COURT OF APPEALS
DECISION
DATED AND FILED

May 8, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1391-CR **Cir. Ct. No. 2011CF478**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONALD W. MAIER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Wood County: JON M. COUNSELL, Judge. *Affirmed*.

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

¶1 LUNDSTEN, J. Donald Maier appeals the circuit court's judgment convicting him of six counts of stalking under WIS. STAT. § 940.32, as a repeater.[1] Maier also appeals the circuit court's order denying his motion for postconviction relief. The stalking charges were based on two letters that Maier sent to jurors who had found him guilty in a prior criminal proceeding in 2006. Maier argues that (1) the stalking statute is unconstitutional as applied to him under the First Amendment because his letters did not constitute a "true threat"; (2) the evidence was insufficient for the jury to find a true threat; (3) his trial counsel was ineffective in several respects; and (4) his sentence should be vacated based on a new sentencing factor and because the sentence was unduly harsh and excessive. We reject Maier's arguments, and affirm.

Background

¶2 In 2006, a Wood County jury found Maier guilty of two counts of threatening a judge. In 2011, after Maier had finished serving a prison sentence on those convictions and was living in the community, Maier sent two letters to at least ten of the jurors on the 2006 jury.

¶3 The first letter included pardon materials, along with a handwritten addendum directed at the jurors. It began:

> Jury Duty
> is
> Not Over
>
> I did 2 years in prison and because of the power Judge Zappen had I got skrewed. Now I'm going for a

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

> Pardon with the Governor's office. And I will need your help.

The letter directed numerous questions to the 2006 jurors, including the following:

> 1. Do you think Wood County did a Professional Job? Such as keeping your Name's and addresses from someone like me?
>
> ….
>
> Note you good people help poor Judge Zappen put me in prison. Real good people in there.
>
> 2. Can I give this list o[f] Jurors to the people I had to live with?
>
> ….
>
> 8. Did you know I had a 50,000 volt zapper on my arm to control what I might say to you?
>
> ….
>
> 10. Did you know Wood County took me out of Mendota Mental ins. to put me in Wood County Norwood mental ins ...[?]
>
> From Norwood to the Wood County Jail in a suicide watch ….
>
> ….
>
> 14. Do you think you did the right thing sending me to prison?

The first letter went on to state:

> My story will be heard nation wide soon. Your names could be too. Because you helped in the Judge Zappen conspiracy.
>
> Feel free to call the police[,] the DA's office in Wood County or [the clerk of court].
>
> And please do the Right thing. Mail this to the Governor's Pardon Advisory Board 115 East State Capitol, Madison WI 53702.

> ….
>
> The sooner I get justice will be when everybody in the Wisconsin Rapids police cover-up and the Judge Zappen conspiracy will get peace. "No more letters"

¶4 The second letter, sent shortly after the first, reproduced a newspaper clipping stating that a "Wisconsin Rapids woman reported receiving a threatening letter from a man for whose trial she was a juror." In the second letter, Maier wrote:

> I read the paper too.
>
> My [prior] letter was not threatening in any way.
>
> I just want to let you see what kind of Idiots you helped put me in prison.
>
> I feel Judge Zappen and Judge Mason were two of the Biggest corrupt gangsters in Wood County.
>
> "you have Nothing to fear from me"
>
> Please call [a state representative or the governor].

¶5 The State charged Maier with ten counts of stalking, consisting of one count for each of the ten 2006 jurors who received both letters. The elements of stalking, as applicable here, are:

> 1) "The actor intentionally engages in a course of conduct[.]"
>
> 2) "[The course of conduct is] 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."
>
> 3) "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."

> 4) "The actor's acts cause the specific person to suffer serious emotional distress or induce fear in the specific person of bodily injury to or the death of himself or herself or a member of his or her family or household."

WIS. STAT. § 940.32(2)(a)-(c); *see also* WIS JI—CRIMINAL 1284. Under the statute, there are a variety of "acts" that may form the basis for the actor's "course of conduct," including "[s]ending material by any means to the victim." WIS. STAT. § 940.32(1)(a)7.

¶6 The ten stalking charges proceeded to a jury trial at which the ten 2006 jurors and Maier testified. All of the 2006 jurors testified about their reactions to Maier's letters, the reasons for their reactions, and the actions they took after receiving the letters.

¶7 Nine of the ten 2006 jurors testified that the letters made them feel frightened, threatened, or both. For example, one juror testified:

> Q … How did these letters make you feel?
>
> A Terrified the day I opened them. I still am, not only for me, but for my family, as well.
>
> Q Why did you feel terrified?
>
> A I feel threatened that I was contacted, and some of the verbiage of the letter made me feel scared.
>
> Q Is there anything about [the 2006] trial that you sat on that adds to that feeling terrified?
>
> A I remember the demeanor of the defendant in court whispering in an angry tone of voice. I remember being terrified of him. I remember how afraid he made the judge feel, just terrified … the way he was.
>
> Q You talked about some of the language in the letter that causes you to feel terrified. What are you terrified about?

> A That he might come to the address he has, my place of work, he knows my name; that I could be harmed; my family could be harmed.

One juror, Brian C., testified somewhat differently than the other nine in this respect. He stated that he was "shocked" and "angry" because Maier had obtained his name, but "never really feared for my safety" and that it "takes a lot to put fear into me."

¶8 Three jurors other than Brian C. gave testimony indicating that they did not immediately contact police after receiving Maier's first letter. The remaining six jurors gave testimony indicating that they immediately contacted police (or, in one instance, the clerk of court) after receiving Maier's first letter.

¶9 The jury in the present case found Maier guilty on six of the ten stalking counts and not guilty on the other four counts. The four not guilty counts pertain to Brian C. and the three jurors who did not immediately call police.

¶10 We reference additional facts as needed in the Discussion section.

Discussion

A. Constitutionality Of Stalking Statute As Applied To Maier

¶11 Maier argues that the stalking statute is unconstitutional as applied to him under the First Amendment. The constitutionality of a statute, as it applies to particular facts, is a question of law that we review de novo. *See* ***State v. Baron***, 2009 WI 58, ¶10, 318 Wis. 2d 60, 769 N.W.2d 34.

¶12 As we understand it, Maier's argument, generally speaking, proceeds as follows: his "course of conduct" was comprised solely of speech; the statute may be applied to punish speech only if that speech is a "true threat"; and, under

the correct legal test, the letters he sent do not contain a true threat. Maier's more specific arguments on the constitutionality of the statute as applied to him can be broken down into three topics: (1) whether ***State v. Hemmingway***, 2012 WI App 133, 345 Wis. 2d 297, 825 N.W.2d 303, *review denied*, 2013 WI 80, __ Wis. 2d __, 839 N.W.2d 616, applies to bar his as-applied challenge; (2) assuming, as we do, that ***Hemmingway*** does not bar Maier's as-applied challenge, whether the true threat standard is wholly objective or has a subjective element; and (3) whether the jury instructions were deficient because they did not require the jury to find a threat that was sufficiently serious to constitute a "true threat."

*1. The Parties' Dispute Over **Hemmingway***

¶13 The State argues that we must reject Maier's as-applied challenge under ***Hemmingway***. Hemmingway was charged "based on his alleged ongoing and intimidating text messages, phone[] calls and e-mails to his ex-wife." ***Id.***, ¶2. In a pretrial posture, we addressed Hemmingway's assertion that the stalking statute is facially unconstitutional because it is overbroad under the First Amendment. *See* ***id.***, ¶¶1, 18. We concluded that the statute did not, on its face, violate the First Amendment, explaining:

> In this case, the communications associated with the acts of contacting the victim by telephone and sending messages and e-mails were evidence of Hemmingway's intent to cause [his ex-wife] to fear bodily injury or death, contrary to the stalking statute. Such intimidating conduct serves no legitimate purpose and merits no First Amendment protection. "There is no appreciable amount of protected speech where the speaker both intends to cause intimidation, abuse, damage to property, or fear of physical harm or property damage, and does in fact cause one of these alternatives." Hemmingway's speech is incidental to and evidence of his intent to engage in a course of conduct that he knew or should have known would instill fear of violence in [his ex-wife]. Such stalking conduct does not trigger First Amendment scrutiny or protection.

Id., ¶16 (citation and quoted source omitted). As we understand the State's argument, this analysis requires the rejection of Maier's First Amendment challenge as a matter of law without examining the particular conduct at issue. This is true, according to the State, because ***Hemmingway*** explains that the stalking statute punishes "conduct," not protected speech, and, therefore, the fact that a jury convicted Maier of stalking means that First Amendment scrutiny is not "triggered."

¶14 Maier contends that ***Hemmingway*** does not control here because he is making an as-applied challenge that is subject to a different test. Maier points out that a facially valid statute may be applied unconstitutionally. And, as noted above, we understand Maier to be arguing that the particular alleged "course of conduct" that formed the basis for his stalking convictions consisted entirely of "speech" and, therefore, the State was required to show that the speech in his letters was not protected by the First Amendment.

¶15 We question whether ***Hemmingway*** must be read as broadly as the State contends it should be. Facial constitutionality was the issue in ***Hemmingway*** and, obviously, a statute that is facially constitutional may be applied unconstitutionally. Given this fact, it is not apparent why, if the State at some future date attempts to use the stalking statute to punish protected First Amendment activity, ***Hemmingway*** should or could prevent all as-applied challenges. Regardless, we need not attempt to decide whether ***Hemmingway*** can be reconciled with Maier's arguments and the case law on which Maier relies. Instead, we will assume, without deciding, that the stalking statute cannot be constitutionally applied to Maier unless his letters contained a true threat. Even making this assumption in Maier's favor, we reject Maier's as-applied challenge

because, as we explain below, the statute as applied here required the jury to find a true threat.[2]

2. Nature Of The True Threat Standard—Objective Or Partly Subjective?

¶16 As we have seen, Maier argues that his speech, in the form of his letters, is implicated here and, therefore, the State was required to show that his letters contained a "true threat." Accordingly, we first discuss the meaning of the term "true threat."

¶17 Our supreme court has explained that "true threat" is used to refer to one of the categories of speech that does not enjoy First Amendment protection. "'[T]rue threat' is a term of art used by courts to refer to threatening language that is not protected by the First Amendment." ***State v. Perkins***, 2001 WI 46, ¶17, 243 Wis. 2d 141, 626 N.W.2d 762.

¶18 In ***Perkins***, after canvassing the case law across jurisdictions, the supreme court adopted a true-threat standard that is objective from the perspective of both the speaker and the listener:

> This court has considered [the] cases and concludes that the test for a true threat that appropriately balances free speech and the need to proscribe unprotected speech is an

[2] Maier invokes his First Amendment right to petition the government as well as his First Amendment right to free speech but, in his reply brief, "concedes that the First Amendment right to petition the government does not require a different test than the 'true threat' test derived from the First Amendment's guarantee of freedom of speech."

Maier acknowledges that he did not raise any First Amendment issue prior to his postconviction motion, but he asserts that we should address the issue for several reasons. The State does not object, and has briefed the merits of this issue. We choose to address the issue. *See* ***State v. Agnello***, 226 Wis. 2d 164, 173, 593 N.W.2d 427 (1999) (the forfeiture rule "exists in large part so that both parties and courts have notice of the disputed issues as well as a fair opportunity to prepare and address them in a way that most efficiently uses judicial resources").

> 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. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered.

Id., ¶29 (footnotes omitted). In keeping with this objective reasonable-person standard, Wisconsin's stalking statute requires that the actor "knows *or should know*" that his or her "course of conduct" will cause harm to the particular victim and that the actor's "course of conduct" would cause harm to a reasonable person under the same circumstances. *See* WIS. STAT. § 940.32(2)(a) and (b) (emphasis added).

¶19 Maier acknowledges the objective test articulated in ***Perkins***, but argues that ***Virginia v. Black***, 538 U.S. 343 (2003), a United States Supreme Court case that post-dates ***Perkins***, clarifies that the "true threat" standard is partly subjective. That is, Maier contends that the "true threat" standard requires that the speaker have a subjective intent to threaten. In ***Black***, the Court said: "'True threats' *encompass* those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence …." ***Black***, 538 U.S. at 359 (emphasis added).

¶20 The State offers extensive argument and case law supporting the proposition that use of the term "encompass" in ***Black*** means that true threats include, *but are not limited to*, situations where the speaker subjectively intends a threat. We agree. We find the cases cited by the State persuasive. For example, the State cites a Colorado decision explaining:

> We acknowledge that reasonable persons can read ***Black*** differently. However, given that courts have, prior to ***Black***, defined "true threat" in numerous contexts according to an objective standard, and have done so virtually unanimously, we think it highly unlikely the Supreme Court in ***Black*** intended to effectively overrule that vast body of precedent sub silentio.

People v. Stanley, 170 P.3d 782, 789 (Colo. App. 2007), *cert. denied*, 552 U.S. 1297 (2008); *see also, e.g.*, ***United States v. Elonis***, 730 F.3d 321, 330 (3d Cir. 2013) ("The majority of circuits that have considered this question have not found the Supreme Court decision in ***Black*** to require a subjective intent to threaten."); ***United States v. Jeffries***, 692 F.3d 473, 479-80 (6th Cir. 2012) (rejecting the proposition that ***Black*** works a "sea change" by generally requiring a subjective intent to threaten), *cert. denied*, 134 S. Ct. 59 (2013).

¶21 Maier relies on what he implicitly concedes is a minority interpretation of ***Black*** in federal case law. Suffice it to say that he does not point to anything about that minority interpretation that persuades us that that interpretation makes more sense than the majority interpretation.[3] In short, Maier does not persuade us that there is a conflict between ***Black*** and ***Perkins*** such that we may deviate from ***Perkins***. *See* ***State v. Jennings***, 2002 WI 44, ¶¶17-19, 252 Wis. 2d 228, 647 N.W.2d 142 (when there is such a "direct conflict," "court of appeals must necessarily adhere to the subsequent United States Supreme Court decision"). Accordingly, we apply the objective standard from ***Perkins***.

[3] Maier relies on our statement in ***State v. Robert T.***, 2008 WI App 22, 307 Wis. 2d 488, 746 N.W.2d 564, that a defendant's bomb threat fell within the ambit of a "true threat" because the defendant "apparently intended to frighten the listener." ***Id.***, ¶16. This reliance is flawed for the same reason Maier's reliance on ***Virginia v. Black***, 538 U.S. 343 (2003), is flawed. The conclusion that a statement qualifies as a "true threat" because the speaker subjectively intends the statement as a threat does not mean that subjective intent is always required.

*3. The Jury Instructions And The **Perkins** Objective Standard*

¶22 Maier argues that, even if he may be prosecuted based on the objective "true threat" standard, the jury instructions here were defective because they did not reflect the ***Perkins*** objective standard. We disagree. We first describe the instructions given to the jury, and then address Maier's specific arguments.

¶23 The jury here received an individualized instruction for each stalking count. As pertinent to Maier's arguments, each instruction read as follows:

> [1] [T]he defendant intentionally engaged in a course of conduct directed at [the individual 2006 juror in question]….
>
> ….
>
> [2] *[T]he course of conduct would have caused a reasonable person to suffer serious emotional distress. Suffer serious emotional distress means to feel terrified, intimidated, threatened, harassed, or tormented….*
>
> *To determine whether this element is established, the standard is what effect the course of conduct would have had on a person of ordinary intelligence and prudence in the position of [the 2006 juror] under the circumstances that existed at the time of the course of conduct.*
>
> [3] [T]he defendant's acts caused [the 2006 juror] to suffer serious emotional distress.
>
> [4] [T]he defendant knew *or should have known that at least one of the acts constituting the course of conduct would cause [the 2006 juror] to suffer serious emotional distress.*

(Emphasis added.) *See* WIS JI—CRIMINAL 1284; *see also* WIS. STAT. § 940.32(1)(d) and (2).

¶24 Given that the "course of conduct" in this case consists of Maier's letters, the second element in the instructions told the jury to find Maier guilty only if Maier's letters would have caused a reasonable person in the position of the 2006 jurors to experience serious emotional distress. And, the fourth element in the instructions told the jury to find Maier guilty only if Maier knew or should have known that his letters would have that effect. In other words, the italicized portions of the instruction essentially informed the jury that it must find that Maier's letters contained a true threat—under the ***Perkins*** objective standard—in order to find Maier guilty.

¶25 As the State points out, we reached a similar conclusion in our unpublished decision in ***State v. Hills***, No. 2012AP1901-CR, unpublished slip op. (WI App Apr. 11, 2013). In ***Hills***, we concluded that a similar jury instruction for stalking accurately described a true threat, explaining:

> To prove stalking, the State had to prove beyond a reasonable doubt that Hills' intentional course of conduct would have caused a reasonable person to suffer serious emotional distress or to fear bodily injury or death to herself or to a member of her family. This language, of course, aptly describes a "true threat" that does not enjoy constitutional protection.

Id., ¶43; *see also* ***id.***, ¶¶29-32, 38. Following our logic in ***Hills***, we reach the same conclusion here.

¶26 We turn now to Maier's specific arguments.

¶27 Maier argues that ***Hills*** is not persuasive because, unlike in ***Hills***, the jury here was instructed only on the "serious emotional distress" alternative. Maier seemingly believes it is significant that, in ***Hills***, the jury was instructed on the "serious emotional distress" alternative and *additionally* instructed on the "fear

bodily injury or death" alternative. We disagree that this is a reason to depart from our reasoning in ***Hills***. As the quoted passage from ***Hills*** indicates, we concluded in ***Hills*** that each alternative was sufficient to meet the objective listener part of the ***Perkins*** standard.

¶28 In a related argument, Maier appears to contend that, regardless of ***Hills***, the supreme court's decision in ***Perkins*** requires that a true threat must be a threat to inflict bodily harm. Therefore, in Maier's view, the serious emotional distress alternative is not sufficient to constitute a true threat. As the jury instructions here indicated, the stalking statute defines "serious emotional distress" as feeling "terrified, intimidated, threatened, harassed, or tormented." *See* WIS. STAT. § 940.32(1)(d).

¶29 In support of this argument, Maier relies on the ***Perkins*** court's application of the true threat standard to the elements of the pertinent crime in ***Perkins***, threatening a judge. The ***Perkins*** court explained:

> Because the instructions did not define the first element [of threatening a judge], namely, whether the defendant "threatened to cause bodily harm," the jury was not instructed that it had to apply an objective test in the first element to determine whether the defendant had "threatened to cause bodily harm," that is, *that a speaker would reasonably foresee that a listener would reasonably interpret the statement to be a serious expression of a purpose to inflict bodily harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech*.

Perkins, 243 Wis. 2d 141, ¶37 (emphasis added). We are not persuaded that the ***Perkins*** court's application of the true threat standard to the threatening a judge statute demonstrates that a true threat requires a threat to inflict bodily harm. Elsewhere in its opinion, the ***Perkins*** court explained:

> This test for a "true threat" may, of course, need modification to fit the particular statute that criminalizes threatening speech. In this case, for example, the harm threatened is bodily harm. Other statutes may criminalize speech that threatens different harms.

Id., ¶30.

¶30 In sum, we reject Maier's argument that the jury instructions did not require the jurors to find a true threat in order to find him guilty of stalking. Furthermore, this conclusion, combined with our rejection of Maier's subjective standard argument in ¶¶16-21 above, means that we reject Maier's argument that the stalking statute is unconstitutional as applied to him.

B. Sufficiency Of The Evidence To Support A True Threat Finding

¶31 Maier argues that, even if the ***Perkins*** objective standard is applied, the State failed to produce sufficient evidence to support a jury finding that the letters amounted to a true threat. We disagree.

¶32 A sufficiency-of-the-evidence analysis asks whether "any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). More specifically:

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

Id. (citations omitted).

¶33 Maier argues that the evidence is insufficient because a reasonable person in the position of the 2006 jurors would have understood that Maier was simply attempting to enlist the jurors' help in obtaining a pardon. Maier argues that it is unreasonable to interpret his letters as a threat, particularly given that the first letter asked the jurors to submit their responses to Maier's questions to the pardon board. In his reply brief, Maier summarizes his position that his letters were simply communicating:

> (1) his belief that the criminal justice system was corrupt and incompetent, as demonstrated by (a) his treatment by the system and (b) the system accidentally giving the juror names to a convict; (2) his observation that they, as jurors, played some role in his current situation; (3) his hope that they, in light of the unfairness of the situation and their role in it, would help rectify matters by forwarding a completed questionnaire to pardon officials; and (4) his resolve to clear his name even if they decline to help him.

¶34 The problem with Maier's argument, as the State aptly puts it, is that Maier places a benign spin on the evidence. In other words, Maier views the content of the letters in a light most favorable to him, not in a light most favorable to the verdict. That is the opposite of the standard we must apply. *See* ***id.*** The jury here could reasonably infer that the letters would have been perceived by a reasonable person in the position of the 2006 jurors as threatening, rather than benign. While we need not exhaustively discuss all of the contents of the letters, we highlight some of the reasons why the letters can reasonably be seen as threatening.

¶35 Maier's first letter begins by stating "Jury Duty is Not Over." One reasonable view of this language is that Maier is ominously saying: "You may think your service as a juror is over, but I'm not done with you yet." The first

letter then poses several questions that may reasonably be viewed as indicating that Maier is mentally unstable and wishes harm on the 2006 jurors ("Do you think Wood County did a Professional Job? Such as keeping your Name's and addresses from someone like me?" "Can I give this list o[f] Jurors to the people I had to live with [in prison]?" "Did you know I had a 50,000 volt zapper on my arm to control what I might say to you?" "Did you know Wood County took me out of Mendota Mental ins. to put me in Wood County Norwood mental ins ...[?]"). The letter went on to make several statements that, in context, can reasonably be viewed as suggesting that Maier might soon take action against the jurors, especially if they would not help him ("My story will be heard nation wide soon. Your names could be too. Because you helped in the Judge Zappen conspiracy.… The sooner I get justice will be when everybody in the Wisconsin Rapids police cover-up and the Judge Zappen conspiracy will get peace.").

¶36 Maier's second letter similarly begins ominously, by reproducing the newspaper clipping referring to a 2006 juror's police report about his first letter and stating, "I read the paper too." The 2006 jurors could have reasonably understood this statement as Maier telling the jurors that he knows one of them complained, that he is unhappy about it, and that they better not complain again.

¶37 Maier now highlights that he wrote in his second letter: "you have Nothing to fear from me." However, Maier oddly put this statement in quotes. One reasonable inference from this is that he did not mean what the words would normally communicate or that he might mean the opposite. Maier's nothing-to-fear statement is roughly akin to Maier writing: I am "not" going to hurt you if you do not help me. The quotes could suggest that "not" does not mean not. Accordingly, the jury was entitled to draw the reasonable inference that the quote marks made the statement threatening.

¶38 In short, the evidence supports a jury finding that a reasonable person in the position of the 2006 jurors would have understood the letters to be threatening.

¶39 Maier argues that each of his two letters must be sufficient by itself to supply evidence of a true threat and that the second letter by itself is not reasonably interpreted as a true threat. We are not persuaded.

¶40 Maier cites no authority for the proposition that each letter must be sufficient by itself to supply evidence of a true threat, and we see no reason why this would be true. Maier points out that the stalking statute defines "course of conduct" as a "series of 2 or more acts carried out over time … that show a continuity of purpose." *See* WIS. STAT. § 940.32(1)(a). As we see it, however, this definition undercuts Maier's position because it supports the proposition that the letters should be considered together.

¶41 Alternatively, Maier seems to argue that, if the letters are considered together, the second letter "clarifies" that the first letter was not a true threat. We disagree. As we have explained, the second letter is reasonably viewed as threatening.

¶42 In sum, we conclude that the evidence was sufficient for the jury to find a true threat.[4]

[4] As we have indicated, the jury found Maier not guilty on four of the ten stalking counts, corresponding to four of the ten 2006 jurors. However, as the facts in the Background section indicate, and as Maier recognizes in his briefing, the apparent basis for the split verdict is a difference in evidence among jurors as to the third stalking element—the element requiring that Maier's letters actually caused each juror to experience serious emotional distress. *See* WIS. STAT. § 940.32(2)(c). Accordingly, our true threat analysis—which relates to the second and fourth elements—is not inconsistent with the split verdict.

C. Ineffective Assistance Of Trial Counsel

¶43 Maier discusses his trial counsel's heart condition and alleges four specific instances of ineffective assistance: (1) the failure to object to the prosecutor's elicitation of other acts evidence from Maier; (2) the failure to request a limiting instruction on other acts evidence; (3) the failure to identify and introduce evidence of Maier's intent to obtain a pardon; and (4) the failure to offer into evidence certain material disclosed in discovery.

¶44 The ineffective assistance of counsel standards are well established:

> A defendant claiming ineffective assistance of counsel must establish that a defense attorney's performance was deficient, and that the deficient performance prejudiced the defense. Assessing deficient performance means determining whether counsel's performance was objectively reasonable. In making this determination we may consider reasons trial counsel overlooked or disavowed. An attorney's performance is deficient when "the attorney made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Deficient performance has prejudiced the defense when there is "a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." A claim for ineffective assistance of counsel fails if we conclude either that counsel's performance was not deficient or that the deficient performance did not prejudice the defense, and we may begin with either inquiry.

State v. Williams, 2006 WI App 212, ¶18, 296 Wis. 2d 834, 723 N.W.2d 719 (citations omitted).

¶45 Before discussing Maier's specific ineffective assistance arguments, we briefly address his trial counsel's heart condition. Maier points to evidence, including postconviction testimony by trial counsel, that counsel was sometimes

unable to organize his thoughts during trial because, as counsel later found out, counsel was suffering from a heart condition called supraventricular tachycardia. Maier also tells us that the record shows that the condition caused counsel to suffer symptoms at trial, such as elevated heart rate, difficulty breathing, and fatigue. However, while we acknowledge that poor health might contribute to deficient performance, Maier's generalized assertions tell us nothing about whether particular acts or omissions by counsel satisfy the two-pronged test for ineffective assistance of counsel. Accordingly, we turn to Maier's cognizable ineffective assistance claims.

1. Other Acts Evidence Elicited From Maier

¶46 Before trial, the circuit court granted the prosecutor's motion to allow other acts evidence in the form of testimony by the 2006 jurors about the facts surrounding Maier's 2006 case. The circuit court analyzed this proposed other acts evidence under ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998). *See* ***id.*** at 772-73 (setting out three-step analytical framework).

¶47 Applying the ***Sullivan*** framework, the circuit court concluded that the evidence was offered for a proper purpose and that it was relevant because it provided necessary background or context, was probative of the 2006 jurors' states of mind, and was probative of whether Maier's letters would have caused a reasonable person "under the same circumstances" to suffer serious emotional distress. *See* WIS. STAT. § 940.32(2)(a) (describing one stalking element as including whether defendant's course of conduct "would cause a reasonable person under the same circumstances to suffer serious emotional distress"). The court concluded that the probative value of the evidence outweighed the danger of unfair prejudice because the facts surrounding Maier's 2006 case were critical to

provide context and to show why someone in the position of the 2006 jurors might react differently from someone with no prior awareness of Maier's 2006 case. *See* § 940.32(2)(a); *see also* § 940.32(2)(c) (describing another stalking element as including whether the defendant's acts "cause the specific person to suffer serious emotional distress").

¶48 At trial, the prosecutor elicited some facts from the 2006 jurors about Maier's 2006 case, but the prosecutor also sought to elicit such facts from Maier, including that Maier had been accused of threatening two different judges. Maier denied a number of other facts suggested by the prosecutor's questions. Maier's trial counsel did not object to this line of questioning.

¶49 Maier does not challenge the circuit court's ***Sullivan*** analysis or pretrial ruling. Rather, he argues that counsel was ineffective by failing to object when the prosecutor went "beyond the scope" of that ruling by questioning not just the 2006 jurors but also questioning Maier about the facts surrounding the 2006 case.[5]

¶50 We reject this argument because Maier does not show that the prosecutor's line of questioning was geared at procuring evidence that went beyond the scope of other acts evidence permissible under the circuit court's ***Sullivan*** analysis. Keeping in mind that there is no challenge to the circuit court's ***Sullivan*** analysis, the pertinent question is not whether the other acts evidence

[5] Maier also argues that permitting the prosecutor to question Maier about other acts is "plain error" that the State cannot show is harmless. However, we agree with the State that we should review trial counsel's failure to object in the context of ineffective assistance of counsel. As the State points out, trial counsel's failure to object forfeited direct review of the issue. Indeed, Maier seems to concede this in his reply brief by not responding to the State's argument that direct review of the issue is forfeited.

came in through the 2006 jurors or through Maier, but rather whether information elicited was information surrounding the 2006 case that the 2006 jurors knew at the time they received Maier's letters. Maier has not asserted, let alone demonstrated with record citations, that the 2006 jurors were unaware of the particular facts surrounding the 2006 case that the prosecutor sought to elicit from Maier. Maier, therefore, has not shown that trial counsel's failure to object to the prosecutor's questions was deficient performance or that counsel's performance resulted in prejudice.

2. Limiting Instruction On Other Acts Evidence

¶51 Maier argues that trial counsel was ineffective in failing to request a limiting instruction on the other acts evidence. Maier argues that, because both his 2006 case and the instant case involve "similar" charges, such an instruction was essential to minimize the danger that the jury would improperly find him guilty based on his propensity to make threats. We agree with the State, however, that the jury's split verdict makes it highly improbable that the danger that Maier describes came to fruition. Accordingly, Maier has not shown that counsel's failure to request a limiting instruction resulted in prejudice.

3. Evidence Of Maier's Intent To Obtain A Pardon

¶52 Maier argues that trial counsel inadequately investigated and prepared for Maier's defense because counsel did not identify documents and a witness that could have corroborated Maier's testimony that he genuinely intended to obtain a pardon. Maier asserts that there are several documents that show he was actively engaged in the pardon process, and that his neighbor could have testified that she helped Maier obtain pardon materials and that Maier never expressed any animosity toward the 2006 jurors. According to Maier, such

evidence would have negated that Maier "knew" that his letters would cause the 2006 jurors to suffer serious emotional distress.

¶53 We are not persuaded. We instead agree with the State that there is not a reasonable probability that this "intent" evidence would have changed the result, particularly given that the prosecution did not need to show that Maier actually intended to threaten the 2006 jurors. Rather, as we have explained, the State had to show that Maier knew *or should have known* that his letters would cause a reasonable person in the 2006 jurors' position to experience serious emotional distress.

¶54 For that matter, at least with regard to Maier's desire to obtain a pardon, there is nothing inherently inconsistent with him subjectively desiring a pardon and a jury finding that he knew *or should have known* that his letters to the 2006 jurors would reasonably be perceived as threatening. In other words, there is nothing inherently inconsistent with Maier's asserted subjective intent and the jury's findings here that he was guilty of stalking.

¶55 In sum, we are confident that the outcome of the trial was unaffected by the omission of documents evidencing Maier's pardon efforts and the testimony from Maier's neighbor.

4. Discovery Material

¶56 Maier argues that trial counsel failed to "capitalize on discovery material concerning the reactions of certain [2006] jury members and law enforcement" to the first letter. We agree with the State that this argument lacks record citations and supporting reasoned argument to the point of being so undeveloped that we need not address the argument. Therefore, we could stop our

analysis of this topic here. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not consider inadequately developed arguments). Accordingly, we reject all of Maier's discovery-related ineffective assistance arguments on that basis.

¶57 We choose, however, to explain why there is no merit to what appears to be Maier's main assertion relating to the alleged failure to "capitalize" on discovery. Maier contends that his trial counsel failed to take advantage of a deputy sheriff's report indicating the deputy's opinion that "none of the questions [in Maier's first letter] are actually threatening." Maier argues, as we understand it, that counsel should have offered this report as evidence to show that the letters are not reasonably viewed as threatening.

¶58 Assuming, without deciding, that the deputy's opinion was relevant and admissible, it would have been of little significance in comparison to the letters, which speak for themselves, and the 2006 jurors' testimony. Moreover, we can conceive of a number of ways that the State could have minimized the defense value of the report, including pointing out that the deputy's opinion was apparently not directed at the letters as a whole, or the letters taken in context, but rather to Maier's "questions." The report does not clearly characterize other statements in Maier's first letter as non-threatening, including the statement that "Jury Duty is Not Over" and the statement that: "My story will be heard nation wide soon. Your names could be too. Because you helped in the Judge Zappen conspiracy." In short, Maier does not show that there would be a reasonable probability of a different result if counsel had offered the report as evidence.

D. Sentencing

¶59 Maier argues that his sentence should be vacated because of a new sentencing factor and because the sentence was unduly harsh and excessive.

1. New Factor

¶60 Maier argues that the evidence of his intent to obtain a pardon, summarized in ¶52 above, is a new sentencing factor. As Maier recognizes, a "new factor" is defined as:

> "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties."

State v. Harbor, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (quoted source omitted). "The defendant has the burden to demonstrate by clear and convincing evidence the existence of a new factor." ***Id.***, ¶36. Whether a new factor exists is a question of law, but whether a sentence should be modified based on a new factor is a discretionary decision for the circuit court. ***Id.***, ¶¶36-37.

¶61 Maier's new factor argument consists of two paragraphs, including his recitation of the new factor definition. He asserts, without supporting explanation, that the evidence in question was "'unknowingly overlooked by all the parties' because of the ineffective assistance of Maier's counsel [and] … would certainly impact his sentence."

¶62 We agree with the State that Maier's new factor argument is undeveloped for several reasons, including that Maier does not address the circuit

court's sensible postconviction reasoning for rejecting that argument. We decline to address that argument further. *See* ***Pettit***, 171 Wis. 2d at 646-47.

2. Unduly Harsh And Excessive

¶63 On each of the six counts for which Maier was convicted, the circuit court sentenced Maier to two and one-half years of initial confinement and two years of extended supervision, to run consecutively. Maier concedes that this sentence was well within the maximum that he could have received, but argues that it was unduly harsh and excessive.

¶64 Sentencing is committed to the circuit court's discretion. ***State v. Gallion***, 2004 WI 42, ¶¶17-18, 270 Wis. 2d 535, 678 N.W.2d 197. "'[S]entencing decisions of the circuit court are generally afforded a strong presumption of reasonability because the circuit court is best suited to consider the relevant factors and demeanor of the convicted defendant.'" ***Id.***, ¶18 (quoted source omitted). Here, the circuit court set forth detailed reasoning for its sentencing decision, taking into account the required factors and a number of additional factors, including Maier's history of offenses, the potential for conduct like Maier's to undermine the judicial system's functioning, and Maier's tendency to minimize his crimes.

¶65 In arguing that his sentence was unduly harsh and excessive, Maier again puts a "benign spin" on the evidence in an apparent effort to persuade us that he is not as culpable as the circuit court perceived him to be. This is not a viable argument in light of the applicable standard of review. *See* ***id.***, ¶¶17-18.

¶66 Maier points out that the presentence investigation report recommended a significantly lesser sentence than the circuit court imposed, but

Maier does not explain why this undermines the circuit court's reasoning. The circuit court explained in detail its reasons for rejecting the report's recommendation. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 188, 233 N.W.2d 457 (1975) (sentencing court is not bound by presentence investigator's sentencing recommendation).

¶67 Finally, Maier argues that his total sentence on the six counts is excessive because it exceeds the maximum sentence for a single count on more serious felonies that he identifies. This argument is meritless on its face because Maier is comparing a total sentence on six stalking counts involving six victims to the maximum sentence for one count of the higher-class felonies.

Conclusion

¶68 In sum, for all of the reasons stated above, we affirm the judgment convicting Maier of the six stalking counts, and we also affirm the order denying his motion for postconviction relief.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.