after the prior conviction." WIS. STAT. § 940.32(2m)(b).

Ardell's statutory arguments.

¶29 The element that is the focus of Ardell's statutory arguments is the first one: a requirement that he "intentionally engage[d]" in a "course of conduct" that was "directed at a specific person"—in this case, N.

¶30 He acknowledges that the course of conduct can include actions to contact or communicate with the victim "directly or indirectly." However, he argues that the jury cannot find that his act of sending the emails to the principal was "directed at" N. without "proof that [he] either intended such requests or information to be passed on to the alleged victim or intended the third party to harass the alleged victim based on the information."

¶31 The statute defines "course of conduct," but it does not define the term "directed at." We may consult a dictionary for a definition. *See* ***Spiegelberg***, 291 Wis. 2d 601, ¶19. Among the definitions Webster's Third New International Dictionary[8] gives for "direct" is "to engage in or launch hostilely" and to "focus"; these definitions apply when the word "direct" is "used with 'against' or 'at.' " The question is then whether Ardell's act of sending the emails to the principal was "launched hostilely" against N. or was "focused" on N.

¶32 Ardell argues that this finding cannot be made without evidence of his subjective intent. He directs us to a handful of decisions from other

---

[8] Webster's Third New International Dictionary Unabridged 640 (Philip Babcock Gove, et al. eds., 1966).

jurisdictions interpreting the "directed at" language in similar stalking statutes. The cases deal with a variety of fact patterns, none of which is precisely on point, in which courts are asked to determine whether, for purposes of a stalking or cyberstalking statute, certain conduct was "directed at" the victim. *See*, *e.g.*, ***Scott v. Blum***, 191 So. 3d 502, 504-05 (Fla. App. 2016) (derogatory internet posts and group emails not "directed at" victim); ***Chevaldina v. R.K./FL Mgmt., Inc.***, 133 So. 3d 1086, 1091-92 (Fla. App. 2014) (derogatory internet blog posts not "directed at" victim); ***David v. Textor***, 189 So. 3d 871, 875 (Fla. App. 2016) (holding that emails and social media posts, "comments [that] are made on an electronic medium to be read by others . . . cannot be said to be directed to a particular person"); ***LaFaro v. Cahill***, 56 P.3d 56, 59-60 (Ariz. App. 2002) (conversation "overheard" by victim not "directed at" victim); and ***Commonwealth v. Johnson***, 21 N.E.3d 937, 948 (Mass. 2014) (online Craigslist postings that caused third parties to contact victim were "the equivalent of . . . recruiting others to harass the victims and the victims alone").

¶33 Ardell argues that these cases "confirm the plain meaning" of the "directed at" language: that communications "not intended to be transmitted to the alleged victim do not legally qualify." He therefore argues that "absent proof that the defendant . . . intended such requests or information to be passed on to the alleged victim," there can be no violation of the statute.

¶34 We disagree. First we note that the cases Ardell cites are not controlling precedent here and, more importantly, all are factually distinguishable in that all involve digital or social media postings. Second, nothing in the plain words of the statute requires that the communications be "intended to be transmitted to" the victim, and nothing in the statute requires the State to prove that the defendant subjectively intended the communications to go to the victim.

¶35 The statute does include an "intent" component ("intentionally engages in a course of conduct"), a *mens rea* element common to criminal statutes in order to preclude criminal liability for unintentional conduct. There is no question that Ardell intentionally sent the emails. The statute also requires that he "knows or should know" that the conduct "will cause the specific person to suffer serious emotional distress[.]" *See* WIS. STAT. § 940.32(2)(b). The legislature's use of "should know" makes that element an objective standard, not a subjective one.

¶36 Ardell's argument conflates the requirement that he "intentionally engaged in a course of conduct" with the requirement that the course of conduct be "directed at" N. The requirements are distinct. His attempt to import the "intentionally" requirement into the other element is not consistent with the rest of the language of the statute, in which the legislature expressly made the test an objective one. And he too narrowly defines "directed at" as we explain above. As to the intent to cause distress element, we conclude that there was ample evidence here from which a jury could

reasonably conclude from an objective viewpoint that Ardell intended the communications to the third party to be conveyed to N. and cause her emotional distress. For example, he explicitly stated in both 2014 emails that he accused the principal of working with N. to obtain the restraining order. He clearly believed they still were in contact with each other. He explicitly threatened to engage in public protests at the principal's school in response to her "conspiring" with N. From these facts alone, the jury could reasonably conclude he emailed the principal believing N. would be told or find out and that this demonstrated, objectively, that he intended to cause N. emotional stress.

¶37 We need not decide whether, as Ardell argues, a course of conduct "directed at" a victim "generally does not include" third-party communications; we decide only that it *can* include communication with a third party without proof of the sender's subjective intent, and that the jury could have found that it did include the actions here. Looking at the content of the emails, we conclude that a jury could find that when Ardell sent them, his act was focused on and launched hostilely against N. The purpose of the July 4 email was to tell the principal about N. making false statements and obtaining restraining orders against Ardell on false grounds. The purpose of the July 23 email was to find out whether N. had been encouraged by the principal to petition for the injunction; it referred to a prior phone call when Ardell had asked the principal the same question.

¶38 Ardell's second statutory argument is that the emails to the principal did not satisfy the "course of conduct" definition under WIS. STAT. § 940.32(1)(a)7. because the principal was not, on the dates the emails were sent, a current coworker or employer of N.'s. The course of conduct definition relevant here is "*[s]ending material* by any means to the victim or, *for the purpose of obtaining information about, disseminating information about*, or communicating with the victim, to a member of the victim's family or household or *an employer, coworker*, or friend of the victim." WIS. STAT. § 940.32(1)(a)7. (emphasis added). Ardell argues that the principal, who had moved to a different school district by the time of the July 2014 emails, no longer fit into any of the categories in the statute and that Ardell's sending material to her therefore could not constitute a course of conduct that violates the stalking statute.

¶39 The statute does not explicitly distinguish between current and former coworkers and employers. It is certainly not unreasonable, in the context of the statute, to read the words "coworker" and "employer" to encompass both current and former coworkers and employers. Alternatively, we could conclude that absent the word "former," the statute must mean that the list is limited to only those who are coworkers and employers at the moment when the third-party communication takes place. Even if we did so conclude, however, the analysis would not end there. In that case, we would turn to the legislative history to determine whether the legislature intended the "unthinkable"

result that Ardell's email to N.'s principal—which was sent to her solely because she had been N.'s employer and coworker—should be excluded as evidence solely on the grounds that the principal had accepted a different job before he sent the email. *See* ***Teschendorf***, 293 Wis. 2d 123, ¶15.

¶40 Our supreme court has discussed the stalking statute's legislative history:

> Our analysis is confirmed by the legislative history of stalking statutes in Wisconsin and nationally. Stalking statutes were passed nationwide in the early 1990s in response to several high-profile murders of women who had previously been stalked by their killers. Wisconsin's initial enactment closely tracks much of the language of a model statute promulgated in 1993 by the National Institute of Justice.
>
> The Institute noted, "Stalkers may be obsessive, unpredictable, and potentially violent. They often commit a series of increasingly violent acts, which may become suddenly violent, and result in the victim's injury or death." Unlike with other crimes against life and bodily security, the mental state of the victim—as well as the mental state of the perpetrator—is an element of the crime of stalking. . . . "Since stalking statutes criminalize what otherwise would be legitimate behavior based upon the fact that the behavior induces fear, the level of fear induced in a stalking victim is a crucial element of the stalking offense."

> At the time that the model statute was promulgated, nine states permitted enhanced penalties for stalking if the defendant has previously been convicted of another felony. The Institute recommended that states "consider establishing a continuum of charges that could be used by law enforcement officials to intervene at various stages."

State v. Warbelton, 2009 WI 6, ¶¶35-37, 315 Wis. 2d 253, 759 N.W.2d 557 (citations and footnote omitted). In light of the fact that WIS. STAT. § 940.32 was based on the model anti-stalking statute, and in light of its goals of protecting victims from "obsessive, unpredictable, and violent" acts, we conclude that reading the "coworker" and "employer" as excluding all former coworkers and employers would be a meaning that "produces absurd results" because it would protect the wrong person—the perpetrator—by excluding evidence of conduct that the legislature would not have intended to exclude. ***Teschendorf***, 293 Wis. 2d 123, ¶15. We conclude that "the legislature did not intend these unreasonable or unthinkable results." We note that all of Ardell's emails explicitly explain that the reason he is sending them is because of the principal's work relationship with N.

II. Failure to object to the jury instructions or raise due process and free speech arguments on the stalking charge does not constitute deficient performance of trial counsel because no Wisconsin court has addressed the issues Ardell now raises, and it is not deficient performance to fail to raise novel issues.

¶41 Ardell argues that the jury instructions improperly defined the stalking offense in a way that permitted conviction without evidence that Ardell "acted with the subjective intent" to cause N. fear, as he argues the statute requires. He further argues that without such proof of subjective intent, the statute violates his constitutional rights to due process (because he had no notice that the statute would be interpreted in this way) and to free speech (because it criminalizes speech based on the fact that its content is about the victim). These arguments were not made at the circuit court.

¶42 Where an argument has not been preserved, we review the challenge under the rubric of ineffective assistance of counsel. In order to show ineffective assistance of counsel, Ardell must show that counsel performed deficiently and that the deficient performance prejudiced him. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). "First, the defendant must show that counsel's performance was deficient." ***Id.*** "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id***

"Second, the defendant must show that the deficient performance prejudiced the defense." ***Id.*** "Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." ***Id.***

¶43 It is well established that a defendant cannot satisfy the deficient performance prong where the claimed deficiency is failure to raise an issue on a point that has not been addressed in the law. *See* ***Ronald J.R. v. Alexis L.A.***, 2013 WI App 79, ¶11 n.5, 348 Wis. 2d 552, 834 N.W.2d 437 (counsel not ineffective for failing to pursue novel arguments); *see also* ***State v. Jackson***, 2011 WI App 63, ¶10, 333 Wis. 2d 665, 799 N.W.2d 461 ("When the law is unsettled, the failure to raise an issue is objectively reasonable and therefore not deficient performance."). Ardell acknowledges that "Wisconsin [c]ourts have yet to address the requirement that the course of conduct be 'directed at' the alleged victim." However, he argues, "basic rules of statutory interpretation, as well as the apparently uniform and common sense interpretation by states with similar statutory language, dictate that the requirement be limited to actions aimed at or targeting the alleged victim." That limitation, he argues, means that "it generally does not include actions such as seeking or obtaining information about the alleged victim from, or imparting such information to, a third party."

¶44 The problem with Ardell's assertion is that no Wisconsin court has ever interpreted the statute as he does. That ends the deficient-performance analysis. Likewise, no Wisconsin court has ruled on the

constitutional challenges he now raises. Regardless of the merits of those arguments, the fact that they were raised for the first time on appeal is fatal because under these circumstances, they do not rise to an ineffective assistance of counsel claim.

¶45 Besides that, as to the statutory argument, we note that the statute explicitly *does* include certain third-party communications as stalking conduct *without regard to whether the information sent is conveyed to the victim*: "[s]ending material . . . to a member of the victim's family or household or an employer, coworker, or friend of the victim" when it is "for the purpose of obtaining information about, disseminating information about, or communicating with the victim[.]" The communications here were very clearly for the purpose of "obtaining information about" N.'s representations about the injunction and "disseminating information about" her purportedly false statements. The statute's plain language criminalizes sending material for those purposes—obtaining information about and disseminating information about—as well as "communicating with the victim." The emails to the principal had both of those purposes. Because we conclude that "directed at" includes communications "focused on" and "hostilely launched" toward a victim, we conclude that Ardell's statutory jury instruction argument would have failed, which means that it was not deficient performance for trial counsel to fail to make it.

III. To the extent that Ardell argues that he is entitled to a new trial on the grounds of insufficiency of the evidence, his argument fails to recognize the applicable standard of review.

¶46 Ardell repeatedly cites the existence of conflicting trial testimony. He argues first that the emails to the principal cannot support the verdict that requires proof of a course of conduct "directed at" N., and second that there is no other evidence that supports the verdict. He is mistaken on two counts.

¶47 First, as explained above, we reject the argument that the facts in evidence at trial about Ardell's emails to N.'s principal fail to satisfy the requirement of a course of conduct that Ardell "intentionally engaged in" and that was "directed at" N.

¶48 Second, the existence of testimony contrary to the verdict does not affect the standard of review. We view facts in the light most favorable to the verdict, and if more than one inference can be drawn from the evidence, this court must accept the inference drawn by the jury. ***State v. Forster***, 2003 WI App 29, ¶2, 260 Wis. 2d 149, 659 N.W.2d 144. Further, "[t]he rule in Wisconsin is that the jury, *as ultimate arbiter of credibility*, has the power to accept one portion of a witness' testimony, reject another portion and assign historical facts based upon both portions." ***O'Connell v. Schrader***, 145 Wis. 2d 554, 557, 427 N.W.2d 152 (Ct. App. 1988) (emphasis added). "In short, a jury can find that a witness is partially truthful, partially untruthful and have both of these determinations mean something

quite independent of one another." ***Id.*** The jury verdict of guilty requires us to accept the inferences drawn by the jury as to the credibility of the witnesses, and we reject Ardell's arguments to the extent that they rely on evidence the verdict shows the jury rejected.

IV. This is not the extraordinary case in which we exercise our discretionary reversal power.

¶49 Finally, Ardell requests that we exercise our discretion to order a new trial in the interests of justice. We may order a new trial in the interests of justice "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried[.]" WIS. STAT. § 752.35. However, we do so only in exceptional cases. ***State v. McKellips***, 2016 WI 51, ¶30, 369 Wis. 2d 437, 881 N.W.2d 258. Ardell gives the reasons we have already addressed as the basis for his argument that the real controversy was not fully tried. Because we have rejected his interpretation of the statute and concluded that he did not receive ineffective assistance of counsel, there is no injustice, and extraordinary relief is not warranted in this case. Thus, we decline to exercise our discretionary powers to order a new trial in the interests of justice.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

APPENDIX G

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DISTRICT I

March 22, 2018

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You are hereby notified that the Court has entered the following order:

2017AP381-CR

State of Wisconsin v. Korry L. Ardell
(L.C. # 2014CF3516)

Before Brennan, P.J., Kessler and Brash, JJ.

Defendant-Appellant Korry L. Ardell moves for reconsideration of this court's decision of March 6, 2018. After reviewing the motion, this court concludes that reconsideration is not warranted.

IT IS ORDERED that the motion for reconsideration is denied.

Sheila T. Reiff
Clerk of Court of Appeals

APPENDIX H

STATE OF WISCONSIN	CIRCUIT COURT Branch 38	MILWAUKEE COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

KORRY L. ARDELL,

Defendant.

Case No. 14CF003516

DECISION AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF

(Filed Feb. 9, 2017)

On October 21, 2016, the defendant by his attorney filed a motion for postconviction relief seeking a new trial on the basis of ineffective assistance of counsel. He was charged with stalking as a domestic abuse repeater having had a previous conviction within seven years, knowingly violating a domestic abuse restraining order as a domestic abuse repeater, and solicitation of harboring or aiding a felony.[1] A jury trial was held before this court[2] on November 2-6, 2015,

[1] An amended information alleged harboring or aiding a felon (falsifying information – PTAC) on count three.

[2] The case was assigned to the court's domestic violence successor, the Hon. Cynthia Davis, who ordered a briefing schedule.

after which the defendant was found guilty on the first two counts and not guilty of aiding a felon. The court ordered count two dismissed on the State's motion after verdict. On December 10, 2015, the court sentenced him to five years in prison on count one (two years of initial confinement and three years of extended supervision).

The defendant contends, as he did at the conclusion of trial and at the beginning of the sentencing hearing, that count one must be dismissed. More specifically, he claims that the course of conduct (stalking) must be "directed at" the victim rather than be "transmitted to" the victim and that sec. 940.32(2) is vague and overbroad. He maintains that statements he may have made to a third party *about* the victim constitutes an insufficient basis to sustain a verdict for stalking. Consequently, he argues that his communications with Michele Hagen do not fall within the definition or requirement that what he did was "directed at" Nicole Thomas, and thus, they were not relevant but rather prejudicial.

The victim, Nicole Thomas, testified that she learned the defendant had made a request to see her personnel file at her place of employment. (11/3/15, a.m., p. 18). Thomas testified that the defendant had made personal threats to her safety and that he had sent a letter to the Milwaukee public school system

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However, because a weeklong trial was held before this court in which the court heard and observed the witnesses, the court agreed to review and address the postconviction motion filed by the defendant.

accusing her of prostitution and illegal drug use. (Id. at 23-24, 29). Before obtaining a restraining order, she said she became frightened when she saw the defendant outside of her house. (Id. at 33-34).

The defendant also contacted one of Thomas's coworkers that she had previously worked with. Michelle Hagen testified that on May 23, 2013, Nicole Thomas spoke to her before school started and told her the defendant had made some threatening statements about killing her and that she was very frightened. (Tr. 11/3/15, p.m. pp. 8-9). She said a discussion ensued about getting a restraining order against the defendant. (Id. at 9). On July 4, 2014, the defendant sent Hagen an email about Thomas asking why Hagen had Thomas file a frivolous/false restraining order. (Id. at 20). He sent multiple emails to Hagen on July 4, 2014.

There was testimony that the defendant also made calls to Daniel Fischer, the person with whom the victim had a child in common. The defendant admitted that he intentionally attempted to locate people after the restraining order issued that knew Nicole Thomas.

The defendant asserts that the emails he sent to Hagen, as well as her testimony, were not relevant or admissible because they were not directed at the victim but rather to third parties and that the jury instructions allowed the jury to use this evidence, as well as his open records requests, his communications with law enforcement and with Daniel Fischer, as proof of stalking. The court denied the defendant's motion in

limine to exclude the emails to Hagen, finding them admissible. (Tr. 11/2/15, pp. 12-14).

The defendant further asserts that the jury instructions failed to apprise the jurors that his communications with third parties could not be part of the required course of conduct directed at Thomas. He argues that there was no jury instruction to explain that sec. 940.32(2)(a), Wis. Stats., requires that "the actor intentionally engag[ed] in a course of conduct directed at a specific person that would cause a reasonable person under the same circumstances to . . . fear bodily injury." (*Motion, p. 14*). Finally, he argues that the State argued facts known to be false during closing argument.

The defendant's third attempt to dismiss count one is denied. Although the current motion sets forth more specific issues and a host of case law in support of the arguments made, the court rejects his arguments for the same reasons set forth by the State at pages 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, and 19. The court adopts these portions of the State's brief as its decision in this matter and also finds that a new trial is not warranted in the interests of justice.

THEREFORE, IT IS HEREBY ORDERED that the defendant's notion for postconviction relief (newt 1 is **DENIED**.

Dated this 9th day of February, 2017 at Milwaukee, Wisconsin.

BY THE COURT:

[SEAL]

/s/ Jeffrey A. Wagner
Jeffrey A. Wagner
Circuit Court Judge