COURT OF APPEALS
DECISION
DATED AND FILED

June 23, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2014AP2953-CR
2014AP2954-CR

Cir. Ct. Nos. 2012CF53
2012CF91

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER M. MOLZAHN,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed in part; reversed in part and cause remanded.*

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

¶1 PER CURIAM. Christopher Molzahn appeals judgments of conviction for two counts of stalking and one count of felony bail jumping, and the circuit court's order denying postconviction relief. Molzahn argues that his

trial counsel was ineffective in multiple respects, and that the circuit court erroneously excluded medical records evidence relevant to the stalking charges and erroneously imposed restitution for damage to the victims' vehicles. All but one of Molzahn's arguments relate to the stalking charges, and we reject those arguments and affirm the judgments as to the stalking convictions in every respect. As to the one argument that relates to the bail jumping charge, we agree that Molzahn's trial counsel was ineffective and we reverse the bail jumping conviction and remand for a new trial on that charge.

BACKGROUND

¶2 The State charged Molzahn with stalking his ex-girlfriend, TR, and her boyfriend, DF, between March 28, 2010 and January 4, 2012. The State also charged Molzahn with felony bail jumping for failing to appear for the arraignment on the stalking charges. All of the charges were tried before a jury in February 2013.

¶3 DF testified at trial to the following incidents involving him and Molzahn:

- Incident #1, March 2011. DF and TR were playing pool at a tournament, when Molzahn came up to DF and said, "Are you living with her?" Molzahn was yelling at TR after the tournament ended, DF asked the officials to have Molzahn removed, and Molzahn told DF that DF did not want to mess with him.

- Incident #2, April 8, 2011. At a different pool tournament, DF saw Molzahn arguing with TR and asked Molzahn to leave TR alone. Molzahn said to DF, "[Y]ou're lucky I'm not drinking right now ... or I'd beat you up right now.... I'm not afraid to go to jail."

- Incident #3, April 8, 2011. Later when TR and DF left the tournament, DF observed that a tire on DF's car was flat, someone

had tried to pull off a license plate, and the oil filter in TR's car had been punctured, causing the oil to leak out and ruin the engine.

- Incident #4, April 11, 2011. Molzahn called DF on his cell phone and told him that DF was a target now and that Molzahn was going to get him. Molzahn repeatedly called DF filthy names, said that he knew where DF lived and the car DF drove, said that sometime in the next few days or weeks "something" was going to happen to DF, and said that DF would "pay" for getting involved with TR. DF called law enforcement. DF also requested a restraining order, which the circuit court granted, enjoining Molzahn from contacting DF at his home, in public places, by phone, in person, or in any other manner, from April 2011 to April 2015.

- Incident #5, January 4, 2012. DF called law enforcement after he found all four tires on his car and all four outside tires on his motor home punctured and flat, in the driveway of TR's residence.

DF further testified that he feared for his personal safety and that Molzahn could hurt him physically. DF stated that he suffered emotional stress; felt intimidated, threatened and harassed by Molzahn; thought that feeling would continue for the rest of his life; described his feelings as, "[Y]ou wake up ... and you just wonder if he's out there."

¶4 TR testified at trial to the following incidents involving her and Molzahn:

- Incident #1, March 28, 2010. In the early morning, Molzahn and TR had a physical altercation in TR's car while Molzahn was driving them from a bar back to TR's residence. Later that morning, TR took Molzahn to his truck in La Crosse and may have told him not to come back. Molzahn returned to TR's residence that afternoon, and TR told him to go, but Molzahn did not leave. TR called her father, who came over and asked Molzahn to leave. TR then called the police, and Molzahn left. TR felt threatened by Molzahn that afternoon.

- Incident #2, March 28, 2010. Later on that same day, Molzahn returned to TR's residence, TR told him to leave, and Molzahn intimidated TR and said that she would be in trouble if he had to go to jail. TR again felt threatened by Molzahn and was concerned about her safety. Molzahn was taken to the Vernon County Jail.

- Incident #3, April 9, 2010. TR contacted the police about Molzahn calling her at her workplace, a medical facility. Molzahn had called TR at work before that day, and she had told him not to call and hung up on him.

- Incident #4, July 29, 2010. When TR went to move her car, Molzahn was outside TR's workplace and said he wanted to talk to TR. TR said no, moved her car, and returned to work. When TR came out about two hours later, Molzahn was there. Molzahn came over to TR's car, stood in the way as she tried to close her door, and let her go only after she honked her horn. Molzahn told TR to call and tell the District Attorney to drop charges pending against Molzahn. TR drove off and Molzahn followed her. TR headed to her sister's home, and Molzahn followed her there. TR went inside her sister's residence, and Molzahn followed her in. TR asked Molzahn to leave, he did not. TR then left and Molzahn followed right behind her. TR drove to where her mother was house-sitting and went in and called the police. TR and her mother walked to a store nearby and when they came out, Molzahn was in the parking lot. TR then went to the police station and made a report. TR was crying when she left; she feared that Molzahn would be looking for her.

- Incident #5, April 8, 2011. As referenced above in DF's testimony, Molzahn came to the pool tournament, and at one point was leaning into TR in a threatening manner. After the tournament, TR's car engine locked up because the oil filter had been punctured and all the oil had drained out. TR believed that Molzahn punctured the oil filter because of the confrontation between Molzahn and DF at the tournament. TR felt threatened by Molzahn. TR petitioned for a restraining order on April 12, 2011, and an order was issued, effective April 2011-April 2015.

- Incident #6, April 18, 2011. TR called the police because Molzahn was outside her workplace, where he could see if she went to her car, and because he had called her at work more than once and hung up.

- Incident #7, June 16, 2011. After receiving multiple calls from Molzahn, TR answered one of Molzahn's calls. Molzahn told her that he saw her car at the auto repair shop, that he wanted to help pay for it, that he was sorry and did not mean for that to happen, and asked her not to call the police.

- Incident #8, January 3-4, 2012. On the night of January 3, 2012, TR received ten calls from Molzahn and Molzahn was intoxicated and hard to understand. The next morning, the tires were punctured on DF's vehicles at TR's residence. Shortly after, Molzahn called TR at work. TR asked him why he punctured the tires of the vehicles at her house. Molzahn responded that he did not puncture *her* tires. TR then hung up.

According to TR, since 2010, Molzahn has called her more than one thousand times, at times calling her five times a day. Sometimes, TR would answer and tell Molzahn to stop calling her and then hang up. Sometimes, TR would talk to Molzahn to appease him because she was scared and believed that if she acted as if everything was okay, then Molzahn would not hurt her. Even now, when TR sees private name/private number on her phone at work, she does not want to pick it up. It can be frightening and unnerving. TR has been in "a living hell for the last two years."

¶5 With respect to these incidents, Molzahn testified that:

- DF confronted Molzahn first at the two pool tournaments in 2011, and Molzahn told DF that DF was lucky that Molzahn did not beat DF up.

- Molzahn did nothing to any vehicle when he left the April 8, 2011 tournament.

- Molzahn offered to pay for the damage to TR's car if it was related to the repair work that Molzahn had done on the car earlier.
- Molzahn did call DF more than once.
- Molzahn would call TR until she answered, and TR never told him not to call her any more or hung up.
- Molzahn returned to TR's residence after the March 2010 altercation to get his medications and property, and TR told Molzahn to leave and he returned numerous times thereafter to get his property.
- On July 29, 2010, Molzahn was at TR's workplace. He did not prevent TR from leaving her workplace, he did not follow her to her sister's because he knew where she was going, and he did not intentionally follow her further, but they both happened to be travelling in the same direction.
- Molzahn was at TR's workplace on April 18, 2011 and June 16, 2011, because he was having medical issues, although he had no appointments.
- Molzahn called TR many times between January 2 and 4, 2012, and left a garbled, non-threatening message because he was very intoxicated. He was in "no shape" to drive to her residence at that time.
- More than 1,000 phone calls were made from Molzahn's cell phone to TR's phones between March 2010 and May 2012.
- TR encouraged Molzahn to call her on the phone and contact her.

¶6 In addition, three of the six law enforcement officers who responded to DF's and TR's calls testified regarding their investigations and the statements they obtained from TR and Molzahn. Four witnesses testified as to TR being intoxicated at the tournaments and on other occasions. Molzahn's brother also testified that when Molzahn was living with him in September 2010, the brother

received a phone call from the medical facility at which TR worked with no message, and that Molzahn told him that it was probably from TR.

¶7 The clerk of court and a deputy clerk of court testified regarding the bail jumping charge. According to the clerks, and exhibits submitted by the State, after Molzahn was charged with stalking, he was released on a bond dated May 29, 2012, which imposed certain conditions including that he appear on all court dates. Molzahn attended the preliminary hearing on June 25, 2012, without counsel. At the end of that hearing, the circuit court scheduled arraignment for July 11, 2012. Molzahn did not appear at the scheduled July 11, 2012 arraignment, but turned himself in later.

¶8 After a three-day trial, the jury found Molzahn guilty as charged. Molzahn filed postconviction motions for relief. The court held a ***Machner***[1] hearing, after which the court denied the postconviction motions and Molzahn filed this appeal.[2] We relate additional facts as relevant to each of the issues that Molzahn raises in the discussion that follows.

DISCUSSION

¶9 Molzahn argues that his trial counsel was ineffective in multiple respects, and that the circuit court erroneously excluded medical records evidence relevant to the stalking charges and erroneously imposed restitution for damage to the victims' vehicles. In the sections that follow, we first address and reject each

[1] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[2] The circuit court granted certain portions of Molzahn's postconviction motions relating to a dismissed repeater allegation and the computation of restitution. These issues are not raised on appeal.

of Molzahn's ineffective assistance of counsel claims as to the stalking convictions. We then address and reject his two claims of circuit court error, which also relate to the stalking convictions. Finally, we address Molzahn's ineffective assistance of counsel claim as to his bail jumping conviction, and we conclude, under the totality of the circumstances in this case, that he demonstrates that his trial counsel's not eliciting testimony explaining his failure to appear at the July 11, 2012 hearing was both deficient and prejudicial, and therefore constituted ineffective performance. Consequently, we reverse as to the bail jumping conviction and remand for a new trial on that charge.[3]

I. Ineffective Assistance of Counsel: Stalking Convictions

¶10 To succeed on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's representation was deficient and that the deficiency prejudiced the defendant. ***State v. Erickson***, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). Both deficient performance and prejudice present mixed questions of fact and law. ***State v. Jeannie M. P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. We uphold the circuit court's factual findings as to what counsel did and the basis for the challenged conduct unless they are clearly erroneous. ***State v. Thiel***, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305. However, we review de novo whether counsel's performance was deficient or prejudicial. ***Jeannie M. P.***, 286 Wis. 2d 721, ¶6.

[3] *See* ***State v. Jenkins***, 2014 WI 59, ¶¶8-9, 355 Wis. 2d 180, 848 N.W.2d 786 (reversing and remanding for a new trial after concluding that trial counsel provided ineffective assistance of counsel).

¶11 To prove deficient performance, a defendant must show that, under all of the circumstances, counsel's specific acts or omissions fell "outside the wide range of professionally competent assistance." ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). We review counsel's strategic decisions with great deference, because a strong presumption exists that counsel was reasonable in his or her performance. ***Id.*** at 689. "A reviewing court can determine that defense counsel's performance was objectively reasonable, even if trial counsel offers no sound strategic reasons for decisions made. We will sustain counsel's strategic decisions as long as they were reasonable under the circumstances." ***State v. Honig***, 2016 WI App 10, ¶24, 366 Wis. 2d 681, 874 N.W.2d 589 (2015) (citations omitted). "Deficient performance is judged by an objective test, not a subjective one. So, regardless of defense counsel's thought process, if counsel's conduct falls within what a reasonably competent defense attorney could have done, then it was not deficient performance." ***State v. Jackson***, 2011 WI App 63, ¶9, 333 Wis. 2d 665, 799 N.W.2d 461 (citation omitted).

¶12 To prove prejudice, a defendant must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland***, 466 U.S. at 694.

¶13 If a defendant's argument falls short with respect to either deficient performance or prejudice, we need not address the other prong. *See* ***State v. Smith***, 2003 WI App 234, ¶15, 268 Wis. 2d 138, 671 N.W.2d 854 ("A court need not address both components of this inquiry if the defendant does not make a sufficient showing on one.").

A. Elements of the Crime of Stalking

¶14 All but one of Molzahn's claims of attorney error concern the stalking charges. We assess the merits of those claims, particularly whether the alleged errors prejudiced his defense, against what the State was required to prove to support those charges. To provide the context for our analysis, we begin with the elements of the crime of stalking.

¶15 WISCONSIN STAT. § 940.32(2) (2013-14)[4] provides that:

> (2) Whoever meets all of the following criteria is guilty of a Class I felony:
>
> (a) The actor intentionally engages in a course of conduct directed at a specific person that would cause a reasonable person under the same circumstances to suffer serious emotional distress or to fear bodily injury to or the death of himself or herself or a member of his or her family or household.
>
> (b) The actor knows or should know that at least one of the acts that constitute the course of conduct will cause the specific person to suffer serious emotional distress or place the specific person in reasonable fear of bodily injury to or the death of himself or herself or a member of his or her family or household.
>
> (c) The actor's acts cause the specific person to suffer serious emotional distress or induce fear in the specific person of bodily injury to or the death of himself or herself or a member of his or her family or household.

¶16 WISCONSIN STAT. § 940.32(1) defines "course of conduct" in pertinent part as:

[4] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted. We use this version of the statutes for ease of reference. Molzahn does not contend that there have been any relevant changes in the statutes since the times his crimes were committed.

> (a) "Course of conduct" means a series of 2 or more acts carried out over time, however short or long, that show a continuity of purpose, including any of the following:
>
> 1. Maintaining a visual or physical proximity to the victim.
>
> 2. Approaching or confronting the victim.
>
> 3. Appearing at the victim's workplace or contacting the victim's employer or coworkers.
>
> 4. Appearing at the victim's home or contacting the victim's neighbors.
>
> 5. Entering property owned, leased, or occupied by the victim.
>
> 6. Contacting the victim by telephone or causing the victim's telephone or any other person's telephone to ring repeatedly or continuously, regardless of whether a conversation ensues.

¶17 Finally, WIS. STAT. § 940.32(1)(d) defines "suffer serious emotional distress" as "to feel terrified, intimidated, threatened, harassed, or tormented."

¶18 On appeal, Molzahn does not dispute that any two of the incidents described by DF and TR above, excluding the damage to the vehicles, may constitute a "course of conduct" as defined by the statute.[5] At trial, Molzahn denied that he caused the damage to the vehicles in two of the incidents, on April 8, 2011 and January 4, 2012. Molzahn did not deny his involvement in the remaining incidents, namely, as to DF, Incidents 1, 2, and 4 (threat at the pool tournaments in March 2011 and on April 8, 2011 and threat over the phone on April 11, 2011), and as to TR, Incidents 1-4 and 6-8 (returning twice to TR's residence on March 28, 2010; calls on April 9, 2010; following TR from work on

[5] For the reader's convenience, we will often refer to the five incidents that DF described and the eight incidents that TR described, collectively, as the incidents; and we will refer to the incidents individually by their numbers in paragraphs 3 and 4.

July 29, 2010; appearing at TR's workplace on April 18, 2011; call about TR's vehicle repair on June 16, 2011; calls on January 3-4, 2012).

¶19 As to these remaining incidents in which Molzahn did not deny involvement, the crux of Molzahn's defense was that he neither knew nor should have known that those incidents would cause DF or TR to suffer serious emotional distress, and that those incidents did not cause DF or TR to suffer serious emotional distress because TR encouraged Molzahn to make the contacts. *See* WIS. STAT. § 940.32(2)(b) and (c).

¶20 As we will explain, most of Molzahn's arguments disregard the fact that the jury had to find only that any two of the incidents described by DF and any two of the incidents described by TR caused DF and TR, respectively, to suffer serious emotional distress, and that Molzahn knew or should have known that those particular two incidents would have that effect. Molzahn's arguments largely fail to acknowledge that the evidence against Molzahn, with respect to the incidents described by DF and TR and not denied by Molzahn, was consistent and strong, and that Molzahn's testimony fell well short of compromising that evidence.

B. Failing to Move to Suppress Molzahn's Statement to the Police

¶21 Molzahn argues that his trial counsel was ineffective in not moving to suppress a statement that Molzahn made to the police on March 28, 2010, after Molzahn was taken to the Vernon County Jail. Molzahn asserts, and the State does not dispute, that there was no evidence that Molzahn was read the ***Miranda***[6]

[6] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

warnings before he gave the statement. Accordingly, Molzahn argues, and the State does not dispute, that the statement was required to be suppressed and could not be used except for impeachment purposes. *See* ***State v. Rockette***, 2005 WI App 205, ¶¶23, 30, 287 Wis. 2d 257, 704 N.W.2d 382. As we proceed to explain, Molzahn fails to demonstrate that trial counsel was ineffective in this regard, because the portions of his statement that were used for impeachment purposes were admissible for that purpose, and because Molzahn does not explain how the introduction of the other portions of his statement prejudiced him.

¶22 As Molzahn points out, the State used the statement once in its case-in-chief and once during cross-examination of Molzahn. In its case-in-chief, the prosecutor had the officer who took the statement read portions of the statement to the jury. In those portions, Molzahn said that nothing happened between him and TR at TR's residence or elsewhere, and that he was taken to jail because TR was "playing the system." On direct examination, Molzahn testified that he was mad and being "a smart mouth" when the officer questioned him.

¶23 During cross-examination, Molzahn testified that he did not tell the officer facts that he had related at trial—that TR was so intoxicated that she tried to take the keys out of the ignition, leading to a physical altercation between them—because he did not want to get TR in trouble. The prosecutor then read a portion of the statement in which Molzahn had stated, after being asked about an injury to TR's eye, that TR had fallen at a pool tournament and that TR fabricated the incident in the car. Finally, the prosecutor read the answers Molzahn had given the police when asked why TR would make up the allegations against Molzahn:

> Because she was mad.... She's going through menopause. She's very dysfunctional, and she has hormones freaking

> up and down all around.... She's menopausal but she's very, like I say, any woman that is on the jury is going to know what I'm talking about. She's freaking all over the chart.

¶24 It appears that the portions of the statement used during cross-examination were for purposes of impeachment, specifically contrasting what Molzahn had told the police (nothing happened) with what he testified to at trial (something did happen) about the altercation in TR's car, and contrasting his explanation to the police (TR's hormones) against his explanation at trial (TR's extreme intoxication) for that altercation. Therefore, the statement was properly used during cross-examination, and Molzahn's trial counsel was not ineffective for failing to object. *See* ***State v. Mendoza***, 96 Wis. 2d 106, 118, 291 N.W.2d 478 (1980) ("A statement of the defendant made without the appropriate *Miranda* warnings, although inadmissible in the prosecution's case-in-chief, may be used to impeach the defendant's credibility if the defendant testifies to matters contrary to what is in the excluded statement.").

¶25 We next address the portions of Molzahn's statement introduced through the officer in the State's case-in-chief. Molzahn asserts in a conclusory manner that his trial counsel's failure to move to suppress the statement allowed the statement "to be used against him throughout trial." However, Molzahn does not specify how the reading of the brief portions of his statement introduced through the officer caused him prejudice. Molzahn does not explain how the exclusion of these portions of his statement—that nothing had happened between him and TR on March 28, 2010, and that TR was playing the system when she called the police—would have resulted in a different outcome when he testified why he made those statements and when more specific portions of the statement were properly admitted on cross-examination. Most importantly, Molzahn does

not explain how the exclusion of those portions of his statement would have resulted in a different outcome in terms of the jury's convicting him of stalking based on the evidence of his conduct in at least two of the incidents involving him and DF and him and TR.

¶26 In sum, Molzahn fails to show that his trial counsel was ineffective for not moving to suppress his statement to the police.

C. Disclosing Molzahn's Telephone Records

¶27 Molzahn argues that his trial counsel was ineffective for disclosing, to the State and the circuit court, confidential material comprising Molzahn's telephone records from April 15, 2010, to May 1, 2012, because counsel did so without Molzahn's informed consent. The records showed 1,183 calls to TR and fourteen calls to DF from Molzahn's phone during that period. The records also gave the duration of each call. As we explain, we conclude that Molzahn fails to show that his trial counsel was ineffective in this regard because it was reasonable trial strategy, discussed between counsel and Molzahn, to disclose these records.

¶28 At the ***Machner*** hearing, Molzahn's trial counsel testified that Molzahn had given him the information about whom to contact to get the records, that he and Molzahn had discussed whether to disclose the records and had agreed that disclosing the records would be "good for [Molzahn's] defense." Molzahn's trial counsel testified that the records showed a pattern of Molzahn making short calls to TR at work when she could not talk, followed by lengthy calls when she could talk, that this pattern continued after they broke up, and that the lengthy calls in particular showed TR's continued engagement with Molzahn.

¶29 Molzahn testified that he and trial counsel had discussed obtaining the records covering a shorter period of time, that he did not have a chance to review the records or discuss disclosing them with counsel before the records were disclosed, and that he would not have allowed counsel to disclose the records if he had been given a chance to review the records. The circuit court found Molzahn not credible and his counsel credible and, therefore, found trial counsel not deficient in his performance with respect to the disclosure of the phone records.

¶30 We are given no reason to disturb the circuit court's credibility finding on appeal. Moreover, we conclude that the record demonstrates that trial counsel's strategy was reasonable, and therefore, trial counsel's challenged performance was not deficient.

¶31 In sum, Molzahn fails to show that his trial counsel was ineffective for disclosing the telephone records.

D. Failing to Object to Hearsay

¶32 Molzahn argues that his trial counsel was ineffective for failing to object to the admission of hearsay evidence at trial. The State does not dispute Molzahn's assertion that all of the following evidence that he contends should have been excluded "would have been excluded as inadmissible hearsay not satisfying any exception." Accordingly, we proceed on the assumption that the testimony was inadmissible hearsay. Nevertheless, as we explain, we conclude that Molzahn's trial counsel was not ineffective for failing to object to this evidence because none of it prejudiced his defense.

¶33 The hearsay evidence that Molzahn contends should have been excluded is as follows:

1. DF testifying as to what TR told him: DF testified that TR told DF that at work "sometimes [TR] would just pick the phone up and set it down just so [Molzahn] wouldn't keep calling her and she can get her work done."

2. Officer testifying as to what DF told him: Deputy Kris Malphy testified that when he went to TR's residence in response to a call from DF about damage to vehicles there on January 4, 2012, DF told him about phone calls that DF and TR had been getting the night before, and about one call that was from Molzahn and that DF overheard.

3. Officer testifying as to what TR's mother told her: Sergeant JoEllen Zitzner testified that TR's mother stated during an interview that she had seen Molzahn's truck pull into the driveway on April 9, 2010, while she was out walking and that she subsequently called dispatch.

4. Officer testifying as to what TR told her: Sergeant Zitzner testified about TR's statements during the April 9, 2010, interview regarding phone calls that she had received from Molzahn.

5. Officer testifying as to what TR told her: Sergeant Zitzner testified that TR told her that Molzahn drove into TR's driveway and came up to the house on April 26, 2010.

6. Officer testifying as to what TR told another officer: Officer Phillip Martin testified about TR's statement to Officer Eric Christianson regarding the July 29, 2010, incident.

7. Officer testifying as to what TR told him: Officer Martin testified about statements TR made to him regarding incidents on April 18, 2011 and June 20, 2011.

8. Officer testifying as to what TR told other officers: Sergeant Zitzner testified about TR's statements to Deputy Stuber and Deputy Torgerson regarding the March 28, 2010 incident.

9. TR reading portions of her statements to officers: During her testimony TR read portions of her statement to Deputy Torgerson regarding the March 28, 2010 incident, and portions of her April 9,

> 2010 interview with Sergeant Zitzner; and the prosecutor read portions of Officer Martin's report into the record to refresh TR's recollection of the April 18, 2011 incident.

¶34 Molzahn argues that most of this hearsay evidence duplicated (and therefore prejudicially amplified) DF's and TR's testimony, increased the amount of officer testimony, and did not help support the defense's primary theme of creating doubt about TR's fearfulness of Molzahn.

¶35 We conclude that Molzahn fails to show that this hearsay evidence prejudiced his defense, for several reasons.

¶36 First, Molzahn fails to address whether and how each item specifically harmed him. We provide the following examples to the contrary. As to item number 2 above, Molzahn does not explain how it prejudiced him for the officer to testify that DF told him about certain calls that Molzahn himself testified he made. As to item number 3 above, the officer properly testified that she received a dispatch that Molzahn's vehicle was in TR's driveway, and Molzahn does not explain how it prejudiced him for the officer to identify TR's mother as the source of that report to dispatch. Regardless of the source, Molzahn cross-examined the officer as to her interview of TR at the time of that dispatch.

¶37 Second, Molzahn does not explain how these items of hearsay evidence prejudiced him in general. As he acknowledges, most of the hearsay evidence duplicated DF's and TR's testimony, and DF and TR were both subject to cross-examination. Molzahn suggests that his trial counsel's failure to object to this hearsay evidence prejudiced him because the overall effect was to improperly "restate and reemphasize" the testimony against him, as in ***Virgil v. State***, 84 Wis. 2d 166, 179-80, 267 N.W.2d 852 (1978). However, our supreme court in

that case rejected a claim much like Molzahn's. The court concluded that "substantially reading into the record prior statements" that "fortified" a witness's statements was not prejudicial error, because "the evidence was cumulative and added nothing to the state's case." ***Id.*** The same is true here.

¶38 In sum, we conclude that Molzahn fails to show that his trial counsel was ineffective for not objecting to hearsay evidence.

E. Failing to Object to Statements Violating Molzahn's Confrontation Rights

¶39 Molzahn argues that his trial counsel was ineffective for not objecting to certain hearsay evidence described above because the testimony violated Molzahn's confrontation rights.[7] Specifically, Molzahn argues that the following testimony should have been excluded: (1) Sergeant Zitzner's testimony about TR's mother's statement regarding seeing Molzahn's car in TR's driveway; (2) Officer Martin's testimony about Officer Christianson's report regarding TR's statement concerning the July 29, 2010 incident; and (3) Sergeant Zitzner's testimony about Deputy Stuber's report regarding TR's statement concerning the March 28, 2010 incident (Items 3, 6, and 8 in the previous section). Molzahn argues that the admission of testimony about TR's mother's statement, and Officer Christianson's and Deputy Stuber's reports, violated his confrontation rights because TR's mother, Officer Christianson, and Deputy Stuber did not testify at trial.

[7] A defendant has a constitutional right to confront witnesses against him. ***State v. Jensen***, 2007 WI 26, ¶13, 299 Wis. 2d 267, 727 N.W.2d 518; U.S. CONST. amend. VI; WIS. CONST. art. I, § 7.

¶40 However, Molzahn does not contend that the admission of testimony about TR's mother's statement and Officer Christianson's report was prejudicial, and, therefore, we reject his confrontation clause-based claim of ineffectiveness as to that testimony on that basis. Molzahn does argue that the admission of testimony about Deputy Stuber's report was prejudicial, but we are not persuaded, because this testimony would have supported a defense theory that TR did not testify truthfully.

¶41 Molzahn bases his assertion of prejudice on a discrepancy between Deputy Stuber's report and TR's subsequent accounts regarding the March 28, 2010 altercation between her and Molzahn. Deputy Stuber's report states that TR told him that the altercation occurred in her residence, and TR several hours later told another officer, and testified at trial, that the altercation occurred in her car. TR testified that Deputy Stuber must have made a mistake in his report, because TR did not tell him that the altercation occurred in the residence. From this, Molzahn argues that the State "was permitted to postulate through witness testimony that it was a matter of Stuber's error rather than TR changing her story," and that Molzahn was unable to establish, by questioning Deputy Stuber himself, which it was.

¶42 The hole in Molzahn's argument is that the absence of Deputy Stuber as a witness did not prevent the defense from questioning the credibility of TR's testimony. Had Sergeant Zitzner's testimony about Deputy Stuber's report been excluded, the jury would not have heard about this inconsistency. Because the testimony came in, this inconsistency favorable to the defense remained for the jury to consider.

¶43 In sum, we conclude that Molzahn fails to show that his trial counsel was ineffective for not objecting to testimony that violated Molzahn's confrontation rights.

F. Failing to Object to Irrelevant and Speculative Testimony

¶44 Molzahn argues that his trial counsel was ineffective for failing to object to certain testimony that he asserts was either not relevant or speculative. Molzahn argues that the following testimony should have been excluded because it was not relevant:[8] (1) evidence regarding damage to TR's and DF's vehicles on April 8, 2011; (2) evidence regarding damage to DF's vehicles on January 4, 2012; and (3) evidence regarding damage to DF's vehicle's windshield. Molzahn argues that the following testimony should have been excluded because it was based on speculation: (1) evidence regarding how Molzahn obtained DF's cell phone number; and (3) evidence regarding whether Molzahn was the source of certain unidentified phone calls. As we explain, we reject Molzahn's arguments because he fails to show that counsel was deficient in failing to object to the evidence about the vehicle damage, and he fails to show prejudice as to the evidence referring to the windshield, his obtaining DF's cell phone number, and the unidentified phone calls.

¶45 Molzahn argues that the evidence regarding damage to the vehicles was not relevant because property damage is not an act that may constitute a course of conduct under the stalking statute. *See* WIS. STAT. § 940.32(1)(a).

[8] Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01.

Therefore, according to Molzahn, evidence of property damage could not be relevant to proving that he engaged in stalking. Molzahn's argument fails because it overlooks the relevance of the property damage evidence to the other elements of the crime of stalking, namely whether the other acts that may constitute a course of conduct were undertaken so as to, and did, cause the victim to suffer serious emotional distress or fear. *See* WIS. STAT. § 940.32(2). In other words, the evidence of property damage provides a context to determine whether the other alleged acts that could constitute a course of conduct caused the victim to suffer serious emotional distress or fear. These acts by Molzahn include approaching the victim, appearing at the victim's workplace, appearing at the victim's home, and contacting the victim by telephone or causing the victim's telephone to ring repeatedly—all acts that Molzahn admitted.

¶46 In light of the timing of these other acts vis-à-vis the vehicle damage, and the threats that Molzahn did make in the course of those acts, the evidence of the vehicle damage was relevant to whether DF and TR had reason to and did suffer serious emotional distress or fear, which was a key issue raised in Molzahn's defense, and to whether Molzahn knew his acts would cause them to suffer serious emotional distress or fear. Indeed, Molzahn appears to concede as much in his initial brief on appeal. Nevertheless, we proceed to explain why this evidence was relevant to the serious emotional distress or fear elements of stalking.

¶47 The first vehicle damage incident occurred on April 8, 2011. DF and TR testified that on that date, Molzahn approached TR at a pool tournament in a threatening manner and threatened to beat DF up. When TR and DF left the tournament, they found that DF's vehicle had a flat tire and it appeared that someone had tried to remove a license plate, and the oil filter in TR's car had been

punctured. DF testified that he believed that Molzahn was responsible for this damage because the damage to the cars occurred immediately following the confrontation. In addition, Molzahn called DF right after the incident and said that DF was lucky he did not get a drunk driving ticket, and DF wondered how Molzahn would know the police had been on the scene unless he had been watching. TR testified that she believed Molzahn was responsible for the car damage, because of the confrontation at the tournament and the fact that Molzahn was at the tournament to begin with. As a result of the confrontation, combined with the vehicle damage, she felt threatened by Molzahn and requested a restraining order against Molzahn.

¶48 DF testified that three nights later, Molzahn called him and said that DF was a target now, that Molzahn knew where DF lived and the car he drove, that sometime in the next few days or weeks something was going to happen to DF, and that DF was going to pay for getting involved with TR. After those threats, combined with the confrontation and vehicle damage three days earlier, DF called law enforcement and requested a restraining order against Molzahn.

¶49 The evidence of the April 8, 2011, damage to DF's and TR's vehicles was relevant to whether Molzahn's contacts with DF and TR by phone and in person around the same time were undertaken with intent to cause them serious emotional distress or fear, whether those contacts did cause DF and TR to suffer serious emotional distress or fear, and whether as a result of those contacts a reasonable person would have suffered serious emotional distress or fear.

¶50 The same is true of the second incident of vehicle damage, on January 4, 2012. DF and TR testified that numerous calls had been made to TR's home phone from January 1 to 4. Molzahn admitted to making the twenty-one

calls shown by the subpoenaed telephone record to TR's home phone between January 2 and 4, and that Molzahn was intoxicated and hard to understand. The next day, the tires were punctured on DF's vehicles in TR's driveway, and shortly after, Molzahn called TR at work, said he did not puncture *her* tires, and told her that maybe she "pissed somebody off." The evidence of the January 4, 2012 damage to DF's vehicles was relevant to whether Molzahn's calls that preceded and followed that incident were intended to cause, did cause, and would reasonably cause, DF and TR to suffer serious emotional distress or fear.[9]

¶51 While the same ties of relevance may not be able to be drawn as to DF's testimony that his windshield was hit and cracked at a time when DF was not present, that testimony was so brief as to be inconsequential, and for counsel to object would only have drawn attention to it. Thus, even if this evidence was not admissible, Molzahn does not show that he was prejudiced by its admission.

¶52 Molzahn also argues that his trial counsel should have objected to the admission of testimony that he asserts was based purely on speculation as to how Molzahn got DF's cell phone number and that Molzahn was the source of certain unidentified phone calls to DF and TR. As to the former, DF testified that, "I suspect he walked into [TR's] house when she wasn't home and looked at her phone or looked at the phone numbers on her phone. That's the only way he could have got it was by looking at her caller ID." Molzahn testified that he found DF's number by looking on the chart of members of DF's pool league. As the State

[9] Molzahn asserts that DF and TR could not establish that Molzahn "was the culprit" in either vehicle damage incident, by which we understand Molzahn to mean that neither they nor the State had direct proof that Molzahn caused the vehicle damage. However, Molzahn fails to acknowledge that the jury could have found that Molzahn was the culprit based on circumstantial evidence.

points out, it did not matter how Molzahn got DF's number, but instead what mattered is that he did so and then made the call to which DF testified, as described in ¶3 Incident 4 above.[10] As with the windshield testimony, while this testimony may have been objectionable as based on speculation, Molzahn fails to show that it prejudiced him.

¶53 Finally, Molzahn points to certain testimony as inviting speculation about Molzahn being the source of unidentified phone calls. DF testified that he received one call from a person asking where TR was, that the caller did not identify himself and hung up, that DF called the number back and the person who answered sounded like Molzahn and hung up again. Molzahn does not explain why DF's testifying that he thought that the caller sounded like Molzahn was objectionable.

¶54 DF also testified that he received calls at home "that [I] don't know where they came from." And TR, answering the question whether Molzahn had called her since the criminal complaint in this case was filed, testified, "There were private name/private numbers on my ... home phone. Mainly it was call and ring once. And then hang up.... It was happening more than once a week. So I did the star 50 whatever and I called the police .... And so as far as I know they're still checking that."[11] Inasmuch as Molzahn admitted to calling both DF and TR

[10] Molzahn may also be suggesting that DF's testimony should have been objected to because it was bad character evidence, when Molzahn states in his appellant's brief that DF "was allowed to wildly speculate about nefarious means Molzahn may have employed" to obtain DF's cell phone number. However, Molzahn does not develop this argument, and, therefore, we do not address it further.

[11] Because this testimony related to calls made outside the time charged in the complaint, we are not certain of its relevance. However, Molzahn does not make any argument on this basis, and, therefore, we do not address it.

multiple times, we are not persuaded that this testimony by DF and TR about these calls caused Molzahn any prejudice.

¶55 In sum, Molzahn fails to show that the vehicle damage evidence was not relevant, that DF's and TR's testimony about the phone calls was prejudicial, and that DF's testimony as to the windshield and how Molzahn obtained DF's number would have had any effect on the outcome of the trial. Accordingly, Molzahn fails to show that his trial counsel was ineffective for not objecting to any of this evidence.

G. Failing to Investigate Damage to TR's Vehicle

¶56 Molzahn argues that his trial counsel was ineffective for failing to investigate and present evidence regarding the damage to TR's car on April 8, 2011, which would have cast doubt on the ability of Molzahn to have done the damage. As we explain, we reject Molzahn's argument because he does not show that his trial counsel's failure to investigate prejudiced his defense.

¶57 As a general matter, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." ***Thiel***, 264 Wis. 2d 571, ¶40 (quoted source omitted).

¶58 We first briefly recap the facts leading up to the April 8, 2011 incident. TR testified that for months after the March 28, 2010 altercation, Molzahn came to her residence after she had told him not to, called her at work after she told him not to, and waited for her at her workplace and followed her when she left. Then, in early 2011, she and DF began dating. Molzahn testified that he first met DF at a pool tournament in late March 2011, and saw him again at

a pool tournament on April 8, 2011. They exchanged words at both tournaments, though they differed in their testimony as to who confronted whom first.

¶59 DF and Molzahn both testified that Molzahn threatened DF at the April 8, 2011 tournament. DF testified that Molzahn told him, "[Y]ou're lucky I'm not drinking right now ... or I'd beat you up right now.... I'm not afraid to go to jail." Molzahn testified that he told DF, "You're lucky I'm not hearing anything or you'd be face down on the ground." As for TR, DF testified that Molzahn was yelling at or arguing with TR at both tournaments, and TR testified that Molzahn confronted her in a threatening manner at the April 11 tournament.

¶60 Before the tournament, TR parked her car on a street in downtown La Crosse "so it would be right in the middle of everyone, right on the end of a corner so that … if anything happened, somebody could see." After the tournament, TR's car's engine locked up because the oil filter had been punctured and all the oil had drained out. TR testified that she believed that Molzahn punctured the oil filter because he and DF had had the confrontation at the tournament, because Molzahn was at the tournament to begin with, and because nothing like that had ever happened to her before.

¶61 TR testified that Molzahn subsequently called her and told her that he had seen that her car was at the auto repair shop to have its engine replaced, and that he wanted to help pay for it, that he was sorry, and that he did not mean for that to happen. Molzahn admitted that he called TR about her car after he saw it at the repair shop and talked to the owner about it, and testified that he offered to pay for the repair if it had something to do with repairs that he had made to the car earlier.

¶62 After the trial, Molzahn's postconviction counsel contacted the owner of the repair shop that fixed TR's car and a defense investigator spoke to the owner and an employee. A memorandum prepared by the investigator reflected that the employee said that it is difficult to puncture the oil filter on TR's car, because a person would need to remove a protective plate under the car or have access to the interior of the car to open the hood At the postconviction motion hearing, the owner testified that his shop replaced the engine in TR's car, and that TR had told them that the engine had seized up and she suspected vandalism to the oil filter, which she said was punctured. The owner testified that the oil filter is covered from below with a plastic covering, which a person would have to remove or break in order to gain access to the oil filter from below.

¶63 Molzahn argues that this information provided by the repair shop owner and his employee after trial, as to how difficult it would have been to puncture the oil filter, combined with the fact that TR had parked the car in a visible location, would have made it difficult for the jury to believe that Molzahn had punctured TR's oil filter. Molzahn argues further that the State used TR's and DF's speculative testimony that they thought that Molzahn caused the oil filter damage to fortify its case with regard to the serious emotional distress or fear element of stalking, and that the additional evidence would have undermined both TR's and DF's speculation and their credibility generally.

¶64 The circuit court concluded that the postconviction investigation did not add much to the case and that the failure to present the investigation evidence did not affect the outcome of the trial. We agree. The investigation showed, at most, that someone who knew how to get to the oil filter could have punctured it. And, Molzahn testified that he had previously worked on the car, which suggests he knew how it was set up and how to get to the oil filter. Molzahn does not

persuade us that the absence of the investigation evidence undermines confidence in the outcome of the trial.

¶65 In sum, we conclude that Molzahn fails to show that his trial counsel was ineffective for not investigating the damage to TR's car before trial.

H. Failing to Argue Admission of Medical Records Evidence

¶66 Molzahn argues that his trial counsel was ineffective for failing to properly argue for admission of electronic medical records evidence that would show, contrary to TR's testimony at trial, either that TR visited Molzahn multiple times or that she accessed his medical records without his permission when he was in the hospital. As we explain, we reject Molzahn's argument because he does not show that his trial counsel's failure to properly argue for admission of the medical records evidence prejudiced him.

¶67 Before trial, Molzahn's counsel filed a motion to admit the electronic medical records to show that TR had accessed Molzahn's records, and the circuit court ruled that the evidence was admissible, to show "the relationship between the parties and ... what the alleged victim may have done that kind of aggravates this course of conduct." The records show that TR accessed Molzahn's medical records eleven separate times over a period of six different days.

¶68 At trial, TR testified that she looked at Molzahn's medical records with his permission when she visited him in the hospital in September 2010 and March 2011, and that she did not know "if it was just one day in September and one day in March." When asked if she was attempting to appease Molzahn, she answered, "Yes. He asked me, he had questions. And I said I could look that up for you. And I did." Molzahn testified that he saw TR every day when he was in

the hospital, the first time for three or four days and the second time for two days, and that he did not ask TR to review his medical records.

¶69 Molzahn's counsel called the hospital records custodian, who told the circuit court that under federal medical confidentiality law she could provide patient information only if the court ordered her to do so, and counsel asked the court to so order. Counsel informed the circuit court that the custodian would testify that TR had no authorization to access Molzahn's medical records. The circuit court excluded the testimony after concluding that whether Molzahn authorized TR to access Molzahn's medical records was not relevant and that the records custodian's testimony would be collateral impeachment.

¶70 Molzahn argues that his trial counsel was ineffective because he failed to argue the proper basis for admitting the testimony, namely, that the custodian's testimony would show when and how many times TR accessed Molzahn's records, and would establish either that she visited Molzahn in his hospital room many more times than just the one day in September and one day in March, as she "suggested" she had done, or that she accessed the records when she was not visiting him and therefore lied when she testified to the contrary. Molzahn contends that the medical records evidence would have supported his defense that TR's behavior was inconsistent with her testimony and that she had in reality encouraged their relationship, thereby undermining TR's claims to the contrary and damaging her credibility generally. We are not persuaded.

¶71 The records would not have accomplished what Molzahn says they would have. As noted, the records show that TR accessed Molzahn's medical records eleven separate times over a period of six days. The records are not inconsistent either with TR's testimony that she visited Molzahn on at least two of

the five or six days when he was in the hospital, nor with Molzahn's testimony that she visited him on all five or six days. Nor are the records inconsistent with TR's testimony that she accessed Molzahn's medical records. Whether TR did so with or without Molzahn's authorization is irrelevant, because either way this conduct would have shown that she was engaging in their relationship. More specifically, if her access of Molzahn's medical records was done with his authorization, then it could tend to show that she intended to help him, or if it was done without his authorization, then it could tend to show that she maintained an interest in a relationship with him.

¶72 TR did not deny visiting Molzahn in the hospital or accessing his medical records, the two points that Molzahn argues are indicative of the encouraging relationship that was the cornerstone of his defense. That the jury would have learned from the records that TR visited Molzahn more than twice would not have significantly enhanced his defense, and the records would not have resolved the dispute between TR and Molzahn as to whether TR accessed the records with or without his authorization.

¶73 In sum, Molzahn fails to show that his trial counsel was ineffective for not properly arguing for the admission of the medical records evidence.

I. Failing to Object to Closing Argument

¶74 Molzahn argues that his trial counsel was ineffective for failing to object to what he contends were improper comments by the prosecutor in closing argument. As we explain, we reject Molzahn's argument because he does not show that his trial counsel's failure to object to the prosecutor's statements prejudiced him.

¶75 Generally, "[c]losing argument is the lawyer's opportunity to tell the trier of fact how the lawyer views the evidence and is usually spoken extemporaneously and with some emotion." ***State v. Draize***, 88 Wis. 2d 445, 455-56, 276 N.W.2d 784 (1979). A prosecutor may comment on the evidence, detail the evidence, argue from it to a conclusion, and state that the evidence convinces him or her and should convince the jurors. *See* ***id.*** at 454. The prosecutor may not, however, suggest that the jury arrive at its verdict by considering factors other than the evidence. *See* ***id.***

¶76 Molzahn points to three sets of comments by the prosecutor. First, the prosecutor (a) stated that all victims of domestic violence have fear and that some victims of domestic violence have been killed; (b) "apologize[d]" to TR, who the prosecutor said did not feel that she was getting justice in the system, for not seeking a longer sentence in a prior case; and (c) stated that domestic violence victims who are unable to obtain justice through the system might take the law into their own hands and "get guns and shoot people."[12]

[12] The pertinent passage from the transcript is as follows:

> Every victim that's a victim of domestic violence has fear. We've had occasions where victims of a disorderly conduct have been killed because of domestic violence. You've seen that. You've seen it in the news. Just recently with the guy from the Olympics that had trouble handling fatigue just, eventually, killed his wife or his girlfriend, excuse me. Domestic violence gone bad.
>
> People are fearful and sometimes you do things to appease the perpetrator. They don't always use common sense. You know that. People will do things that do not get justice through the systems, which [TR] testified. She didn't feel she was getting justice in the system. And I apologize to her for that. I'm the one who convicted him of the first case. I thought 20 days would be a lesson learned. It wasn't.

(continued)

¶77 Second, the prosecutor asked the jurors if they would want someone calling them twelve or fourteen times a day.[13]

¶78 Third, the prosecutor said, "I don't believe that [Molzahn] had sex with [TR]."

¶79 Molzahn argues that his trial counsel should have objected to the first set of comments because they were designed to inflame the jury and "divert their focus from the actual evidence in the case," they encouraged the jury to make up for a past error by the State, and they suggested that if the jury returned a verdict of not guilty the result would be "drastic vigilante justice." Molzahn argues that the second set of comments improperly appealed to the jurors' sympathy by asking the jurors to put themselves in TR's shoes.[14] And Molzahn

---

....

> There's a point where why people might get the restraining orders. They're tired of the harassment. They're tired of this. And if we're not willing as a system, as [TR] said, to put some teeth to it, to make it work, to give her justice, then let's throw it away because then, victims are going to get their own justice. They're going to get guns and shoot people because if the system isn't going to work, they're going to enter into appeasal [sic] or they're going to take the law into their own hands.

[13] This argument states in full:

> Think about it yourself. Would you want somebody calling you 12, 14 times a day? It's bad enough during political season when you get calls all the time and you can ignore them. But think about it. This is ongoing. This is not a political season. This is life. This is [TR's] life, and it sucks.

[14] Asking jurors to place themselves in the victim's shoes is a "golden rule" argument that is not allowed because it appeals to the jurors' sympathy for persons who have been victimized by a crime. ***State v. DeLain***, 2004 WI App 79, ¶23, 272 Wis. 2d 356, 679 N.W.2d 562.

argues that the third comment improperly expressed the prosecutor's personal belief as to the falseness of Molzahn's testimony. Molzahn argues that each of these arguments led the jury to reason beyond the evidence and to consider factors other than the evidence.

¶80 The circuit court concluded that Molzahn's counsel was deficient in not objecting to some of the prosecutor's statements, but that Molzahn was not prejudiced by any of those statements. The court stated,

> I'm well-satisfied that ... the outcome of this case wasn't dictated by what [the prosecutor] said in closing argument. This case came down to I think issues of credibility, whether the jury wanted to believe the two victims or whether they wanted to believe Mr. Molzahn. There were reasons not to believe especially [TR] in some respects ... she kept coming back for more, so how can she complain if he was stalking her. But ... all those issues were put before the jury and that was why the case turned out, in my opinion, as it did. Not because of anything [Molzahn's] counsel did or didn't do ....

¶81 "Even if there are improper statements by a prosecutor, the statements alone will not be cause to overturn a conviction. Rather, the statements must be looked at in context of the entire trial." ***State v. Mayo***, 2007 WI 78, ¶43, 301 Wis. 2d 642, 734 N.W.2d 115 (citing ***State v. Wolff***, 171 Wis. 2d 161, 168, 491 N.W.2d 498 (Ct. App. 1992)). Here, the facts relevant to the incidents described in ¶¶3 and 4 above, other than those involving vehicle damage, were largely admitted by Molzahn, and the prosecutor called the jury's attention to those facts in the rest of his closing arguments: Molzahn's returning to TR's house on March 28, 2012; Molzahn's calling TR at her workplace multiple times on April 9, 2010; Molzahn's showing up at TR's workplace and following her as she left work on July 29, 2010; Molzahn's calling TR at her home on January 3 and 4, 2012; Molzahn's threats in person and over the phone to DF; Molzahn's

calling TR 1,183 times and DF fourteen times; TR's multiple contacts with the police; and Molzahn's thirteen prior convictions. The prosecutor noted that the State had to prove only two acts to prove a course of conduct for stalking, and that those two acts could be two phone calls, or the two times Molzahn came to TR's workplace. On top of Molzahn's admissions to these facts as to his conduct, TR and DF both testified that they were intimidated and threatened by Molzahn's conduct, and that they feared for their safety on account of that conduct. The prosecutor detailed the evidence and argued from it to, in his opinion, the appropriate conclusion. *See* ***Draize***, 88 Wis. 2d at 454.

¶82 Nevertheless, we must express great dismay at the multiple improper comments made by the prosecutor. We are mindful that we have only the trial transcript to review, but the transcript plainly reveals that these were not mere slips of the tongue. It was completely improper for the prosecutor to make *any* of the following references, much less all of them: to refer explicitly to dead domestic violence victims; to draw attention to a prior sentence of Molzahn's, following his conviction in a separate case; to inform the jury that the prosecutor believed that the prior sentence had been too short; and to invite the jury in graphic terms to envision domestic violence victims getting guns and shooting perpetrators if people like the defendant are not convicted at trials. In addition, the "golden rule" violation here was unambiguous. If this case had been close, depending on the overall record of the trial, this series of highly improper remarks might have resulted in a reversal. *See* ***State v. Jorgensen***, 2008 WI 60, ¶¶40-44, 310 Wis. 2d 138, 754 N.W.2d 77 (significant, repeated improper statements by the prosecutor "infected the trial with unfairness," denying the defendant due process).

¶83 However, the case was not close, and looking as we must at the context of the entire trial, we are not persuaded that Molzahn's trial counsel's

failure to object to the comments described above, regrettable as they are, undermined confidence in the trial's outcome. We are guided in part by the rule that jurors are presumed to follow the court's instructions, *see* ***State v. Adams***, 221 Wis. 2d 1, 12, 584 N.W.2d 695 (Ct. App. 1998), including the standard instruction that statements of the attorneys at trial are not evidence. Because Molzahn does not show prejudice from his trial counsel's failure to object to the portions of the prosecutor's closing argument that he now highlights, we conclude that Molzahn fails to show that his trial counsel was ineffective.

J. Cumulative Prejudice

¶84 Molzahn argues that the cumulative effect of the errors claimed above was to so undermine confidence in the outcome of Molzahn's trial as to establish a reasonable probability of a different outcome upon retrial without those errors. *See* ***Thiel***, 264 Wis. 2d 571, ¶¶20, 59-60. Molzahn argues that this is so because the evidence of guilt was not overwhelming in that there was evidence that TR was giving Molzahn mixed signals and that Molzahn's contacts with DF were few or limited. Molzahn's argument falls short.

¶85 As discussed above, the State was required to prove only two contacts by Molzahn against TR and against DF, in order to prove a course of conduct for stalking, and the evidence reviewed extensively above sufficed to prove that Molzahn intentionally engaged in a course of conduct prohibited by WIS. STAT. § 940.32(1), knowing that it would cause serious emotional distress or fear, that a reasonable person would have suffered serious emotional distress or fear, and that TR and DF did suffer serious emotional distress or fear. *See* WIS. STAT. § 940.32(2).

¶86 In sum, we agree with the circuit court that Molzahn fails to show that any deficiencies by his trial counsel, singly or cumulatively, caused him prejudice as to his convictions for stalking.

II. Erroneous Exclusion of Medical Records Evidence

¶87 Molzahn argues that the circuit court denied him his right to present a defense when it erroneously did not allow the custodian of his medical records to testify. As we explain, we conclude that the circuit court properly determined that the proffered medical records evidence was not relevant.

¶88 We review a circuit court's decision to admit or exclude evidence, including a court's determination of whether evidence is relevant, with deference, and we reverse only if there was an erroneous exercise of discretion. ***State v. Wollman***, 86 Wis. 2d 459, 464, 273 N.W.2d 225 (1979).

¶89 Molzahn argues that the medical records evidence "was highly relevant to Molzahn's defense as it established that TR initiated contact with Molzahn by going to his hospital room numerous times ... [and] undermin[ed] TR's claim that contact with Molzahn was unwanted or caused her distress or fear." There are at least two flaws in Molzahn's argument.

¶90 First, Molzahn's trial counsel sought admission of the custodian's testimony solely to show that TR's access to Molzahn's medical records was not authorized, and the circuit court ruled that whether TR's access was or was not authorized was not relevant. As we have already explained, what was relevant to Molzahn's defense—that TR encouraged a relationship with Molzahn—was that TR accessed his medical records. Whether she did so on her own initiative or at

his request, many times or several times, supported his defense either way in roughly the same measure.

¶91 Second, evidence was admitted, through TR's and Molzahn's testimony, showing precisely what Molzahn now argues he was precluded from establishing, namely, that TR initiated contact with Molzahn by going to his hospital room and by accessing his medical records. TR admitted doing both. While TR admitted doing so on at least two days, and Molzahn testified she came every day for five or six days, the difference in number of visits does not negate the fact that TR initiated the visits.

¶92 In sum, we conclude that the circuit court did not erroneously exercise its discretion when it did not allow the custodian of Molzahn's medical records to testify.

III. Erroneous Imposition of Restitution

¶93 Molzahn argues that the circuit court erred in ordering Molzahn to pay restitution for damage to TR's and DF's vehicles, because the court erroneously exercised its discretion when it found that TR and DF had proved by a preponderance of the evidence that Molzahn caused those damages. Molzahn also argues that his trial counsel was ineffective for not investigating and presenting evidence to show that he did not cause the damage to TR's vehicle. As we now explain, we conclude that the court properly exercised its discretion in imposing restitution, and that Molzahn fails to show that his trial counsel was ineffective for not investigating the damage to TR's vehicle prior to the restitution hearing.

¶94 WISCONSIN STAT. § 973.20(1r) provides, in relevant part, that, when imposing a sentence, a circuit court "shall order the defendant to make full or

partial restitution ... to any victim of a crime considered at sentencing ... unless the court finds substantial reason not to do so and states the reason on the record." A crime considered at sentencing encompasses "all facts and reasonable inferences concerning the defendant's activity related to the crime for which the defendant was convicted, not just those facts necessary to support the elements of the specific charge." ***State v. Canady***, 2000 WI App 87, ¶10, 234 Wis. 2d 261, 610 N.W.2d 147 (quoted source and emphasis omitted).

¶95 Before restitution can be ordered, the victim must prove by a preponderance of the evidence, WIS. STAT. § 973.20(14)(a), that there is "a causal nexus" between "the 'crime considered at sentencing' and the disputed damage." ***Canady***, 234 Wis. 2d 261, ¶9 (quoted source omitted). To prove causation, the "victim must show that the defendant's criminal activity was a 'substantial factor' in causing damage. The defendant's actions must be the 'precipitating cause of the injury' and the harm must have resulted from 'the natural consequence[s] of the actions.'" ***Id.*** (citation omitted; brackets in ***Canady***).

¶96 Determinations of restitution, including whether there is a sufficient nexus between the defendant's criminal conduct and damage for which restitution is ordered, are left to the sound discretion of the circuit court. ***Id.***, ¶¶6, 12. "We may reverse a discretionary decision only if the circuit court applied the wrong legal standard or did not ground its decision on a logical interpretation of the facts." ***Id.***, ¶6. In cases where the circuit court inadequately sets forth its reasoning, or fails to fully explain its ruling, we "independently review the record to determine whether it provides a basis for the [circuit] court's exercise of discretion." ***State v. Pharr***, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983) .

¶97 The circuit ordered Molzahn to pay restitution to TR for the damage to TR's car when the oil filter was punctured causing the engine to fail on April 8, 2011, and to pay DF for the damage to DF's vehicles when eight of the tires on those vehicles were punctured on January 4, 2012. The crux of Molzahn's argument is that TR and DF failed to prove by a preponderance of the evidence that Molzahn caused those damages.

¶98 The following evidence was presented through the testimony by TR and DF at the restitution hearing and at trial. As extensively discussed above, the damages to TR's car occurred after Molzahn confronted DF and TR at the pool tournament. Molzahn threatened to beat DF up, and Molzahn threatened TR when he was leaving the tournament. When TR and DF left the tournament, they found that DF's car had a flat tire and some one had tried to pull off a license plate. Right after this incident, Molzahn called DF and said that DF was lucky he did not get a drunk driving ticket, and DF wondered how Molzahn would know the police were there (they had arrived while DF was changing his tire) unless Molzahn was watching. TR and DF also learned that the oil filter on TR's car was punctured, leaving a big oil spot where the car had been parked and causing all the oil to leak out and the engine to fail. Molzahn had previously worked on the car which suggests he knew how the car was set up and how to get to the oil filter. Molzahn subsequently expressed interest in the status of TR's car and its repair. In one of the multiple calls that TR received from Molzahn after the oil filter was punctured, he apologized and said that he did not mean for that to happen. Molzahn also admitted having gone to the repair shop where TR's car was being fixed and talked to the owner about TR's car.

¶99 The damages to DF's vehicles occurred after Molzahn called TR multiple times during the night and was audibly intoxicated. The next morning,

the tires on DF's vehicles at TR's house were slashed. Shortly after, Molzahn called TR at work, TR asked him why he punctured the tires at her house, and he said he did not puncture *her* tires, leaving her to wonder how he knew that of all the cars hers was the only vehicle with tires that had not been punctured. Molzahn also told her in a sarcastic and cocky manner that maybe she "pissed somebody off."

¶100 Molzahn testified that he did not threaten TR at the pool tournament but that he told her that he just wanted his property that was still at her house, that he never damaged TR's car, and that he told TR that he would pay for the repairs if the work he had done on it a month before was a contributing factor for the engine failing. Molzahn admitted making calls to TR on the night of January 3, 2012. He testified that he never damaged DF's vehicles, that he did not go to TR's house on the night he called her in January 2012, that he was living sixty-five miles away and was intoxicated and would never drive there in that condition.

¶101 The circuit court found by a preponderance of the evidence that Molzahn caused the damages. Given the evidence above, we conclude that the record provides an ample basis for the court's exercise of discretion.

¶102 Molzahn also argues that his trial counsel was ineffective for not investigating and presenting at the restitution hearing the information that he presented at the postconviction motion hearing, described above in section I.G.[15] Molzahn contends that that information contradicted TR's testimony in two ways

[15] That information included the invoice showing that TR paid slightly less than she had claimed based on the repair order. Molzahn acknowledges that, postconviction, the court reduced the amount of restitution ordered to reflect the amount that TR actually paid.

and that these inconsistencies would have undermined her credibility: (1) TR claimed restitution based on the repair order when the invoice showed she paid less; and (2) TR testified that the repair shop owner told her that the man who came into his shop to talk about her car was intoxicated but the shop owner testified that the man was not intoxicated. Molzahn also contends that the postconviction investigation information called into question that TR's car was vandalized, as discussed above, because the information showed that the perpetrator would have had to puncture the oil filter from underneath or have access to the car's interior. Molzahn fails to demonstrate that the absence of this information at the restitution hearing prejudiced him, or made any difference at all.

¶103 The circuit court heard the parties testify at trial and at the restitution hearing, and we are not persuaded that the two minor inconsistencies that Molzahn identifies with respect to TR's testimony would have changed the circuit court's credibility determinations. Nor are we persuaded that the investigation evidence would have had any effect on the circuit court's determination of causation, inasmuch as that evidence did not establish that TR's car was not vandalized, or that Molzahn did not do it.

¶104 In sum, we conclude that the circuit court properly exercised its discretion in ordering restitution, and that Molzahn fails to show that his trial counsel was ineffective with respect to restitution.

IV. Ineffective Assistance of Counsel—Failing to Elicit Testimony About Molzahn's Failure to Appear

¶105 As stated above, Molzahn was convicted of felony bail jumping for failing to appear in court for arraignment in the stalking case on July 11, 2012. Molzahn argues that his trial counsel was ineffective for not eliciting testimony

from Molzahn about his failure to appear. More specifically, Molzahn argues that his trial counsel's failure to elicit testimony constitutes deficient performance, and that that deficiency prejudiced him because it deprived him of the opportunity to explain to the jury that his failure to appear was unintentional and, therefore, not criminal. We agree.

¶106 To convict Molzahn of bail jumping, the State was required to prove that he "intentionally fail[ed] to comply with the terms of his … bond," after being released from custody. WIS. STAT. § 946.49(1). "'Intentionally' means 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." WIS. STAT. § 939.23(3). At the August 1, 2012 hearing held after Molzahn's return to custody following the alleged bail jumping, and again at the postconviction motion hearing, Molzahn testified that his failure to appear in court on July 11 was a mistake. However, his trial counsel did not elicit that testimony at trial. As we explain, we conclude that under the totality of circumstances in this case, Molzahn's counsel was ineffective for failing to do so.

¶107 At the August 1 hearing, the prosecutor reported to the court that Molzahn had missed the July 11 court appearance for arraignment, that Molzahn had contacted the district attorney's office during the course of the following week and was told to turn himself in, and that Molzahn called the office again one more week later and was again told to turn himself in. Molzahn told the circuit court that at the hearing at which the July 11th date had been set, he had misheard and misunderstood the date and thought the hearing was scheduled for the 21st. Molzahn further explained that he "drive[s] truck" and supplies sales people in thirty-eight states; that he was out of state and following his case on CCAP, but the hearing was not listed there; that he called the clerk one week after the 11th

when he noticed that the 21st was a Saturday; that he left his number with a secretary at the district attorney's office, but no one returned his call; that when he called the clerk of courts, he was told to turn himself in, but he was working out of state at that time; and that he turned himself in when he returned to the area.

¶108 Molzahn gave the same explanation when he testified at the postconviction motion hearing, and he also testified that he had told his trial counsel the same before trial. Molzahn testified that he discussed his failure to appear with his trial counsel before trial and that he understood that his trial counsel would question him during his trial testimony about what happened with regards to his missing the July 11 court appearance, but that his counsel did not do that. Molzahn testified that during breaks in the trial, his trial counsel did not express concerns with his testimony or tell him anything about cutting his testimony short, and did not inform him that counsel no longer intended to ask about his reasons for failing to appear.

¶109 When asked during the postconviction hearing about his not having elicited Molzahn's explanation for missing the court appearance, Molzahn's trial counsel testified that he either: (1) believed that some of what Molzahn was conveying to the jury during his testimony about the stalking charge was damaging to his case and that counsel decided to minimize the damage by getting Molzahn off the stand quickly, leaving no time for testimony about the bail jumping facts; or (2) simply forgot to address the topic of the bail jumping during Molzahn's trial testimony.

¶110 Molzahn argues that his trial counsel's failure to elicit his reasons for missing the July 11 hearing was deficient because Molzahn was facing a felony for failing to appear, that he consistently maintained that his failure to appear was

a mistake, that it would not have taken long to elicit his explanation, and that the State had not presented any evidence inconsistent with Molzahn's explanation.

¶111 The State argues that regardless whether Molzahn's trial counsel's performance was deficient, Molzahn suffered no prejudice, because his explanation was not credible. The State argues that Molzahn did not fully explain his misunderstanding as to the date of the hearing, did not say that he intended to return and appear on July 21, and did not explain why he called twice before turning himself in. The State argues that Molzahn's explanation is incredible, and thus would only have served to lessen his credibility and damage his defense to the stalking charges.

¶112 We reject the State's argument, for the simple reason that Molzahn's credibility is for a jury to decide. Our supreme court's decision in ***State v. Jenkins***, 2014 WI 59, 355 Wis. 2d 180, 848 N.W.2d 786, is instructive. In that case, the court concluded that trial counsel performed deficiently for failing to call a key witness whose testimony would contradict the State's only eyewitness to a shooting and support the defendant's defense. ***Id.***, ¶¶41-44. Here, trial counsel failed to question the only witness with an explanation for Molzahn's failure to appear, Molzahn himself, which would support his defense. And, as in ***Jenkins***, the record is devoid of any reasonable trial strategy to support counsel's failure to question Molzahn about his failure to appear. *See* ***id.***, ¶¶45-47. Forgetting to address the topic is certainly not a reasonable trial strategy. It is simply illogical to suggest that, because trial counsel believed it was time to stop questioning Molzahn about the stalking charges, it was *not* time to question Molzahn about the entirely unrelated facts regarding the bail jumping charge. As in ***Jenkins***, we conclude that Molzahn's trial counsel's representation fell below the objective standard of reasonably effective assistance. ***Id.***, ¶48.

¶113 The prejudice from not eliciting a plausible explanation based on mistake, in defense to a charge that requires intent, is self-evident. Molzahn's trial counsel's assessment of his credibility at trial regarding facts relating to the stalking charges does not justify depriving Molzahn of his right to present his explanation of his missed court appearance to the jury, and to have the jury determine whether he mistakenly or intentionally missed the court appearance. *See* ***id.***, ¶¶61-66 (that a witness's credibility may be impeached or may have weaknesses "does not eliminate the prejudicial effect of leaving corroborative evidence unintroduced" (quoted source omitted)).

¶114 In sum, we conclude that, under the totality of the circumstances, Molzahn demonstrates that his trial counsel's not eliciting testimony explaining his failure to appear at the July 11, 2012, hearing was both deficient and prejudicial, and therefore constituted ineffective assistance. Consequently, we reverse as to the bail jumping conviction and remand for a new trial on that charge.

CONCLUSION

¶115 For the reasons stated, we affirm the convictions for stalking, reverse the conviction for bail jumping, and remand for a new trial on the bail jumping charge.

By the Court.—Judgments and order affirmed in part; reversed in part and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.