STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case Nos. 2016AP1045-CR, 2016AP1046-CR,
2016AP1047-CR, 2016AP1048-CR, 2016AP1049-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TERRANCE LAVONE
EGERSON,

Defendant-Appellant.

ON APPEAL FROM JUDGMENTS OF CONVICTION AND SENTENCE ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE MEL FLANAGAN, PRESIDING, AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE MICHELLE A. HAVAS, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Did the circuit court err in denying Defendant-Appellant Terrance Egerson's plea withdrawal motion, which was premised on trial counsel's purported ineffective assistance in not moving to dismiss the domestic abuse repeater enhancers from the criminal complaints?

The circuit court answered: no. This Court should affirm the decision of the circuit court.

2. Is Egerson entitled to a new trial in the interest of justice as provided by Wis. Stat. § 752.35?

The circuit court did not address this question. This Court should deny Egerson's request for a new trial in the interest of justice.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication because the issues presented can be resolved by application of established law to the particular facts.

INTRODUCTION

Over the course of ten months, between January and October 2013, Defendant-Appellant Terrance Egerson harassed his estranged wife, whom he had a long history of physically abusing, with dozens of unwanted and forbidden phone calls. The calls were forbidden pursuant to several court orders entered against Egerson prohibiting contact with his wife.

These dozens of harassing telephone calls resulted in five separate criminal complaints being lodged against Egerson, containing a total of 16 felony and misdemeanor charges. Ultimately, the prosecution and the defense agreed to a global resolution of the five cases. Egerson pleaded guilty to six counts, and the rest were dismissed and read in.

In addition to dismissing ten criminal counts, the State also dismissed domestic abuse repeater penalty enhancers attached to each of the 16 counts. Accordingly, Egerson was not sentenced as a repeater on any of the counts he pleaded guilty to.

Nevertheless, post-sentencing, Egerson moved to withdraw his guilty pleas on the theory that the dismissed penalty enhancers had no factual basis. Because trial counsel had never challenged the enhancers, Egerson presented his arguments in the ineffective assistance of counsel framework.

The domestic abuse repeater penalty enhancers had an adequate factual basis. Therefore, trial counsel was not ineffective for not moving to dismiss them, and there is no ground for allowing Egerson to withdraw his guilty pleas.

STATEMENT OF THE CASE

Terrance Egerson has a history of abusing A.E., his estranged wife and the mother of three of his children. On September 10, 2011, officers from the Milwaukee Police Department were dispatched to the couple's home to investigate a domestic violence battery complaint. (45R33:Ex. A.)[1] A.E. and Egerson's teenage son, T.E., told the officers that Egerson shoved and choked A.E. after she intervened in an argument between T.E. and Egerson. (45R33:Ex. A.) As a result of this incident, Egerson was charged in Milwaukee County Case No. 11CM005728 with one count of misdemeanor battery, domestic abuse. (45R33:Ex. B.) Egerson was released on bail, with a condition that he have no contact with A.E. besides phone

[1] Consistent with Egerson's brief, this brief cites to the record for Case No. 2016AP1045 as "45R_"; the record for Case No. 2016AP1046 as "46R_"; and so forth.

contact and third party contact for child visitation purposes. (45R33:Ex. B.)

On December 21, 2011, A.E. called 911. (45R33:Ex. C.) She reported that Egerson, out on bail, was inside her house and refusing to leave. (45R33:Ex. C.) Investigating officers searched her home and discovered Egerson hiding in a basement crawl space. A.E. told the officers that she and Egerson argued about their pending divorce before she called for help. (45R33:Ex. C.) Egerson was again taken into custody and charged in Milwaukee County Case No. 11CM007406 with one count of misdemeanor bail jumping as an act of domestic abuse. (45R33:Ex. d.)

On March 14, 2012, Egerson was convicted in both cases. (45R33:Ex. B, Ex. D.) On April 6, 2012, the court sentenced him to 90 days in the House of Corrections for Case 11CM005728 and 180 days in the House of Corrections for Case 11CM007406. (45R33:Ex. B, Ex. D.) Both sentences in the 2011 cases included a prohibition against contacting A.E. (45R33:Ex. B, Ex. D.) The court stayed the sentences and imposed 21 months of probation on Egerson. (45R33:Ex. B, Ex. D.)

Egerson's probation in the first two cases was revoked in January 2013. (45R33:Ex. B, Ex. D.) He immediately began serving the previously stayed jail sentences. Egerson was allowed to enter the Huber program so he could "travel [from the House of Corrections] to Schaumburg, Illinois for work 3 days per week as scheduled by his employer." (45R33:Ex. B, Ex. D.) Egerson completed the combined revocation sentence for Cases 11CM005728 and 11CM007406 on June 20, 2013. (47R2:3.)

Meanwhile, on March 15, 2013, A.E. petitioned for and received a domestic abuse temporary restraining order against Egerson. (45R33:Ex. F.) Her petition described Egerson's continual harassment of her:

> Most recent has been Terry consistently calling, text messages and emails. He stalks me. Has hacked my Facebook. He followed me to find out where I moved to. He found my new number after I changed it. He has been going through my trash. He makes open ended threats such as "I know everything, don't lie to me, you know what I'm capable of." He called my cell 48 times on Wednesday, my work phone roughly 20+ times.
>
> In the past he has hit me, punched me, pulled a gun on me, tried to light me on fire, kicked me, hit me with different objects. He has made threats in the past referencing the Brookfield Azana Spa incident.[2]

(45R33:Ex. F.) The petition was granted on March 15, 2013, and a restraining order was served on Egerson the same day. (45R33:Ex. F.)

Egerson went to A.E.'s place of work on March 22, 2013, less than a week after the restraining order was served. (45R7.) He was on Huber release from the House of Corrections at that time. (48R33:10.) Officer Peter Graber of the Milwaukee Police Department responded to a property damage complaint at A.E.'s workplace. (45R40:5.) There, he met A.E. and her co-worker, Derrick Peterson. (45R40:7.) Peterson claimed that Egerson had slashed his car tires. (45R40:5; 48R33:9–10.) A.E. and Peterson told Officer Graber that they had both been receiving phone calls from Egerson. (45R40:6–7.) During the interview, Officer Graber witnessed Peterson and A.E. each receive a phone call from

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[2] The Brookfield Azana Spa incident was a notorious 2012 mass shooting that occurred outside of Milwaukee. In that incident, after his estranged wife received a restraining order against him, the perpetrator came to her place of employment and opened fire, killing her and two others, before committing suicide.
See http://archive.jsonline.com/news/crime/multiple-victims-shot-near-brookfield-square-le7a3b4-175147441.html (last visited January 27, 2017)

Egerson, who repeatedly accused A.E. of "'fucking' another man." (45R40:6–7; 45R40:18; 45R7; 45R2:3.)

As a result of this contact, the State charged Egerson in Milwaukee County Case No. 13CF1401[3] with one count of violating a temporary restraining order and two counts of intentionally contacting a victim. (45R7.) Egerson was now considered a domestic abuse repeater and subject to Wis. Stat. § 939.621. There are two requirements for the domestic abuse repeater enhancer under § 939.621. First, an individual must have committed two offenses for which a court imposed a domestic abuse surcharge in the past ten years. Second, an individual must commit an act of domestic abuse that constitutes a criminal act. If an offender qualifies as a domestic abuse repeater, his term of imprisonment may be increased by two years and any misdemeanor charge will be upgraded to a felony. Thus, the three misdemeanor counts in Case 13CF1401 were upgraded to felonies. (45R2:1–2.)

Egerson was arrested in Case 13CF1401 on April 3, 2013, and made his initial appearance the next day. (45R24.) The court commissioner found that the criminal complaint stated probable cause. (45R39:4.) The commissioner set bail at $500 and entered a no-contact order as a condition of release. (45R39:4–5.) Egerson signed the no-contact order on April 4, 2013. (45R4.) The order stated that any violation could result in a charge of bail jumping under Wis. Stat. § 946.49. (45R4.) Bail was not paid until June 8, 2013. (45R9.)[4]

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[3] WCA Case No. 16AP1045.

[4] The copy of the bail/bond form cited is not signed by Egerson. (45R9.) A signed copy of the form can be found as an unnumbered attachment to Egerson's presentence investigation report. (45R21.)

While awaiting his preliminary hearing in Case 13CF1401, Egerson continued to call A.E., in violation of the orders entered in the 2011 cases, the restraining order filed by A.E., and the no-contact order in Case 13CF1401. (46R2.) On April 17, 2013, A.E. called the Milwaukee County Police Department to report that Egerson was calling her repeatedly from jail. (46R2.)

As a consequence, the State charged Egerson in Milwaukee County Case No. 13CF1860[5] with knowingly violating a domestic abuse injunction, felony bail jumping, and intentionally contacting a victim, all as a domestic abuse repeater. (46R4.)

At a combined preliminary hearing for Cases 13CF1401 and 13CF1860, the court found probable cause that Egerson committed a felony in both cases and bound him over for trial. (45R40:28, 30.) The court reminded Egerson that contact with A.E. would violate the 2011 orders and the no-contact order from Case 13CF1401. (45R40:30.) The court warned Egerson further that each contact and attempted contact could be charged separately. (45R40:30.) While awaiting trial on these cases, Egerson continued to call A.E. (47R2.)

On June 8, 2013, Egerson's bond in Case 13CF1860 was paid. (46R5.)[6] Egerson completed his revocation sentences from the 2011 cases and was released from custody on June 20, 2013. (47R2:3.) Five days later, the Milwaukee District Attorney's Office received a phone call

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[5] WCA Case No. 16AP1046

[6] The copy of the bail/bond form cited is not signed by Egerson. (46R5.) A signed copy of the form can be found as an unnumbered attachment to Egerson's presentence investigation report. (45R21.)

from an individual claiming to be James Causey of the Milwaukee Journal Sentinel, asking for details on one of Egerson's cases. (47R2:3; 48R33:13–14.) After confirming with the Milwaukee Journal Sentinel that none of their employees placed the call and discovering that Egerson was not in custody, investigators for the District Attorney's Office concluded that Egerson had probably made the call. (47R2; 48R33:13–14.) Although Egerson could have been charged with identity theft for this incident, he was not. (48R33:13–15.) *See* Wis. Stat. §§ 943.201; 943.203.

In the ensuing inquiry, investigators examined jail call records and discovered that 49 calls were made to A.E.'s phone number while Egerson was in custody between January 7, 2013, and June 20, 2013. (47R2:3.) A.E. confirmed that Egerson called her repeatedly from jail, and tried to convince her not to come to court so the charges against him would be dropped. (47R2:3.) She also stated that Egerson had a habit of impersonation, and had once called her landlord pretending to be a police officer and claiming that A.E. was under investigation for child care fraud. (47R2:3–4) The investigators gave A.E. a recording device, and on July 1, 2015 she used it to record two separate abusive phone calls from Egerson. (47R2:4.)

Soon after, on July 10, an analyst with the Witness Protection and Security Unit[7] gave investigators a transcript of a call Egerson made from jail to A.E. on May 26, 2013, which contained evidence of intimidation of a victim in violation of Wis. Stat. § 940.45. (47R2:4.) During the call Egerson explained how other guys in jail for "beating up their girls" had cases dismissed because the victims did not

[7] The Witness Protection and Security Unit is a Milwaukee County entity dedicated to ensuring victim and witness safety. Analysts regularly monitor jail calls for evidence of victim intimidation. (47R2:4)

show up for court. (47R2:5.) Egerson also declared that he did not know how long his mother had to live, or who would take care of her if Egerson were incarcerated. (47R2.)

As a result of the May 26 and July 1 phone calls, the State charged Egerson in Milwaukee County Case No. 13CF3152[8] with two counts of violation of a domestic abuse injunction and two counts of felony bail jumping, all as a domestic abuse repeater. (47R2.) The felony bail jumping counts were based on Egerson's two calls to A.E. on July 1, 2013. (47R2:2.)

While in jail awaiting his preliminary hearing in Case 13CF3152, Egerson called his mother, Bessie Egerson, on July 18, 2013. (48R2:3.) He asked her to contact A.E. every day and to tell her to "do the right thing." (48R2:3.) A.E. told investigators for the District Attorney's office that Bessie Egerson contacted her two to four times a day and asked her to come to court to speak on Egerson's behalf. (48R2:3.)

On July 21, Egerson called A.E. from jail and asked her to "do the right thing" and come to court to say that they had been having a "harmony type of relationship." (48R2:5.) A.E. responded: "No, we haven't been having a harmony type of relationship. Me and you see this relationship in a completely different light. You view it as this happy thing that only was a small hiccup, no. I view it as a torturous last four years, it's been hell." (48R2:5.) Egerson protested, "I'm in here for not touching you." (48R2:5.) A.E. replied: "That's your problem. You feel like domestic violence is only domestic violence is only touching. No, you're still – you harass, and that falls under abuse, sir!" (48R2:5.)

In Case No. 13CF3152, the court found "probable cause that a felony has been committed and committed by

[8] WCA Case No. 16AP1047

this defendant." (47R28:20–21.) The court bound Egerson over for trial, and ordered his phone and mail privileges to be shut off. (47R28:21, 26.) At this time, the State also informed the court that more charges would be forthcoming, based on the discovery of approximately 57 calls made by Egerson since he returned to custody that month. (47R28:23–4.)

The State then charged Egerson in Milwaukee County Case No. 13CF3435[9] with one count of felony intimidation of a victim in furtherance of a conspiracy, one count of misdemeanor violation of a domestic abuse injunction, and two counts of felony bail jumping, all as a domestic abuse repeater, based on his July 18 phone call to his mother arranging the conspiracy and his July 21 phone call to A.E. (48R2.) Egerson waived his preliminary hearing on August 15. (48R29:4–5.) The court found probable cause for the charges and bound Egerson over for trial. (48R29:4–5.)

Despite the no-contact orders and having his phone privileges suspended, Egerson continued to call A.E. from jail while awaiting trial. (49R2.) On October 9, 2013, A.E. met with investigators from the District Attorney's office to discuss the numerous calls she had received from Egerson. (49R2:2.) She explained that Egerson would have other inmates call her, while he yelled in the background. (49R2:2.) She also described how Egerson called her directly from a phone that did not include the normal jailhouse preamble. (49R2:.) Investigators determined that, despite being held in segregation, Egerson was somehow using the "attorneys only" line to call A.E. (48R33:19.)

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[9] WCA Case No. 16AP1048

Egerson was consequently charged for these calls in Milwaukee County Case No. 14CF0189[10] with one count of knowingly violating a domestic abuse injunction as a domestic abuse repeater, and one count of felony bail jumping. (49R2.) Egerson waived his preliminary hearing and was bound over. (49R28:9.) On February 10, 2014, Case 14CF0189 was joined with the other four cases for trial. (49R28:10.)

On April 21, Egerson's attorney filed a motion to dismiss the domestic abuse enhancers. (45R17.) He argued that § 939.621 did not apply to Egerson because the statute came into effect after Egerson's predicate domestic violence offenses occurred. (45R17.) He made no other argument. The court denied the motion a week later. (45R46:13.)

Egerson resolved all five cases in a global plea agreement on April 28, 2014. In all five cases, the domestic abuse repeater enhancers were dismissed. (45R47:18–24.)

- In Case 13CF1401, Egerson pleaded guilty to one misdemeanor violation of a domestic abuse temporary restraining order; the two misdemeanor counts for intentionally contacting a victim were dismissed and read in. (45R18:1; 45R47:22–23.) Under the plea, he faced a maximum sentence of nine months in jail and a $1000 fine. (45R18:1; 45R47:23.)

- In Case 13CF1860, he pleaded guilty to misdemeanor intentional violation of a court-imposed no-contact order; the misdemeanor count for intentionally contacting a victim and the felony bail jumping count were dismissed and read in. (46R31:22.) Under the plea, he faced a maximum sentence of nine months in jail and a $10,000 fine. (46R8:1; 46R31:21.)

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[10] WCA Case No. 16AP1049

- In Case 13CF3152, Egerson pleaded guilty to one count of felony bail jumping. (47R10:1.) Another felony bail jumping count and two misdemeanor counts for violating a domestic abuse injunction were dismissed and read in. (47R32:21.) Under the plea, he faced a six-year prison sentence (three years initial confinement and three years extended supervision) and a $10,000 fine. (47R10:1; 47R32:20.)

- In Case 13CF3435, Egerson pleaded guilty to one count of felony bail jumping. (48R10:1.) As part of the plea agreement, a count of felony witness intimidation (a felony because it involved a conspiracy between Egerson and his mother) was reduced to misdemeanor witness intimidation. (48R2:1; 48R10:1.) Egerson pleaded guilty to that reduced charge. (48R2:1; 48R10:1.) A misdemeanor count for violating a domestic abuse injunction and a second felony bail jumping count were dismissed and read in. (48R32:29–32.) Under the plea, Egerson faced a maximum sentence of nine months in jail and a $10,000 fine on the misdemeanor count, and a six-year prison sentence (three years initial confinement and three years extended supervision) and a $10,000 fine on the felony count. (48R10:1–2; 48R32:30–31.)

- In Case 14CF189, Egerson pleaded guilty to misdemeanor knowing violation of a domestic abuse temporary restraining order. (49R6:1.) A count of felony bail jumping was dismissed and read in. (49R31:19.) Under the plea, he faced a faced a maximum sentence of nine months in jail and a $1000 fine. (49R6:1; 49R31:18.)

Pursuant to his global plea, Egerson faced a maximum sentence of 12 years in prison,[11] 3 years in jail, and $42,000

[11] A 12 year sentence is a bifurcated prison term with six years initial confinement and six years extended supervision.

in fines. Had he not pleaded guilty, he would have faced additional penalties on the ten charges dismissed pursuant to the plea agreement.

Egerson was sentenced on November 25, 2014. At the sentencing hearing, the court noted that although Egerson's crimes were "not offenses of physical violence," they constituted "emotional abuse" and "an obsessive stalking of [A.E.]" (48R33:39, 43.) The court took care to explain the gravity of Egerson's offenses:

> It disrupts everything about your life when you don't know whether you're safe, whether somebody's going to show up at the door, whether they're going to pick up the phone and you're going to hear that voice again or whether you're going to hear other people telling you about you and sending messages from you or you're going to hear family members calling on your behalf. It's just endless.

(48R33:43.)

The court sentenced Egerson to 22 months and one day in jail for the misdemeanors. (48R33:47–48.) On the felony bail jumping charges, he was sentenced to a ten-year bifurcated prison term with five years initial confinement and five years extended supervision. (48R33:49.)

In February 2016, Egerson filed a postconviction motion for relief.[12] (48R19.) He argued that he was entitled to withdraw his guilty pleas on the ground that trial counsel was constitutionally ineffective for failing to move to dismiss the domestic abuse penalty enhancers. (48R19:8.) The court

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[12] In August 2014, Egerson moved to withdraw his guilty pleas on the basis that they were not entered knowingly. (45R22). The court denied that motion on October 1, 2014. (48R48:11). Egerson has abandoned the argument, and it is not part of this appeal.

rejected the motion without a hearing on April 28, 2016. (48R23.)

This appeal follows.

ARGUMENT

I. Egerson failed to prove manifest injustice entitling him to withdraw his pleas after sentencing because he did not show that trial counsel provided ineffective assistance.

A. Legal principles.

To withdraw a guilty plea after sentencing, "a defendant must show by clear and convincing evidence that a refusal to allow withdrawal of the plea would result in manifest injustice." *State v. Dillard*, 2014 WI 123, ¶ 36, 358 Wis. 2d 543, 859 N.W.2d 44. In other words, the defendant must show that there are "serious questions affecting the fundamental integrity of the plea." *State v. Denk*, 2008 WI 130 ¶ 71, 315 Wis. 2d 5, 758 N.W.2d 775. The defendant has the burden to prove manifest injustice. *Dillard*, 358 Wis. 2d 543, ¶ 36.

A defendant can demonstrate manifest injustice by showing that he received ineffective assistance of trial counsel. *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). The two-pronged test of *Strickland v. Washington*, 466 U.S. 668 (1984), "applies to challenges to guilty pleas based on ineffective assistance of counsel." *Bentley*, 201 Wis. 2d at 311–12. If a defendant premises his plea withdrawal motion on ineffective assistance of counsel, he must allege (and ultimately prove) that he would not have pleaded guilty but for counsel's ineffectiveness. *See State v. Krawczyk*, 2003 WI App 6, ¶¶ 28–29, 259 Wis. 2d 843, 657 N.W.2d 77.

Under the *Strickland* test, a defendant must prove that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687.

To establish deficient performance, the defendant must identify specific acts or omissions of counsel "outside the wide range of professionally competent assistance" demanded of attorneys in criminal practice. *Strickland*, 466 U.S. at 690. The client must demonstrate that his attorney made serious mistakes that could not be justified under an *objective* standard of reasonable professional judgment. *See id.* at 688. An attorney does not perform deficiently by failing to make a meritless argument. *State v. Toliver*, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

To satisfy the prejudice prong, the defendant must "offer more than rank speculation." *State v. Erickson*, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999). He must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "Showing prejudice means showing that counsel's alleged errors *actually* had some adverse effect on the defense." *State v. Koller*, 2001 WI App 253, ¶ 9, 248 Wis. 2d 259, 635 N.W.2d 838 (emphasis added). "The defendant cannot meet this burden by simply showing that an error had *some conceivable effect* on the outcome." *Id.* (emphasis added).

A postconviction *Machner* hearing is a prerequisite to appellate review of an ineffective assistance of counsel claim. *State v. Curtis*, 218 Wis. 2d 550, 554, 582 N.W.2d 409 (Ct. App. 1998) (explaining *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979)). If a postconviction motion "alleges sufficient material facts that, if true, would entitle the defendant to relief . . . the circuit court *must* hold

an evidentiary hearing." *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d 433 (emphasis added) (internal citations omitted). A circuit court, in its discretion, *may* deny the motion without a hearing

> "if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing."

Bentley, 201 Wis. 2d at 309–10 (quoting *State v. Nelson*, 54 Wis. 2d 489, 497–98, 195 N.W.2d 629 (1972)).

On appeal, "[t]he issue of whether a person was deprived of the constitutional right to the effective assistance of counsel presents a mixed question of law and fact." *State v. Mayo*, 2007 WI 78, ¶ 32, 301 Wis. 2d 642, 734 N.W.2d 115 (citations omitted). The circuit court's findings of fact will be upheld unless they are clearly erroneous; whether counsel's performance was deficient and prejudicial to the defense presents a question of law reviewable de novo. *Id.* The court's decision on whether a postconviction motion contained a sufficient factual basis warranting an evidentiary hearing is reviewed for erroneous exercise of discretion. *See Allen*, 274 Wis. 2d 568, ¶ 34.

B. Trial counsel was not ineffective because he did not move to dismiss the domestic abuse penalty enhancers.

1. Trial counsel did not perform deficiently by not moving to dismiss the domestic abuse penalty enhancers.

Egerson argues that his trial counsel performed deficiently by not moving to dismiss the domestic abuse enhancers from his complaints before the entry of his guilty

pleas. He contends that the enhancers were not supported by sufficient facts in the complaints. His argument fails because the complaints did plead sufficient facts.

The test for the sufficiency of a complaint is one of "minimal adequacy." *State v. Olson*, 75 Wis. 2d 575, 581, 250 N.W.2d 12 (1977). A complaint need only "set forth facts that are sufficient, in themselves or with the reasonable inferences to which they give rise, to allow a reasonable person to conclude that a crime was probably committed and that the defendant is probably culpable." *State v. Kempainen*, 2015 WI 32, ¶ 16, 361 Wis. 2d 450, 862 N.W.2d 587. A complaint satisfies this threshold and establishes probable cause if it answers five questions: "(1) Who is being charged?; (2) What is the person charged with?; (3) When and where did the alleged offense take place?; (4) Why is this particular person being charged?; and (5) Who says so?" *State v. Gaudesi*, 112 Wis. 2d 213, 220, 332 N.W.2d 302 (1983) (citations omitted).

Here, Egerson asserts that *Gaudesi*'s fourth question—*why* he was charged as a domestic abuse repeater—was not answered by the complaints. (Egerson's Br. 11.) The circuit court found that all five complaints did state probable cause because each described conduct by Egerson that constituted domestic abuse. Egerson's disagreement with that finding stems from his interpretation of Wis. Stat. § 968.075(1), which defines domestic abuse.

Section 968.075 (1)(a) defines domestic abuse as follows:

> (a) "Domestic abuse" means any of the following engaged in by an adult person against his or her spouse or former spouse, against an adult with whom the person resides or formerly resided or against an adult with whom the person has a child in common:

> 1. Intentional infliction of physical pain, physical injury or illness.
>
> 2. Intentional impairment of physical condition.
>
> 3. A violation of § 940.225(1), (2) or (3).[13]
>
> 4. A physical act that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1., 2. or 3.

Subsection 968.075(1)(a)4. applies to this case.

Under the applicable subsection, an act must meet two criteria to constitute domestic abuse. First, the offender must perform a physical act. Second (as relevant here), that act must cause the victim reasonably to fear that the offender will imminently engage in conduct that would inflict pain, injury, or impairment of her physical condition. Egerson argues that his phone calls to A.E. met neither of these criteria.

Egerson asserts that a phone call is not a "physical act" within the meaning of the statute. (Egerson's Br. 13.) This argument is without merit. Egerson correctly notes that all words and phrases in the Wisconsin Statutes "shall be construed according to common and approved usage." Wis. Stat. § 990.01(1). But he unduly limits the meaning of the term "physical act." "Physical" is defined as "of or relating to the body."[14] "Act" is defined as "the process of doing or performing something."[15] Every time he picked up a telephone and dialed A.E.'s telephone number to call her, Egerson used his "body" to "do[] or perform[] something," i.e.,

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[13] *I.e.*, first-, second-, and third-degree sexual assault.

[14] *Physical*, The American Heritage Dictionary (5th ed. 2011).

[15] *Act*, The American Heritage Dictionary.

to call A.E. Therefore, every time he called A.E., Egerson performed a physical act.

Egerson further contends that the statute requires "a 'physical act' *against* the victim" and that the phone calls were not physical acts "against" A.E. (Egerson's Br. 13 (emphasis added).) The State notes that the word "against" does not appear in the statute. Moreover, if there were an "against" requirement in the statute, it would be satisfied by Egerson's harassing and forbidden phone calls to A.E.

Beyond the phone calls, the preliminary hearing in Case 13CF1401 included testimony that Egerson committed physical acts in addition to the phone calls. This testimony may cure the alleged factual deficiencies in the criminal complaint. *See State v. Higgs*, 230 Wis. 2d 1, 13, 601 N.W.2d 653 (Ct. App. 1999). A.E.'s co-worker, Derrick Peterson, told police that Egerson came to A.E.'s place of employment and slashed Peterson's car tires. (48R33:9–10.) Even Egerson must admit that this behavior constitutes a "physical act."

The facts of this case are similar to those in *State v. Bandy*, 2014 WI App 120, 358 Wis. 2d 712, 856 N.W.2d 347 (unpublished) (R. App. 101–05),[16] in which this Court assumed that sending text messages in violation of a no-contact order constituted an act of domestic abuse. *Id.* ¶¶ 30–31. If text messages can satisfy the domestic abuse statute, telephone calls can also satisfy it.

Even if the phone calls were "physical acts," according to Egerson, they did not constitute "domestic abuse" because they "did not cause A.E. to reasonably fear imminent

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[16] *State v. Bandy*, an unpublished opinion authored by a single judge under Wis. Stat. § 751.31(2), is cited for its persuasive value only. *See* Wis. Stat. § 809.23(3)(b). It is included in the appendix to this brief. *See id.* at (3)(c).

engagement by Egerson in any of the conduct described in Wis. Stat. § 968.075(1)(a)1– 3." (Egerson's Br. 13.)

Egerson argues that A.E. could not "reasonably" fear Egerson's "imminent" conduct against her because he was in jail when he made the calls, because they did not contain any overt threats, and because Egerson had not physically abused A.E. recently. (Egerson's Br. 13–16.) Egerson does not deny that he has physically abused A.E. in the past.

The statute provides that a physical act constitutes domestic abuse if it "*may* cause the other person reasonably to fear imminent engagement in the conduct" specified in the statute. Wis. Stat. § 968.075(1)(a)4. "The word 'may' is ordinarily used to grant permission or to indicate possibility. Accordingly, when interpreting a statute, we generally construe the word 'may' as permissive." *Heritage Farms, Inc. v. Markel Ins. Co.*, 2012 WI 26, ¶ 32, 339 Wis. 2d 125, 810 N.W.2d 465, (internal citations omitted) Therefore, here, the physical act committed by the defendant need not cause *actual* fear in the victim, as long as it "*may* cause [her] *reasonably* to fear imminent" harmful conduct.

From A.E.'s perspective, each and every call from Egerson could reasonably cause her to fear for her physical safety. Although he was in jail when he made most of these calls, A.E. could not be certain that she was safe from physical harm. Indeed, when Egerson made the calls charged in Case 13CF1401, he was being released from the House of Corrections three days a week as part of the Huber work release program. (48R33:10.) And, when he made the calls on July 1, 2013, charged in 13CF3152, he was not in custody. (45R10, 13.) Case 13CF3435 was based on Egerson's use of his mother to make threatening phone calls to A.E. (48R2.) With this precedent, A.E. could reasonably fear that Egerson might take the next step and ask someone

on the outside to harm her physically, just as he had asked someone on the outside to threaten her by telephone.

Egerson was unrelenting and unpredictable. He was an expert at circumventing the restrictions placed on him. He was not allowed to call A.E. from jail, but nevertheless found ways to get around that by having other inmates call her while he yelled in the background, and by using the jail's "attorneys only" phone to call her. (46R33:19; 49R2.) Previously, when A.E. changed her phone number to protect herself from Egerson's calls, he found out what her new number was and called her dozens of times. (45R33:Ex. F.) A.E. could reasonably fear anything from Egerson. After all, as A.E. recounted, "[i]n the past he has hit me, punched me, pulled a gun on me, tried to light me on fire, kicked me, [and] hit me with different objects." (45R33:Ex. F.)

Again, *Bandy* is instructive. There, this Court agreed with the State that it was necessary to look at the context of Bandy's relationship with his former girlfriend to determine whether the text messages he sent her could reasonably cause her to fear imminent physical harm. 2014 WI App 120, ¶¶ 30–31. The Court noted that the texts, sent in violation of two no-contact orders, "demonstrated a disregard for the court's orders and indicated that he was not going to leave [her] alone." *Id.* ¶ 31. The Court concluded that "[g]iven Bandy's history of violence against [the former girlfriend], the texts reasonably may have caused her to fear more imminent physical harm." *Id.*

Given Egerson's history of violence against A.E., and the multiple no-contact orders entered against him, a phone call from Egerson may have reasonably caused A.E. to fear imminent physical harm. A.E. filed a petition for a restraining order against Egerson in March 2013 because, despite his being in custody, he continued to harass her. (45R33:Ex. F.) A.E., the past victim of his abuse, could

reasonably see Egerson's phone calls accusing her of "'fucking' another man" and warning "don't lie to me, you know what I'm capable of," as more than empty threats. (45R2:3; 45R33:Ex. F.)

Egerson relies on *State v. O'Boyle*, 2014 WI App 38, 353 Wis. 2d 305, 844 N.W.2d 666 (unpublished) (A. App. 119–30), to support his interpretation of the "reasonably . . . fear" requirement. The facts of this case have little in common with *O'Boyle*. O'Boyle and K.E. lived together. One evening, K.E. told O'Boyle to leave. He went to a tavern and became intoxicated. In the early hours of the morning O'Boyle returned to their home, and, unable to find the spare key, threw rocks at the windows and climbed onto the roof. K.E. called the police. O'Boyle was charged with disorderly conduct as an act of domestic abuse. *Id.* ¶ 5.

On appeal, this Court found that O'Boyle's conduct was not an act of domestic abuse because his actions were not directed at another person. Rather, he was a drunk man "attempting to enter the house where he resided." *Id.* ¶ 25. The opinion does not mention any abusive history between O'Boyle and K.E. Moreover, O'Boyle's conduct did not violate any court orders. In contrast, Egerson had a history of abusing A.E., which led to a series of restraining orders against him, which he repeatedly violated.

These complaints pled sufficient facts to justify the inclusion of the domestic abuse repeater enhancers. Therefore, any motion to dismiss the enhancers would have failed. An attorney does not perform deficiently by failing to make a meritless argument. *See Toliver*, 187 Wis. 2d at 360. Accordingly, Egerson's ineffectiveness argument fails the first prong of the *Strickland* test.

2. Even if deficient, trial counsel's performance did not prejudice Egerson's defense.

To satisfy the second prong of the *Strickland* test, a defendant who accepted a plea deal must show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52 (1985). Nowhere in his brief does Egerson even suggest that he would have gone to trial but for counsel's failure to dismiss the domestic abuse repeater enhancers. Indeed, given his total sentencing exposure (not including the domestic abuse enhancers), it is highly improbable that anyone in Egerson's position would have chosen trial over the relatively favorable sentence he received in these consolidated cases. *See supra* at 11–12.

Egerson's brief downplays the only thing about the domestic abuse repeater enhancers that matters: they were dismissed. At the plea hearing, the State moved to dismiss all the repeater charges. (45R47:2–8.) Thus, the majority of Egerson's argument for why he should be allowed to withdraw his pleas is dedicated to contesting elements of the complaints to which he did not plead guilty.

Egerson argues that his defense was prejudiced because if the repeater enhancements had been dismissed at the outset of his cases, he would have pleaded guilty to misdemeanor bail jumping charges instead of felony bail jumping charges. The superficial appeal of this argument is overcome by the reality that Egerson faced 16 separate charges in five criminal complaints. *See supra* at 10–11. The parties reached an agreement as to what charges Egerson would plead guilty to and what charges would be dismissed to reach a global disposition of greatest benefit to both sides. If there had been a different assortment of charges to choose from, the parties would have reached a different agreement.

If the two felony bail-jumping charges Egerson pleaded guilty to had been unavailable, the State would have sought comparable guilty pleas from Egerson. For example, instead of reducing the felony intimidation of a witness count to a misdemeanor in Case 13CF3435, the State would have likely sought Egerson's guilty plea to that felony count. *See supra* at 10–11.

Moreover, Egerson ignores the fact that the State did not charge him with every violation of the domestic abuse restraining order and every incident of Egerson's intentionally contacting a victim. Prosecutors have broad discretion in deciding when and how to charge a defendant. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); *State v. Johnson*, 2000 WI 12, 232 Wis. 2d 679, 605 N.W.2d 846. The possibility of Egerson receiving a longer sentence than he did grows when one considers the many other charges the State could have brought. Every phone call from Egerson to A.E. violated at least two court orders. As the circuit court noted at sentencing, there were "dozens and dozens" of phone calls, but only a fraction were actually charged. (48R33:39.) Had the domestic abuse repeater enhancements been dismissed, the State could have charged Egerson for the many other individual contacts. In addition, the State could have charge Egerson with felony identity theft for his false impersonation of a journalist. *See* Wis. Stat. §§ 943.201; 943.203. Had these additional charges been brought, Egerson could have faced a sentence easily exceeding nineteen years.

Egerson's prejudice argument fails for three reasons. First, he does not claim that he would have gone to trial but for trial counsel's purported ineffectiveness. *See Krawczyk*, 259 Wis. 2d 843, ¶¶ 28–29. Second, even if trial counsel had successfully moved to dismiss the domestic abuse enhancers for lack of sufficient factual support, the State could have amended the five complaints, either to provide further

factual support for the enhancers or to add additional counts based on Egerson's many other phone calls. Third, even if the enhancers had been dismissed before the plea hearing, Egerson cannot show that he would have received a shorter sentence than the one he bargained for. He assumes, illogically, that had the domestic abuse repeater enhancers been dismissed, all other aspects of the case would have gone the same way: Egerson would have made the same decisions, the State would have brought the same number of charges, Egerson would have received the same plea bargain, and therefore received a shorter sentence.

If everything except for the domestic abuse repeater enhancements had remained the same and Egerson had gone to trial, he would have faced a maximum sentence of 19 years on the 16 counts in the five complaints. (45R2:1–2; 46R2:1–2; 47R2:1–2l; 48R2:1–2; 49R2:1.) The six counts of violating a domestic abuse restraining order or injunction carried a maximum sentence of nine months each. *See* Wis. Stat. § 813.12(8)(a). The three counts of intentionally contacting a victim in violation of a court order also carried a maximum sentence of nine months each. *See* Wis. Stat. § 941.39(2). Reduced to misdemeanors, the six bail jumping charges carried a maximum of nine months each. *See* Wis. Stat. § 946.49(1)(a). Finally, the one count of intimidating a victim in furtherance of a conspiracy carried a maximum sentence of ten years. *See* Wis. Stat. § 940.45(4). In that scenario, the maximum sentence available to the court if Egerson had been convicted on all 16 counts is over seven years longer than the one Egerson actually received.

A defendant must "offer more than rank speculation to satisfy the prejudice prong." *Erickson*, 227 Wis. 2d at 774. Egerson offers no more than rank speculation. He does not even suggest that he would have gone to trial but for trial counsel's allegedly deficient performance. His argument that he would have been in a more favorable sentencing position

under a plea agreement does not withstand analysis. Therefore, he has not proved prejudice to his defense and his argument fails the second prong of the *Strickland* test.

C. Egerson's other claims of counsel's ineffectiveness fail to satisfy *Strickland.*

As an afterthought, Egerson contends that trial counsel performed deficiently in two other respects.

First, he asserts that counsel should have moved to dismiss the felony bail jumping charge in Case 13CF1860 because it had no factual basis. "Egerson was not released on bond when [on April 17, 2013] he allegedly violated his term of bond." (Egerson's Br. 17.) Egerson is correct on the facts. The bail jumping charge in Case 13CF1860 was based on the bail conditions of Case 13CF1401. (46R2:2–3.) Egerson's bail was not posted in that case until June 8, 2013, almost two months after the calls he made on April 17. (46R2:3.) However, even if Egerson could prove that trial counsel performed deficiently by not moving to dismiss this charge before the guilty plea proceedings, Egerson's *Strickland* claim fails because he has presented no allegation or argument as to what makes the alleged deficiency prejudicial. Egerson has the burden of proving prejudice; by not even bothering to make a prejudice argument, he has failed to meet that burden. *See Erickson*, 227 Wis. 2d at 769, 774.

Moreover, there could be no prejudice here for the same reason there is no prejudice with respect to Egerson's arguments about the domestic abuse enhancers. He does not allege that he would have gone to trial but for this error. There is no reason to suspect that, but for this error, Egerson's sentence would have been any different. And, he did not plead guilty to this charge; it was dismissed and read in. (46R31:22)

Second, Egerson asserts that counsel should have moved to dismiss one of the two "intentionally contact victim" counts in Case 13CF1401 because on March 22, 2013 (the day of the alleged contact), he was serving only one sentence. (Egerson's Br. 17.) The preliminary hearing testimony shows that Egerson contacted A.E. at least twice on March 22, 2013. So, regardless of the number of sentences Egerson was serving that day, there was a factual basis for two counts. (45R40:5–7.) *See Higgs*, 230 Wis. 2d at 13 (preliminary hearing may cure alleged factual deficiencies of complaint). Thus, counsel did not perform deficiently here because Egerson's proposed motion would have failed. *See Toliver*, 187 Wis. 2d at 360.

D. Because Egerson has failed to prove that trial counsel provided ineffective assistance, he has not shown that he is entitled to withdraw his guilty pleas.

After sentencing, a defendant may be able to withdraw his guilty plea or pleas if he can demonstrate a "manifest injustice," such as trial counsel's ineffectiveness. *See Dillard*, 358 Wis. 2d 543, ¶ 36; *Bentley*, 201 Wis. 2d at 311. As the State has shown, trial counsel was not ineffective. Therefore, Egerson has failed to show a manifest injustice and the circuit court correctly denied his motion to withdraw his guilty pleas. This Court should affirm the order of the circuit court.

II. Egerson is not entitled to a new trial in the interest of justice.

Under Wis. Stat. § 752.35, if the court of appeals determines that justice has miscarried, it may exercise its discretion to reverse the order or judgment appealed from, or to remand the case to the circuit court for a new trial. To establish that a miscarriage of justice has occurred, the defendant must show a substantial probability of a different

outcome at a new trial. *State v. Schumacher*, 144 Wis. 2d 388, 400–01, 424 N.W.2d 672 (1988). This remedy "should be used in only *exceptional* cases." *State v. McKellips*, 2016 WI 51, ¶ 52, 369 Wis. 2d 437, 881 N.W.2d 258; *see also State v. Kucharski,* 2015 WI 64, ¶ 23, 63 Wis. 2d 658, 866 N.W.2d 697; *State v. Avery,* 2013 WI 13, ¶ 38, 345 Wis. 2d 407, 826 N.W.2d 60. In exercising discretionary reversal, the court of appeals must engage in "an analysis setting forth the reasons" that the case may be characterized as exceptional. *McKellips*, 2016 WI 51, ¶ 52, 369 Wis. 2d 437, 881 N.W.2d 258.

Egerson's case is not exceptional. Cases qualifying as "exceptional" include ones where new DNA evidence could exonerate a convicted murderer or where similar exculpatory evidence was not presented to a jury before a defendant was convicted of sexual assault. *See, e.g., State v. Armstrong,* 2005 WI 119, ¶ 114, 283 Wis. 2d 639, 700 N.W.2d 98; *State v. Hicks,* 202 Wis. 2d 150, 172, 549 N.W.2d 435 (1996). By contrast, Egerson does not insist that he is innocent, but argues that his continual harassment of his estranged wife in violation of multiple court orders should have been charged as misdemeanors rather than a felonies.

Egerson cannot show that justice miscarried in his case. Egerson's argument can be summed up by saying that the enhancers should not have applied, and without them, he would have received a shorter sentence. For the reasons explained above, the circuit court correctly found probable cause for the domestic abuse repeater enhancements based on § 968.075. Likewise, as stated above, even assuming that Egerson should not have been subject to the domestic abuse repeater statute, he cannot show a reasonable probability that he would have gone to trial instead of pleading guilty or received a shorter sentence in plea negotiations.

Rather than asserting his innocence, Egerson speculates that he would have received a shorter sentence if the domestic abuse repeater enhancements were never applied. This speculation cannot prove a substantial probability of a different outcome at a new trial. *See Schumacher*, 144 Wis. 2d at 388. Nor can Egerson show that any aspect of his case is exceptional. Accordingly, he is not entitled to a new trial in the interest of justice.

CONCLUSION

For the reasons stated herein, the State of Wisconsin respectfully requests that this court affirm the judgment and order from which this appeal is taken.

Dated this 27th day of January, 2017.

Respectfully submitted,

BRAD D. SCHIMEL
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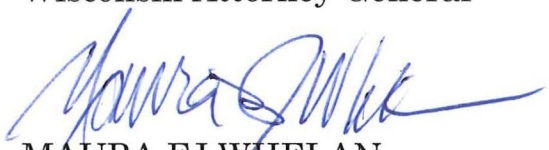

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 7722 words.

Dated this 27th day of January, 2017.

MAURA FJ WHELAN
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 27th day of January, 2017.

MAURA FJ WHELAN
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SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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