STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2017AP381-CR
(Milwaukee County Case No. 2014CF3516)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KORRY L. ARDELL,

Defendant-Appellant.

Appeal From The Judgment of Conviction and Final Order Entered In The Circuit Court For Milwaukee County, The Honorable Jeffrey A. Wagner Presiding

---

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

Robert R. Henak
State Bar No. 1016803

HENAK LAW OFFICE, S.C.
316 North Milwaukee Street, Suite 535
Milwaukee, Wisconsin 53202
(414) 283-9300

Counsel for Defendant-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions, Statutes, and Rules

Other Authorities

ISSUES PRESENTED FOR REVIEW

1. Wisconsin's stalking statute tracks language from an early Model Anti-Stalking Code likewise employed by several other states. Under that language, "stalking" is limited to "a course of *conduct directed at a specific person*," i.e., the alleged victim. Wis. Stat. §940.32(2) (emphasis added). As uniformly interpreted by states with similar language, that language excludes conduct or statements regarding the alleged victim but directed at third parties, absent proof and a jury finding beyond a reasonable doubt that the defendant either intended such information to be passed on to the alleged victim or intended the third party to harass the alleged victim based on the information.

Given that language,

a. Did the circuit court err in admitting evidence that Ardell sought information about N.T. from her former supervisor;

b. Did the jury instructions, which permitted conviction based on the defendant's conversations with third parties about the alleged victim, without requiring a finding that he intended that the substance of the conversations be communicated to the alleged victim or encourage harassment of the alleged victim, fail to require proof beyond a reasonable doubt of all facts necessary for conviction;

c. Did the instructions, which permitted conviction based on the defendant's conversations with third parties about the alleged victim, without requiring a finding beyond a reasonable doubt that he intended that the substance of the conversations be communicated to the alleged victim or encourage harassment of the alleged

victim, violate Ardell's First Amendment rights and Wis. Stat. §940.32(4); and

d. Whether retroactive judicial expansion of the scope of §940.32(2) to allow conviction of Ardell based on his conduct or conversations directed at third parties without proof beyond a reasonable doubt that he intended that the substance of the conversations be communicated to the alleged victim or encourage harassment of the alleged victim, would violate due process.

The circuit court denied Ardell's *in limine* motion to exclude evidence that Ardell sought information about N.T. from her former supervisor and denied Ardell's post-conviction motions challenging the admission of that evidence and the failure of the instructions to properly define the offense.

2. Whether the jury instructions failed to require proof beyond a reasonable doubt of all facts necessary for conviction by:

a. Failing to require proof beyond a reasonable doubt that Ardell acted with the subjective intent or purpose that his actions would cause a reasonable person to fear bodily injury or death to herself or a member of her family; or

b. Failing to require proof beyond a reasonable doubt that Ardell "knew or should have known that at least one of the acts constituting the course of conduct *would* [rather than merely 'could'], place [the alleged victim] in reasonable fear of bodily injury . . .."

The circuit court denied Ardell's post-conviction motion challenging the failure of the instructions to properly define the offense.

3. Whether any alleged failure by Ardell's trial counsel to properly object to any of the substantive errors alleged here denied Ardell the effective assistance of counsel.

The circuit court summarily denied Ardell's post-conviction motion alleging ineffectiveness of trial counsel on these grounds.

4. Whether the circuit court erred in denying Ardell's motion without a hearing.

The circuit court merely adopted portions of the state's post-conviction memorandum and summarily denied Ardell's post-conviction motion without a hearing.

5. Whether reversal is justified in the interests of justice under Wis. Stat. §752.35 on the grounds that the real controversy was not fully tried.

The circuit court did not decide whether this Court should exercise its discretion under §752.35 but did deny a similar claim directed to its own discretion.

6. Whether the circuit court erred in failing to strike the Domestic Abuse enhancer and the Domestic Abuse Repeater enhancer from the Judgment.

Although the Court dismissed the enhancers at the beginning of the trial (R88:14), they somehow returned on the Judgment of Conviction (R50). Ardell sought correction of the oversight in his post-conviction motion (R54:1), but the lower court did not address or decide the point (*see* R65; App. 1-3).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate in this case under Wis. Stat.

(Rule) 809.22. Appellant's arguments clearly are substantial and do not fall within that class of frivolous or near frivolous arguments concerning which oral argument may be denied under Rule 809.22(2)(a). Argument also should prove helpful to the Court given the confusion demonstrated by the state's response below and the circuit court's decision.

Publication likely is necessary under Wis. Stat. (Rule) 809.23. Although Ardell's entitlement to relief is clear under the plain meaning and uniform interpretation by out-of-state courts of the relevant statutory provisions, the courts of this state have not yet addressed application of the stalking statute, Wis. Stat. §940.32(2), to actions directed, not at the alleged victim, but at third parties. A published decision adopting the common sense, plain meaning interpretation of the provision reflected in the out-of-state decisions would provide guidance to litigants and the lower courts and avoid the type of constitutional infringement and misapplication of the stalking statute that happened below.

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2017AP381-CR
(Milwaukee County Case No. 2014CF3516)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KORRY L. ARDELL,

Defendant-Appellant.

STATEMENT OF THE CASE

This case involves the proper interpretation and application of the stalking statute, Wis. Stat. §940.32(2), when the defendant's actions and comments are directed not at the alleged victim, but at third parties. The focus on this issue is aided by the fact that even the prosecutor at trial chose not to dispute that the alleged victim's own assertions were unworthy of belief after unbiased witnesses and physical evidence disproved substantial portions of her claims regarding alleged "stalking" behavior by Ardell and evidence showed that she had attempted to suborn perjury. (*See* R95:57, 86).

On November 5, 2015, the jury convicted Ardell of one count of stalking N.T. in violation of Wis. Stat. §940.32(2) (R96:8). The jury acquitted on a second charge (*id.*), and the state consented to dismissal of a third, despite a jury verdict, on the grounds that the evidence was insufficient (*id.*:8, 10-11).

The evidence at trial established the following:

After a brief intimate relationship in 2007, Ardell and N.T. split up (R89:26; R92:43). N.T. subsequently made a number of allegations about Ardell. When Ardell learned that she had falsely accused him of burning down a home he owned, he was outraged and sought information relevant to her credibility so he could protect himself from her allegations (R92:46-48; R93:23-24; R111:Exh.121). Ardell filed open records requests with the Division of Criminal Investigation and, because N.T. was an M.P.S. teacher (R89:17), with Milwaukee Public Schools (R89:18-22, 39-47; R92:51-57, 62-64; R100:Exhs.1-2, 4-7).

Ardell testified that he believed that he needed to show cause for the open records requests. He therefore included information that N.T. was involved in drug use and prostitution and that she had made false assertions (R92:50, 52).[1] He also testified that he believed the requests would remain confidential and he did not think they would get back to N.T. (*id.*:49, 55). The requests were sent to M.P.S., not N.T. (R89:54-55). Only later did Ardell learn from M.P.S. and the attorney he hired to pursue the M.P.S. open records request that N.T. would be informed of the requests (R92:54; *see id.*:58-62; R111:Exh.123).

At trial, N.T. claimed that the eight years she had known Ardell were "horror" (R89:35). She claimed that he sat in front of her house and followed her to work many times, although she chose not to report them at the time or to keep track of more than a couple of the alleged dates (*id.*:33-35, 67-69, 71; *see also* R90:90).

N.T. claimed at trial that Ardell called and threatened her at home on May 23, 2013, the day the circuit court dismissed his

[1] Ardell corroborated the prostitution claim with an online chat showing N.T.'s offer to exchange sex with him for money (R92:43-46; R111:Exh.120).

open records case against M.P.S. (R89:23-26, 32-33, 58, 63-64). N.T. then claimed that she saw Ardell parked in front of her house the following morning and that he followed her to work around 7:30 a.m. (*id.*:63-64). Based on N.T.'s allegations, her school principal at the time, Michelle Hagen, advised her to seek a temporary restraining order, and she did on May 24, 2013 (R89:32-35, 58, 60, 63-65).

However, while unknown to the T.R.O. Court (*see* R92:81-82), N.T.'s phone records showed that the blocked call she received on May 23 was from the City Attorney representing M.P.S., not from Ardell (R91:42-53; R107:Exhs.110-112). Moreover, independent witnesses and supporting exhibits, also not part of the T.R.O. proceedings, confirmed that Ardell was in Wausau overnight on May 23-24, 2013, and then working in his dump truck rather than in front of N.T.'s home in the Milwaukee area (R90:114-20; R91:10-26, 57-68; R103:Exh.105; R105:Exh.107; R107:Exh. 113; R111:Exhs.124-126, 128; *see also* R92:66-77).

N.T. also told police that Ardell had been in front of her home in a maroon van a week before the interview, on or about July 30, 2014 (R90:89). However, independent witnesses and documentary evidence placed Ardell in Green Lake working with his dump truck throughout the period from July 28 through August 2, 2014 (R90:121-26; R91:27-40, 63-69; *see* R93:6-22; R104:Exh.106; R106:Exh.109; R110:Exh.119; R111:Exh.132-134; R112:Exh.135; R113:Exhs.136-137). Ardell also presented evidence and photographs showing that his maroon van had been parked in his driveway, inoperable since July 2013 (R90:49-53; R92:106-07; R95:7-10; R102:Exhs.101-104).

Roger Myszka, who had been a tenant in N.T.'s duplex, testified that N.T. asked him to tell the police that he saw Ardell in a maroon van outside the duplex, even though she knew that

was false. Originally, he did tell the police that he had seen a maroon van. Later, however, he rejected N.T.'s requests that he stick with the false story and called the District Attorney, admitting that N.T. had put him up to telling the lie. (R90:104-13).

Ardell sought assistance from law enforcement to investigate N.T.'s allegations against him and sought to investigate on his own when his requests were ignored (R92:79-81, 84-85; R111:Exh.129). In July 2014, after Hagen had left M.P.S. and was no longer N.T.'s supervisor (R90:11, 18-19), Ardell sent her a series of emails at her new school in Fond du Lac (with copies to others in the Fond du Lac school system but not N.T. (*id.*:14; R93:28, 31)) seeking information regarding the decision to seek the T.R.O. and reflecting his position that the evidence used to seek that T.R.O. was false (*id.*:11-17, 20-24; R92:85-91; R100:Exhs. 9-13).

Although Ardell did not want N.T. to know of his investigation and did not intend that the emails be forwarded to her (R92:11, 93; R93:44),[2] Hagen contacted N.T. at some point and spoke with her about them (R90:16). However, she did not testify regarding the substance of those conversations (*see id.*) and N.T. did not testify regarding the emails or their impact at all (*see* R88:17-78).

Over defense objection that she was neither N.T.'s employer at the time nor the alleged victim (R90:15), Hagen was allowed to testify that the threat of a lawsuit or publicity concerned her:

> THE WITNESS: I was very concerned. In the email, he threatens to file a lawsuit against me, against

[2] Indeed, Ardell intentionally avoided contacting relatives of N.T. who he knew might contact her (R93:46).

> the school board of Fond du Lac, to also get – start protesting on the first day of school, outside the school
>
> He also threatened in here to take out a radio ad as to why I became the principal of the school district. My husband is a retired police officer. I felt very – [objection]

(R90:15). When she subsequently explained why she felt it was "threaten[ing]," she continued with the same focus regarding publicity and her position rather than any threat of physical harm:

> I got the sense that I was nervous for Nicole. I felt threatened for myself and my position and the school in which I work.

(*Id.*:27).

At some point, Ardell also learned that N.T. had made some kind of allegations against Daniel Fischer and he made several calls to Fischer's number in an unsuccessful attempt to speak with him and learn whether she had made similar false allegations against him. Most calls went unanswered, although Ardell once was able to leave a voicemail and once a message with a relative (R90:72-75; R92:96-97; R93:64-65; R101:Exh.16; R114:Exh.17).

Although Ardell did not know it at the time (R92:95; R93:64), Fischer was the father of N.T.'s child (R88:28-29), but no evidence was presented that the two were married or maintained any current relationship. Likewise, no evidence suggested that Fischer or anyone informed N.T. of Ardell's attempts to contact Fischer. Fischer did not testify.

The state also presented evidence that, in frustration over the failure of law enforcement to investigate his claims that N.T. had falsely accused him, Ardell had left a voicemail message for an assistant district attorney, ADA Westphal, asking what he

would need to do to get arrested in the hopes that would trigger such an investigation (R90:82-83; R114:Exh.18). Again, no evidence suggested that anyone informed N.T. of Ardell's voicemail.

In closing arguments, the state effectively ignored N.T.'s own allegations (R95:57, 86) and likewise admitted that the open records requests alone would not support conviction (*id*.:56). Instead, it focused entirely on the Hagen emails and the attempt to contact Fischer as sufficient for conviction because they were about N.T. (*id*.:54-59, 84-87).

At sentencing, the circuit court denied Ardell's written Motion to Set Aside Jury Verdict (R97:2-6; *see* R45; App. 5-9), and sentenced Ardell to two years initial confinement, three years extended supervision, and a fine of $7,500 (R97:44-45). It also denied Ardell's motion to stay the sentence pending appeal (R97:45-46; *see* R44).

By post-conviction motion filed on October 21, 2016, Ardell raised the same challenges raised here, among others (R54). Following briefing (R59; R64), the circuit court summarily adopted portions of the state's opposition memorandum and denied the motion without a hearing (R65; App. 1-3).

Ardell timely appealed and his opening brief currently is due by July 14, 2017. *See* Order (June 23, 2017).

SUMMARY OF ARGUMENT

Because the trial court's admission of evidence and the state's case relied upon an invalid legal theory, the circuit court erred in denying Ardell's post-conviction motion. Should the Court reach Ardell's contingent ineffectiveness claim, the circuit court also erred in denying that claim without a hearing because Ardell's allegations of ineffectiveness, if true, entitle him to relief.

State v. Balliette, 2011 WI 79, ¶18, 336 Wis.2d 358, 805 N.W.2d 334. The facial sufficiency of a motion is reviewed *de novo*. ***Id.***[3]

The state's primary theory in this case – that Ardell could be convicted of stalking in violation of Wis. Stat. §940.32(2) based in whole or in part on his communications with the complainant's former supervisor, Ms. Hagen and other third parties – was legally impermissible under Wisconsin law. The physical evidence or independent and unbiased third party witnesses rebutted every specific allegation N.T. made regarding alleged "stalking" behavior by Ardell, whether sitting outside her house or calling and threatening her. The state therefore reasonably chose not to rely on her allegations in closing (R95:57, 86). Instead, it focused on what it could prove: that Ardell sent Hagen a series of emails and spoke to others about N.T. (*Id.*:52-62, 85-89).

The jury did not miss the point, with Ardell's emails to Hagen among the first exhibits it requested during deliberations (R94:12; *see* R100:Exhs.9-13).

However, Wisconsin law requires that the acts constituting "stalking" be "directed at" the alleged victim – i.e., N.T. – *not* merely be "about" the alleged victim. The emails to Hagen and communications with other third parties could not, under Wisconsin law or logic, constitute part of any "course of conduct directed at" N.T. simply because they were about N.T. Rather,

---

[3] Although the circuit court erred by summarily adopting the state's post-conviction response (R65; App. 1-3), *see, e.g.*, ***State v. McDermott***, 2012 WI App 14, ¶9 n.2, 339 Wis.2d 316, 810 N.W.2d 237, remand is unnecessary to determine the sufficiency of the motion since that issue is reviewed *de novo*, ***id.***; *see* ***Balliette***, 2011 WI 79, ¶18 (sufficiency of motion to require hearing is issue of law reviewed *de novo*). Remand only would be necessary if the Court chooses not to reverse Ardell's conviction outright but instead holds that a hearing is necessary on his ineffectiveness claim. *See* ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979).

such actions directed at third parties cannot be "directed at" the alleged victim absent a jury finding beyond a reasonable doubt that Ardell intended either that the substance of the communications be transmitted to N.T. or that the third parties act on the information to harass N.T. Argument §I,A,1 & 2, *infra*.

Construing §940.32 as covering a defendant's actions in seeking or imparting information about the alleged victim without the requirement that the defendant either intended those actions to be communicated to the alleged victim or used to harass the alleged victim would not merely conflict with the plain meaning of the statute. It also would violate both the First Amendment and the express statutory exception for such actions under Wis. Stat. §940.32(4). Argument §I,A,3, *infra*.

Given the plain language requiring that the defendant's actions be "directed at" the alleged victim, moreover, retroactively expanding the scope of §940.32 to criminalize actions that are only directed at third parties and not the alleged victim also would violate the due process requirement of notice. Argument §I,B, *infra*.

Given the requirement that the course of conduct be "directed at" the alleged victim, the emails and Hagen's testimony were not relevant or admissible on the "course of conduct" element. Even if they were somehow relevant to some other, as yet unidentified issue, the risk that the jury would erroneously and unfairly interpret the evidence as somehow satisfying the "course of conduct" requirement, as the state argued it should, far exceeds any hypothetical legitimate probative value of that evidence, especially since the Court did not instruct the jury that the evidence could be used for only limited, valid purposes. Wis. Stat. §904.03. Argument §I,C, *infra*.

The substantive jury instructions, moreover, permitted the

jury to misapply the evidence of Ardell's emails to Hagen and his communications with law enforcement and Daniel Fischer – just as the state argued in closing that it should (*id.*:52-62, 85-89)[4] – and to treat them as sufficient evidence to prove the stalking charge. Argument §I,D, *infra*. Those instructions also failed to require proof beyond a reasonable doubt of the statutory requirements that Ardell intended his actions to cause a reasonable person to fear bodily injury and knew that his actions "would," rather than merely "could," place N.T. in reasonable fear. Argument, §II, *infra*. As such, the instructions impermissibly allowed the jury to convict Ardell without requiring proof beyond a reasonable doubt of all facts necessary for conviction.

Although Ardell's trial counsel overlooked and therefore failed to properly object to some of these errors, that failure constitutes ineffective assistance of counsel. Argument, §III, *infra*.

The identified errors likewise justify reversal in the interests of justice under Wis. Stat. §752.35 since – the state having relied on an invalid theory at trial, and the instructions having failed to require a jury finding on all facts necessary for conviction – it cannot rationally be said that the real controversy has been fully tried. Argument, §V, *infra*.

Finally, because the enhancer allegations were dismissed at trial, they must be stricken from the judgment should the Court fail to reverse Ardell's conviction. Argument, §VI, *infra*.

---

[4] The state conceded that conviction could not be based on Ardell's open records requests (R95:56).

ARGUMENT

I.

BECAUSE WIS. STAT. §940.32 DOES NOT SUPPORT THE STATE'S THEORY OF THE OFFENSE, THE ERRORS BASED UPON THAT INVALID THEORY MANDATE REVERSAL AND A NEW TRIAL.

Having effectively and justifiably conceded that N.T.'s own allegations were not credible (R95:57, 86), the state instead focused its case on the theory that Ardell's communications to third parties, and primarily Michelle Hagen, were sufficient to constitute stalking. Section 940.32, however, does not support the state's broad theory of prosecution. Irrelevant and unfairly prejudicial evidence supporting that theory thus was improperly admitted and the jury was left without proper guidance regarding application of §940.32 on the facts of this case.

A. Wis. Stat. §940.32 Requires that the Relevant "Course of Conduct" be "Directed at" the Alleged Victim, Not Merely Relate to Him or Her

As relevant here, Wis. Stat. §940.32(2) requires proof of the following for a stalking conviction:

> (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.

(Emphasis added).

The Wisconsin Courts have yet to address the meaning of the requirement that the course of conduct be "directed at" the alleged victim. However, 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. As such 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.

1. Applicable legal standards

When interpreting a criminal statute, the question is not what interpretation would serve to uphold the conviction, but what the Legislature intended. Accordingly, interpretation of a statute begins with its language. ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. If the meaning is plain, the inquiry should stop. ***Id.*** Plain meaning may be ascertained not only from the words employed in the statue, but from the context. ***Id.*** ¶46. Thus, courts interpret statutory language in the context in which the words are used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results. ***Id.*** Moreover, "statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage." ***Id.***

Criminal statutes, however, must be strictly construed in favor of the defendant unless such a construction conflicts with the *manifest* intent of the Legislature. *E.g.*, ***State v. Olson***, 106

Wis.2d 572, 585, 317 N.W.2d 448 (1982). *See also* ***United States v. Bass***, 404 U.S. 336, 347 (1971). Given the constitutional requirement of prior notice, and because legislatures and not courts must define crimes, criminal liability exists in a given circumstance only when the Legislature "'plainly and unmistakably'" says so. ***Bass***, 404 U.S. at 348-49 (citation omitted).

2. "Directed at" means "directed at," not "relates to"

The language of the statute expressly requires that the course of conduct be "directed at" the alleged victim. Like the broader formulation, "directed toward," the plain meaning of "directed at" as used in §940.32(2) is that the conduct must be targeted or aimed at the alleged victim, and not at a third party. *See generally* ***Leonard v. State***, 2015 WI App 57, ¶¶26-31, 364 Wis.2d 491, 868 N.W.2d 186 (Defendant's act of kicking of a door in his wife's presence not necessarily "directed at" his wife "in the sense that it was part of a course of conduct directed at frightening and intimidating her.").

The statutory definition of "course of conduct" bears this out. Wis. Stat. §940.32(1)(a) defines "course of conduct" in terms of specific actions, all of which directly or indirectly involve actual or attempted contacts with or communications to the alleged victim. (App. 14-17).

The legislative history reinforces the plain language of the statute that dictates that it only applies to actions "directed at" the alleged victim and not to tangential actions involving third parties that are not intended to be communicated to the alleged victim. Wisconsin's stalking statute originally was based on the National Institute of Justice's 1993 Project to Develop a Model Anti-Stalking Code for the States. ***State v. Warbelton***, 2009 WI 6, ¶35, 315 Wis.2d 253, 759 N.W.2d 557. The Model Code

similarly required that the defendant, *inter alia*, "engage[d] in a course of conduct directed at a specific person . . .."). Model Anti-Stalking Code for the States, §2(a) Available at https://www.ncjrs.gov/pdffiles1/Digitization/144477NCJRS.pdf

Not surprisingly, therefore, many other states have stalking or harassment statutes employing similar language. The decisions from those states addressing the issue uniformly support the plain meaning of the statute that the defendant's actions must target the alleged victim to be included within the scope of the prohibited "course of conduct directed at a specific person." Actions merely intended to obtain information about the alleged victim from or to relay such information to third parties are not included absent proof that the defendant 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.

For instance, in ***Chan v. Ellis***, 770 S.E.2d 851 (Ga. 2015), the Georgia Supreme Court reversed a permanent injunction against a website owner who had posted disparaging claims about a poet, on the grounds that the posts were not "directed at" or "directed to" the poet:

> *That a communication is about a particular person does not mean necessarily that it is directed at that person*. . . .The limited evidence in the record shows that Chan and others posted a lot of commentary to his website about Ellis, but it fails for the most part to show that the commentary was directed specifically at Ellis. And there is no evidence that Chan did anything to cause these posts to be delivered to Ellis or otherwise brought to her attention, notwithstanding that he may have reasonably anticipated that Ellis might come across the posts, just as any member of the Internet-using public might.

Id. at 854 (emphasis added).

Similar to Wisconsin's, Florida's stalking statute requires that the prohibited acts be "directed at a specific person." Fla. Stat. §784.048(2). In ***Curry v. State***, 811 So.2d 736, 741 (Fla. App. 2002), the Court held that "stalking" under this statute "retains the concept of some type of contact, whether it is verbal, direct, or indirect, between the stalker and the victim." In ***Chevaldina v. R.K./FL Management, Inc.***, 133 So.3d 1086 (Fla. App. 2014), the Court reversed a preliminary injunction, finding that derogatory internet blog posts about a person were not "directed at" that person under the terms of the stalking statute. ***Id.*** at 1091-92. In ***Scott v. Blum***, 191 So.3d 502 (Fla. App. 2016), the same court recently overturned an injunction for protection from cyberstalking on the grounds that Scott's repeated emailing and derogatory posts and comments about Blum to other members of a professional organization both men belonged to did not constitute a course of action "directed at" Blum:

> Likewise, the emails here do not meet the statutory definition of cyberstalking. The emails were not "addressed" to Mr. Blum, and nothing indicates that Mr. Blum was an intended recipient. . . . The emails sent to 2200 NAPPS members do not constitute words "directed at a specific person" for purposes of the cyberstalking statute simply because they are about Mr. Blum.

Id. at 504-05. *See also* ***David v. Textor***, 189 So.3d 871, 875 (Fla. App. 2016) (overturning cyberstalking injunction on grounds that David's email to other business associates of Textor and posts on social media with links to articles about Textor were not a course of action "directed at" Textor because "where comments are made on an electronic medium to be read by others, they cannot be said to be directed to a particular person."

Massachusetts has a similar stalking or "criminal harass-

ment" statute that requires, among other things, a series of acts "directed at a specific person." Mass. G.L. c.265, §43A(a). In ***Commonwealth v. Welch***, 825 N.E.2d 1005 (Mass. 2005), *abrogated on other grounds*, ***O'Brien v. Borowski***, 961 N.E.2d 547 (Mass. 2012), the Massachusetts Supreme Court addressed this provision as follows in language equally applicable to the same language under Wis. Stat. §940.32(2):

> C. *Conduct "directed at a specific person."* The statute further requires that the "pattern of conduct or series of acts" be "directed at a specific person." G.L. c. 265, §43A(a). Moreover, the statute clarifies that the "specific person" referred to is the victim–the person who is "seriously alarm[ed]" by the harassment. *Id. In short, this provision, by its plain terms, requires the Commonwealth to establish, at the very least, that the defendant intended to target the victim with the harassing conduct on at least three occasions.*

825 N.E.2d at 1014 (emphasis added).

The Court went on to hold that neither the defendant's disparaging comments to a third party about the complainants nor her yelling about them while in her own apartment were "directed at" the complainants even though they overheard the comments. ***Id.*** at 115-16. "[T]he record does not establish that the defendant intended the statements to be heard by Robichau or Brienza, nor that she should have known that the statements would be heard by them." ***Id.***[5] See also ***Demayo v Quinn***, 25 N.E.3d 903 (Mass. App. 2015) (finding no evidence that the actions of the defendant at a horse barn owned by the complainants but occupied as well by others were "directed at" the

[5] *Compare* ***Commonwealth v. Johnson***, 21 N.E.3d 937, 948 (Mass. 2014) (posting false Craig's List ads causing unwitting third parties to contact and harass victim was conduct "directed at" victim, "the equivalent of the defendants recruiting others to harass the victims and the victims alone").

complainants).

Arizona, too, has a statute authorizing injunctions against "harassment," which is defined to require, *inter alia*, that the defendant committed a series of acts "that is directed at a specific person." Ariz. R. S. §§12-1809(E) & (R). In ***LaFaro v. Cahill***, 56 P.3d 56 (Ariz. 2002), the Arizona Supreme Court held that the acts, to be considered, must be directed at the alleged victim; merely talking about the victim with a third party is not enough:

> LaFaro was not a party to this conversation, and Cahill was not talking to LaFaro. Although LaFaro may have overheard a segment of that conversation, Cahill's communication does not satisfy the statutory definition of harassment, which requires a harassing act to be "directed at" the specific person complaining of harassment. [citation omitted]. While Cahill was talking about LaFaro and expressing his opinion of the recall effort, his comments were "directed at" Martelli, not LaFaro.

Id. at 59-60 (footnote omitted).

These decisions addressing the same language at issue here confirm the plain meaning of the statutory requirement that the relevant "course of action" be "directed at a specific person," in this case, N.T. Communications or acts directed at third parties and not intended to be transmitted to the alleged victim do not legally qualify.

3. Including communications with third parties about the alleged victim as permissible parts of the "course of conduct" violates the defendant's First Amendment rights and Wis. Stat. §940.32(4) absent an intent that they be communicated to the alleged victim or encourage harassment of the alleged victim

Wis. Stat. §940.32(4) provides that the stalking statute "does not apply" to conduct protected by the First Amendment,

and specifically identifies "[g]iving publicity to and obtaining or communicating information regarding any subject. . ." as protected. Wis. Stat. §940.32(4)(a)1. The requirement of direct or indirect contact or intended contact between the defendant and the alleged victim thus is necessary both to protect the statute from Constitutional challenge, *see, e.g.*, ***Welch***, 825 N.E.2d at 1018-19, and to harmonize the statute with the express exception under §940.32(4)(a).

"[A] statute . . . which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind." ***Watts v. United States***, 394 U.S. 705, 707 (1969). The states generally may not proscribe speech based on its content. *E.g.*, ***R.A.V. v. St. Paul***, 505 U.S. 377, 387 (1992). Yet, criminalizing communications that are *about* the alleged victim but that the defendant does not intend to be communicated to the alleged victim or to cause others to harass the alleged victim does just that.

While the Supreme Court has recognized certain categorical exceptions to this rule, such as "fighting words," ***Chaplinsky v. New Hampshire***, 315 U.S. 568 (1942), and "true threats," ***Watts***, *supra*, neither applies to communications with third parties *about* an alleged victim that the defendant did not intend to be communicated to the alleged victim. As the Massachusetts Supreme Court has explained:

> the requirement that the harassment must be "directed at specific persons" comports with the rule that where words are not "directed to the person of the hearer" and "[n]o individual actually or likely to be present could reasonably ... regard[ ] the words ... as a direct personal insult," even offensive words are not "fighting words."

Welch, 825 N.E.2d at 1019, quoting ***Cohen v. California***, 403 U.S. 15, 20 (1971), quoting ***Cantwell v. Connecticut***, 310 U.S. 296, 309

(1940).

Nor can comments to a third party about the alleged victim satisfy the test for a "true threat" absent proof and a jury finding that the defendant intended that the comments be relayed to the alleged victim. As the Supreme Court has explained, a "true threat" is defined in terms of its impact on "the listener," not some other alleged victim who is neither present to hear the alleged threat nor the intended recipient:

> This court has considered these cases and concludes that the test for a true threat that appropriately balances free speech and the need to proscribe unprotected speech is an objective standard from the perspectives of *both the speaker and listener*. A true threat is determined using an objective reasonable person standard. A true threat is a statement that a speaker would reasonably foresee *that a listener would reasonably interpret* as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech.

State v. Perkins, 2001 WI 46, ¶29, 243 Wis.2d 141, 626 N.W.2d 762 (emphasis added).

Because the stalking statute cannot constitutionally be applied to a defendant's statements to a third party about the alleged victim absent a jury verdict beyond a reasonable doubt that the defendant intended the substance to be communicated to the alleged victim or to cause third parties to harass the alleged victim, it must not be construed as permitting such an application.

B. Construing §940.32(2) to Modify or Excise the "Directed At" Requirement Would Violate Ardell's Due Process Right to Notice.

The plain meaning of the statutory requirement that the

acts constituting the relevant "course of conduct" be "directed at" the alleged victim, combined with the specific exception for the "[g]iving publicity to and obtaining or communicating information regarding any subject, whatsoever," Wis. Stat. §940.32(4)(a)1, mandate that each act alleged to be part of the "course of conduct" be aimed or targeted at the alleged victim. Communication with a third party about the alleged victim is insufficient absent proof beyond a reasonable doubt that the defendant intended that the communication either be transmitted to the alleged victim or cause third parties to harass the alleged victim. The uniform interpretation elsewhere of that plain language, moreover, confirms that plain meaning. Any reinterpretation of that language contrary to the plain meaning presented here thus would deny Ardell due process.

Due process requires prior notice that will enable ordinary people to understand what is prohibited. *E.g.*, ***City of Chicago v. Morales***, 527 U.S. 41, 56 (1999). That due process requirement is violated where, as here, the defendant is entangled by an unexpected judicial enlargement of the scope of a criminal statute. *E.g.*, ***Marks v. United States***, 430 U.S. 188 (1977).

In ***Bouie v. City of Columbia***, 378 U.S. 347 (1964), for instance, the Court reversed a trespass conviction. The state statute there applied only to "entry upon the lands of another . . . after notice . . . prohibiting such entry." The state court, however, interpreted the statute to apply as well to the defendants' actions in remaining at a drug store lunch counter after being told to leave, even though they entered the drug store legally and with permission.

This, the Supreme Court held, violated the due process right to fair notice.

If a judicial construction of a criminal statute is "unex-

> pected and indefensible by reference to the law which had been expressed prior to the conduct in issue," it must not be given retroactive effect.

378 U.S. at 352 (citation omitted). Retroactive application of the state's construction of its statute violated this due process standard because it was so clearly at odds with the statute's clear language and was unsupported by prior decisions. ***Id.*** at 355-63.

See also ***United States v. Lanier***, 520 U.S. 259, 266 (1997) ("[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope").

Here, as in ***Bouie***, due process bars retroactive application to Ardell of an interpretation of §940.32 that effectively reads the "directed at a specific person" requirement or §940.32(4) out of the statute by permitting communications with third parties about the alleged victim to be considered a part of the required "course of conduct" absent proof that the defendant intended the communications to be relayed to the alleged victim. Such an interpretation would be wholly unexpected given the plain meaning of the statutory language, the uniform interpretation of that language elsewhere, the express provision of §940.32(4), and the Constitutional limitations on content-based restrictions on pure speech.

C. The Circuit Court Erred by Admitting Evidence Concerning Ardell's Communications with Hagen

Over defense objection (R118:¶11; R87:12-14; App. 11-13), the circuit court admitted evidence that Ardell had communicated with N.T.'s *former* supervisor, Michelle Hagen, by email (R90:11-17; R100:Exhs. 9-13). At the time he contacted her, Hagen was no longer employed by N.T.'s employer, the Milwaukee Public Schools (R90:7, 11, 18-19), and N.T. denied any

continuing relationship or any relationship beyond the fact that Hagen had been her supervisor (R89:20).

1. Evidence of Ardell's communications with Hagen were irrelevant and therefore inadmissible.

Evidence of Ardell's communications with Hagen and her reactions were not relevant because, contrary to the state's argument (R85:16-18; R95:53-59, 86-87), they could not legally form part of the "course of conduct" required for conviction:

> 1. Because she had left the M.P.S., Hagen was neither N.T.'s employer nor her coworker, the state presented no evidence that they ever were friends, and N.T. denied any such relationship (R89:20). Accordingly, the communications, by definition, could not legally fall within Wis. Stat. §940.32(1)(a)7.[6]
>
> 2. Because the emails were merely *about* N.T. and no evidence was presented that Ardell intended that they be relayed to N.T. or that Hagen harm N.T. based on them, they do not satisfy the statutory or constitutional requirement that they be "directed at" N.T. *See* Section I,A, *supra*.
>
> 3. Because the communications were pure speech and the intended recipient was Hagen and not N.T., neither the "fighting words" nor "true threat" exceptions apply and the First Amendment and §940.32(4)(a) bar consideration of those communications as part of the required "course

---

[6] Under §940.32(1)(a)7, the following may be considered as part of the required "course of conduct directed at" the victim:

> 7. Sending 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.

of conduct directed at" N.T. *See* Section I,A,3, *supra*. The stalking statute expressly "does not apply" to "[g]iving publicity to and obtaining or communicating information regarding any subject. . .." Wis. Stat. §940.32(4)(a)1.[7]

Although admission of evidence generally is left to the trial court's sound discretion, the court erroneously exercises its discretion, as here, by ruling unreasonably or applying the wrong legal standard. ***State v. Miller***, 231 Wis.2d 447, 467, 605 N.W.2d 567 (Ct. App. 1999). An issue of law is reviewed *de novo*. ***State v. Richard G.B.***, 2003 WI App 13, ¶7, 259 Wis.2d 730, 656 N.W.2d 469.

Here, the trial court admitted the evidence because Hagen was N.T.'s *former* coworker (R87:12-14; App. 11-13). However, §940.32(1)(a)7 expressly requires that the communication be to a "coworker," and a "former" coworker is, by definition, no longer a coworker. The trial court thus erred as a matter of law.

2. Any legitimate relevance to the evidence was outweighed by its prejudicial effect

Even if the Hagen emails and testimony potentially could be deemed relevant for some as yet unidentified purpose other than as a part of the required "course of conduct directed at" N.T., any minimal legitimate relevance was far outweighed by the danger of unfair prejudice given the likelihood that they would be misconstrued (as the prosecutor encouraged the jury

---

[7] Whatever apparent conflict may exist between §940.32(4)(a)1's protection of to "[g]iving publicity to and obtaining or communicating information regarding any subject. . .." and §940.32(1)(a)7's inclusion of "[s]ending material . . . for the purpose of obtaining information about [or] disseminating information about" the victim is reconciled by the latter's requirement that the material be sent to the victim or specific categories of people very closely associated with the victim, *i.e.*, "a member of the victim's family or household or an employer, coworker, or friend of the victim." None are at issue here.

to construe them (R95:53-59, 86-87)) as acts forming part of a course of conduct against N.T. Indeed, the likelihood that the jury in fact erroneously relied on the Hagen evidence as part of the required "course of conduct directed at" N.T. is extremely high. The state effectively abandoned N.T.'s own claims that Ardell sat outside her home or that he had called or threatened her (*see id.*:57, 86), given credible documentary and third-party evidence rebutted them. Virtually all that was left were the Hagen emails and testimony, which the jury was left able to rely on. That evidence accordingly should have been excluded under Wis. Stat. §904.03.

Having erroneously admitted the evidence to show part of the required "course of conduct," the trial court did not reach this prong of Ardell's objection. Because the trial court's decision was based on an error of law, review is therefore *de novo*. ***Miller***, 231 Wis.2d at 467.

D. The Failure of the Jury Instructions to Explain that Ardell's Communications with Third Parties Legally Cannot be Part of the Required "Course of Conduct Directed at" N.T. Absence Proof Beyond a Reasonable Doubt that He Intended Either that They be Relayed to Her or that They Be Used to Harass Her Denied Him the Right to a Jury Verdict Beyond a Reasonably Doubt of All Facts Necessary for Conviction

Absent proper instructions, a lay jury cannot be expected to understand technical legal principles. This is especially true when, as here, the prosecutor has presented his case and argued, without correction from the Court, based entirely on the legally invalid theory that the jury could convict based on evidence that Ardell made assertions to, and sought information from, third parties – Hagen, Daniel Fischer, ADA Westphal, and the M.P.S. – without a jury finding beyond a reasonable doubt that he

intended those communications to get back to N.T. (R95:53-59, 86-87).[8] Absent proper instructions regarding the meaning of "directed at [the alleged victim]," and that the defendant's communications with third parties regarding N.T. legally are not "directed at" her unless he intended either that the substance of those communications be relayed to N.T. or that they cause third parties to harass or frighten her, Ardell was denied the right to a jury verdict beyond a reasonable doubt of all facts necessary for conviction.

The Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." ***In re Winship***, 397 U.S. 358, 364 (1970). The Sixth Amendment, as enforced through the Fourteenth, generally mandates that the jury, rather than the judge, make that determination. *E.g.*, ***Sullivan v. Louisiana***, 508 U.S. 275, 277 (1993); ***Apprendi v. New Jersey***, 530 U.S. 466, 476 (2000).

Accordingly, instructions which relieve the state of its burden of proving all facts or elements necessary for conviction beyond a reasonable doubt violate due process. *E.g.*, ***California v. Roy***, 519 U.S. 2 (1996) (per curiam) (instruction which omitted necessary element violated due process); ***Carella v. California***, 491 U.S. 263, 265-66 (1989) (jury instructions relieving state of burden of proving every element of charged offense beyond

---

[8] The state's pretrial "offer of proof" regarding the stalking charge focused "first and most important" on the Hagen emails, and also cited the other third-party conversations while only briefly mentioning N.T.'s claim that Ardell called and threatened her (R85:16-18), a claim that was disproven at trial by her phone records (R91:42-53; R107:Exhs.110-112). It doubled down on its erroneous legal theory in its Response to Motion to Set Aside the Verdict, again ignoring N.T.'s claims and focusing on Ardell's attempts to contact Mr. Fischer, emails to Hagen, and searching for information about Thomas on the Internet (R46:3-4).

reasonable doubt violate due process).

Although the failure to object generally is deemed a forfeiture of the right to challenge defective jury instructions, Wis. Stat. §805.13; *see* ***State v. Schumacher***, 144 Wis.2d 388, 398-99, 424 N.W.2d 672, 676 (1988), the failure to instruct on a necessary element of the offense in effect constitutes a directed verdict on that element. Accordingly, any waiver or forfeiture of the right to a jury verdict on all facts necessary for conviction must be made during the court's personal colloquy with the defendant demonstrating his knowledge of that right and that his actions would waive it. *E.g.*, ***State v. Smith***, 2012 WI 91, ¶¶52-57, 342 Wis.2d 710, 817 N.W.2d 410; ***State v. Hauk***, 2002 WI App 226; ¶34, 257 Wis.2d 579, 652 N.W.2d 393, citing ***State v. Livingston***, 159 Wis.2d 561, 569, 464 N.W.2d 839 (1991).

"The validity of the jury's verdict depends on the completeness of the instructions," and an inadequate instruction cannot be cured by counsels' arguments or a witness's testimony. ***Perkins***, 2001 WI 46, ¶¶40-42. The jury here was misled by the prosecutor's arguments regarding the facts necessary for conviction. The instructions neither defined the "directed at" requirement nor otherwise cured the prosecutor's error (*see* R95:43-46). Ardell accordingly was denied due process. *E.g.*, ***Carella***, *supra*.

Moreover, because Ardell neither personally waived his right to a verdict beyond a reasonable doubt of all facts necessary for conviction nor demonstrated any knowledge that the instructions would deny him that right, counsel's failure to object to the errors did not forfeit his right to challenge them. ***Smith***, *supra*. Even if counsel's oversight is deemed to have forfeited Ardell's entitlement to review of the claim as of right, that oversight was unreasonable and denied Ardell the effective

assistance of counsel. Section III, *infra*.

II.

THE SUBSTANTIVE INSTRUCTIONS FAILED TO REQUIRE A JURY FINDING BEYOND A REASONABLE DOUBT THAT ARDELL HAD THE SUBJECTIVE INTENT AND KNOWLEDGE NECESSARY FOR CONVICTION

Even separate from the failure of the state's legal theory, the instructions failed to require a jury finding beyond a reasonable doubt of all facts necessary for conviction because they failed to require such proof that Ardell had (1) the subjective intent or purpose that his actions would cause a reasonable person to fear bodily injury or (2) knowledge that his actions would place N.T. in reasonable fear of bodily injury.

Wis. Stat. §940.32(2)(a) requires that "the actor intentionally engage[d] in a course of conduct directed at a specific person *that would cause a reasonable person under the same circumstances to . . . fear bodily injury," etc.* Wis. Stat. §939.23(3) defines "intentionally" as meaning

> that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result.

Because this causation of fear requirement follows the term "intentionally" and is part of the "result specified," the statute thus requires that Ardell had the subjective intent to cause such fear or knew it was practically certain to result. *See also* Wis. Stat. §939.23(3):

> In addition, . . . the actor must have knowledge of those facts which are necessary to make his or her conduct criminal and which are set forth after the word "intentionally."

Yet, there was no instruction requiring such subjective intent or knowledge of practical certainty on Ardell's part.

A finding that Ardell "*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 . . ." (R95:45 (emphasis added)), is not the same as finding that Ardell either intended that the course of conduct have that effect or knew that his actions *would to a practical certainty* cause that result. Likewise, the instruction's "could cause" language does not even conform to the separate statutory requirement that the defendant know or believe that his actions "will cause" such fear. Wis. Stat. §940.32(2)(b). "Could cause" references a mere possibility, while "will cause" requires a particular consequence. As such, the instructions unconstitutionally failed to require a jury finding beyond a reasonable doubt of all facts necessary for conviction. *E.g.*, ***Roy***, *supra*.

Again, Ardell did not personally waive his due process right to a jury verdict on all facts necessary for conviction. Trial counsel's failure to object thus does not waive his right to challenge the error here. ***Smith***, *supra*. Even if it did, counsel's oversight on this point was unreasonable and denied Ardell the effective assistance of counsel. Section III, *infra*.

III.

ARDELL WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL

To the extent that trial counsel failed adequately to preserve any of the substantive issues raised in this motion, Ardell was denied the effective assistance of counsel. U.S. Const. amend. VI; Wis. Const. Art. I, §7. There was no legitimate tactical basis for such failures of counsel, such failures were unreasonable under prevailing professional norms, and Ardell's defense was prejudiced by them.

A. Applicable Legal Standards

An ineffectiveness claim is not an assault on the general competence of trial counsel nor is it a moral judgment on counsel's abilities or conduct. Everyone, defense counsel, prosecutors, and judges included, makes mistakes. A finding of ineffectiveness is simply a recognition that, for whatever reason, this particular human attorney made one or more mistakes in this case, the result of which was to deprive the defendant of a fair trial. *See* ***State v. Felton***, 110 Wis.2d 485, 499, 329 N.W.2d 161 (1983) ("judges should recognize that all lawyers will be ineffective some of the time; the task is too difficult and the human animal too fallible to expect otherwise" (citation omitted)).

A defendant alleging ineffective assistance of counsel first "must show that 'counsel's representation fell below an objective standard of reasonableness.'" ***State v. Johnson***, 133 Wis.2d 207, 217, 395 N.W.2d 176 (1986), *quoting* ***Strickland v. Washington***, 466 U.S. 668, 688 (1984). Reasonableness must be evaluated from counsel's perspective at the time of the alleged error. ***Kimmelman v. Morrison***, 477 U.S. 365, 384 (1986), *citing* ***Strickland***, 466 U.S. at 689. Deficiency is shown when counsel's errors resulted from oversight or inattention rather than a reasoned defense strategy. *See* ***Wiggins v. Smith***, 539 U.S. 510, 534 (2003); ***Kimmelman***, 477 U.S. at 385; ***State v. Moffett***, 147 Wis.2d 343, 355, 433 N.W.2d 572 (1989).

The second prong requires resulting prejudice. "The defendant is not required to show 'that counsel's deficient conduct more likely than not altered the outcome in the case.'" ***Moffett***, 147 Wis.2d at 354 (quoting ***Strickland***, 466 U.S. at 693); *see* ***Kyles v. Whitley***, 514 U.S. 419, 434 (1995). Rather, the question on review is "whether there is 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. No supplemental, abstract inquiry into the "fairness" or reliability of the proceedings is permissible. ***Williams v. Taylor***, 529 U.S. 362 (2000).

In assessing resulting prejudice, the Court must consider the totality of the circumstances, ***Strickland***, 466 U.S. at 695, and thus must assess the cumulative effect of *all* errors. *E.g.*, ***Alvarez v. Boyd***, 225 F.3d 820, 824 (7th Cir. 2000); *see* ***State v. Thiel***, 2003 WI 111, ¶¶ 59-60, 264 Wis.2d 571, 665 N.W.2d 305 (addressing cumulative effect of deficient performance of counsel).

B. Trial Counsel's Performance Was Deficient

Attorney Eippert had no strategic or tactical reasons for any perceived failure to preserve the substantive issues raised here. As shown in Ardell's post-conviction motion, he simply did not think of them. (R54:17, 21-22). Deficient performance is shown where, as here, counsel's failures are the results of oversight rather than a reasoned defense strategy. *E.g.*, ***Wiggins***, 539 U.S. at 534; ***Moffett***, 147 Wis.2d at 354.

C. Counsel's Deficient Performance Prejudiced Ardell's Defense

For the reasons stated in Section IV, *infra*, there exists more than a reasonable probability of a different result but for counsel's deficient performance.

IV.

THE IDENTIFIED ERRORS PREJUDICED ARDELL'S DEFENSE AND WERE NOT HARMLESS

Given that its case against Ardell effectively relied entirely on an erroneous legal theory and irrelevant evidence, the state cannot meet its burden of proving beyond a reasonable doubt that the combined effects of the identified errors were harmless.

See ***State v. Carnemolla***, 229 Wis. 2d 648, 653, 600 N.W.2d 236 (Ct. App. 1999) (burden is on beneficiary of error to prove harmlessness beyond a reasonable doubt); *see* " ***State v. Mayo***, 2007 WI 78, ¶64 & n.8, ¶66, 301 Wis.2d 642, 734 N.W.2d 115 (resulting harm must be assessed cumulatively rather than in artificial isolation). For the same reasons, there exists far more than a reasonable probability of a different result but for the errors.

The state chose not to dispute the trial evidence that N.T.'s own allegations lacked credibility (R95:57, 86). The state's concession was reasonable because:

> – N.T.'s own phone records disproved her claim that Ardell called and threatened her (R91:42-53; R107:Exhs.110-112),
>
> – unbiased third party witnesses and documentary evidence showed that Ardell was far away working or in court at the time she claimed he was sitting outside her house (R90:114-20; R91:10-26, 57-68; R103:Exh.105; R105:Exh.107; R107:Exh. 113; R111:Exhs.124-126, 128; *see also* R92:66-77 (Ardell working in Wausau area May 23-24, 2013, not outside N.T.'s house or following her to work in Milwaukee); (R90:121-26; R91:27-40, 63-69; *see* R93:6-22; R104:Exh.106; R106:Exh.109; R110:Exh.119; R111:Exh.132-134; R112:Exh.135; R113:Exhs.136-137 (Ardell in Green Lake area working July 28-August 2, 2014 (except attended court hearing in Manitowoc morning of July 31, 2014), not sitting outside N.T.'s house or following her to work in Milwaukee)), and
>
> – evidence indicated that she encouraged a neighbor to commit perjury in support of her story (R90:104-13).

The state's choice not to respond to this evidence or to argue N.T.'s credibility effectively conceding the point. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis.2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979) (that not disputed is deemed conceded).

The case against Ardell thus effectively relied upon the state's mistaken theory that a stalking conviction could be based on his communications to third parties – Hagen, Fischer, the M.P.S., and ADA Westphal – (R95:53-59, 86-87), despite the absence of evidence that Ardell intended that those communications would be relayed to N.T. or used by third parties to harass her.[9] The state emphasized that theory in closing (R95:54-59, 84-87), repeatedly – albeit erroneously – asserting that it was sufficient for conviction, and the jury apparently bought into the state's theory since the Hagen emails were among the first exhibits specifically requested during deliberations. (R94:12; *see* R100:Exhs.9-13).

Where, as here, the state's case at trial relied almost entirely, if not exclusively, on evidence supporting a particular invalid legal theory, that error cannot be harmless beyond a reasonable doubt. The state presented little or no evidence, and the instructions did not require the jury to find, that Ardell intended any of the third party communications to get back to N.T., let alone that he either intended that they cause her to fear or that he knew that they would cause such fear.

Harmless error analysis bars this Court from interposing itself as some sort of "super-jury." ***Neder v. United States***, 527

---

[9] Indeed, the state presented no evidence that Ardell's communications or attempted communications with Fischer or Westphal ever were forwarded to N.T., and it admitted in closing that his open records requests to M.P.S. would not support a stalking conviction (R95:56).

U.S. 1, 19 (1999). Where, as here, the defendant contested the issue and the evidence viewed most favorably to the defendant supports his theory, it is for the jury to determine whether to believe it. ***Neder***, 527 U.S. at 19 ("where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding [the court] should not find the error harmless").

V.

A NEW TRIAL IS APPROPRIATE IN THE INTERESTS OF JUSTICE

Regardless of whether prior counsel is deemed ineffective, the state focused its case on Ardell's actions directed at third parties rather than the alleged victim. It did so without appropriate instructions guiding the jury's use of such evidence. Reversal therefore is justified in the interests of justice under Wis. Stat. §752.35 because the real controversy was not fully tried. *See* ***Vollmer v. Luety***, 156 Wis.2d 1, 456 N.W.2d 797 (1990). The Court's discretionary authority to reverse in the interests of justice furthers its obligation to do justice in an individual case. ***Id.***, 156 Wis.2d at 15.

This Court may exercise its discretion under §752.35 regardless whether the circuit court misused its discretion. *See* ***Stivarius v. DiVall***, 121 Wis.2d 145, 152 & n.5, 358 N.W.2d 530 (1984).

The Supreme Court has recognized that reversal in the interests of justice is justified when, as here, "the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried." ***State v. Hicks***, 202 Wis.2d 150, 160, 549 N.W.2d 435 (1996). Reversal in the interests of justice also is appropriate where defective jury instructions prevent the real controversy

from being fully tried. ***Vollmer***, 156 Wis.2d at 20.[10]

This is the prototypical case for application of the Court's discretionary authority to do justice under §752.35. The real controversy cannot be fully tried when, as here, the instructions do not require a jury finding beyond a reasonable doubt regarding the core disputed facts that are legally necessary for conviction. *See, e.g.*, ***In Interest of C.E.W.***, 124 Wis. 2d 47, 57, 368 N.W.2d 47 (1985) ("If the instructions in this case are erroneous, the key issue, that is, whether the County proved facts upon which the jury could conclude that a ground for termination of parental rights exists, would not have been fully or properly tried"); ***Air Wisconsin, Inc. v. N. Cent. Airlines, Inc.***, 98 Wis. 2d 301, 318, 296 N.W.2d 749 (1980).

The prosecutor specifically based his case against Ardell on the erroneous theory that the "course of conduct" required for a stalking conviction may be constructed out of the defendant's communications with third parties even absent any evidence or jury finding beyond a reasonable doubt that Ardell intended the substance of those communications to be relayed back to N.T. or used by third parties to harass her. The jury was not instructed otherwise. Indeed, the prosecutor even raised an email inquiry to Ms. Hagen as the centerpiece of his case, despite the absence of evidence (or a jury finding) that Ardell either intended the substance of that email to be sent to N.T. or intended to cause her or her family to fear bodily injury. Once again, no jury instruction was provided to set the jury straight.

Because the state's entire case was based on an invalid

---

[10] Under the "real controversy not tried" category of "interests of justice" cases, "it is unnecessary . . . to first conclude that the outcome would be different on retrial" prior to ordering a new trial. ***Vollmer***, 156 Wis.2d at 19. As amply demonstrated throughout this motion, however, the facts of this case establish just such a probability of acquittal upon retrial.

legal theory, and because the instructions did not require the jury to find all facts legally and constitutionally necessary for conviction, it cannot rationally be said that the real controversy was fully tried. Ardell accordingly is entitled to reversal and a new trial.

VI.

BECAUSE THEY WERE DISMISSED AT TRIAL, THE ENHANCERS MUST BE STRICKEN FROM THE JUDGMENT

Although the state originally charged Ardell with the Domestic Abuse enhancer and the Domestic Abuse Repeater enhancer (R1), both were dismissed at trial (R88:14). The Judgment nonetheless retains those enhancers (R50), and the circuit court overlooked Ardell's post-conviction request that the improper enhancers be stricken from the judgment (R54:1; *see* R65; App. 1-3).

Because Ardell was not convicted of the enhancers, they must be ordered stricken from the Judgment. *See* ***State v. Prihoda***, 2000 WI 123, ¶5, 239 Wis.2d 244, 618 N.W.2d 857 (trial court must correct clerical error in judgment or direct clerk's office to do so).

CONCLUSION

For these reasons, Korry Ardell respectfully asks that this Court vacate his judgment of conviction and remand the matter to the circuit court for a new trial. If such relief is not granted, the Court should reverse the order denying Ardell's post-conviction motion and remand for an evidentiary hearing on that motion. And finally, should such relief not be granted, the Court should order the circuit court to strike the Domestic Abuse and Domestic Abuse Repeater enhancers from the judgment.

Dated at Milwaukee, Wisconsin, June 30, 2017.

Respectfully submitted,

KORRY L. ARDELL,
Defendant-Appellant

HENAK LAW OFFICE, S.C.

_____

Attorney Robert R. Henak
State Bar No. 1016803

P.O. ADDRESS:

316 North Milwaukee Street, Suite 535
Milwaukee, Wisconsin 53202
(414) 283-9300

RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,624 words.

_____

Robert R. Henak

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

_____

Robert R. Henak

Ardell Ct. App. Brief.wpd

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 30th day of June, 2017, I caused 10 copies of the Brief and Appendix of Defendant-Appellant Korry L. Ardell to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688.

_____

Robert R. Henak