COURT OF APPEALS
DECISION
DATED AND FILED

July 18, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP359-CR **Cir. Ct. No. 2013CF163**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIC J. HODKIEWICZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Eric Hodkiewicz was convicted of nine offenses, based on allegations that he harassed and physically assaulted his now-ex-wife, S.P., during the course of their acrimonious divorce and child custody dispute. On appeal, Hodkiewicz argues he is entitled to a new trial based on plain error, ineffective assistance of trial counsel, and newly discovered evidence. In the alternative, he seeks a new trial in the interest of justice. Finally, Hodkiewicz claims his convictions and consecutive sentences for both bail jumping and the underlying offense (strangulation and suffocation) violated his right to be free from double jeopardy.

¶2 We reject each of Hodkiewicz's appellate arguments, with one exception. We agree that Hodkiewicz's trial attorney rendered ineffective assistance by failing to object to an officer's testimony that S.P. told him she received a particular telephone call "on her work phone." We therefore reverse Hodkiewicz's convictions on Counts 2 and 3 and the related portions of the order denying Hodkiewicz's motion for postconviction relief, and we remand for further proceedings on those counts. In all other respects, we affirm Hodkiewicz's judgment of conviction and the order denying postconviction relief.

BACKGROUND

¶3 A Second Amended Information charged Hodkiewicz with nine counts, each arising from his alleged conduct toward S.P. The State alleged Hodkiewicz committed stalking, as a party to a crime, between May 2010 and January 2013 (Count 1); unlawful use of a telephone, as a domestic abuse repeater, on August 10, 2012 (Count 2); disorderly conduct, as a domestic abuse repeater, on August 6, 2012 (Count 3); and criminal damage to property, as a domestic abuse repeater, on November 5, 2012 (Count 4). The State further alleged that, on

the evening of July 1-2, 2013, Hodkiewicz committed burglary of a building or dwelling (Count 5); substantial battery—domestic abuse, as a domestic abuse repeater (Count 6); strangulation and suffocation—domestic abuse, as a domestic abuse repeater (Count 7); disorderly conduct—domestic abuse, as a domestic abuse repeater (Count 8); and bail jumping (Count 9). A six-day jury trial was held in March 2014.

¶4 At trial, S.P. testified she and Hodkiewicz were married and living together at a residence on Weed Street in Shawano in May 2010. S.P. was eight months pregnant. S.P. claimed she and Hodkiewicz argued about money on May 13, 2010, and during the course of the argument Hodkiewicz pushed her down and rubbed her face against a wall. S.P. testified she did not immediately report this incident to police because she was afraid and did not want Hodkiewicz to get into trouble. However, she told Hodkiewicz to leave their residence and not come back. Hodkiewicz left, but he returned several times during the following week. As a result, on May 20, 2010, S.P. reported the May 13 incident to police. On May 24, 2010, Hodkiewicz filed for divorce.

¶5 S.P. testified that, on a subsequent occasion in May 2010, Hodkiewicz pushed her down the stairs at the Weed Street residence. She also testified regarding an incident on May 27, 2010, in which Hodkiewicz returned to the Weed Street residence and chased her into a bathroom. A struggle ensued, during which Hodkiewicz pushed S.P., causing her to hit her head on the sink. S.P. testified she was knocked unconscious, and when she woke up her pants and underwear were around her ankles.

¶6 Hodkiewicz denied hitting or pushing S.P. during the May 13, 2010 argument. However, he admitted grabbing her wrist and "kind of pulling back and

forth" in an attempt to get his phone and pager, which he claimed S.P. had taken from him. He denied having any contact with S.P. on May 27, 2010.[1]

¶7 S.P.'s and Hodkiewicz's son, J., was born on May 28, 2010. After J.'s birth, S.P. allowed Hodkiewicz to stay at the Weed Street residence at times and permitted him to spend time with J. S.P. testified Hodkiewicz came to the residence on August 9, 2010, but when S.P. told him it was not "a good time" for a visit, he became "angry and upset." Sometime after Hodkiewicz left, S.P. observed a large cut in the side of an above-ground, rubber-sided swimming pool in her backyard. During the same time period, S.P. testified she found a dead rabbit on her doorstep. On September 1, 2010, she noticed the word "bitch" had been keyed into the door of her vehicle. Several days later, S.P. found a red liquid in her dog's dish, which her father believed to be antifreeze. Hodkiewicz denied involvement in each of these incidents.

¶8 S.P. testified she moved to a residence in the Village of Pulaski in May 2011. In September 2011, she found the body of a stray cat hanging from a tree outside her home. Around the same time, S.P. found a "pretty big pile of animal guts" in her driveway. Again, Hodkiewicz denied involvement in these incidents.

¶9 S.P. further testified that, on the evening of December 9, 2011, she was home alone and went to her garage to take out some recycling. While there, she was struck on the head, which caused her to fall and hit her chin on the cement floor. When she tried to get up, someone struck or kicked her leg. While she was

[1] Hodkiewicz was never asked at trial whether he pushed S.P. down the stairs of the Weed Street residence in May 2010.

on the floor, S.P. heard Hodkiewicz say that she was crazy, that she should not have J., and that she should call the police because they also thought she was crazy.

¶10 Hodkiewicz denied striking or otherwise harming S.P. on December 9, 2011. It is undisputed that Hodkiewicz had placement of J. that night. In addition, Hodkiewicz's neighbor, Kyle Thorson, testified he heard Hodkiewicz's garage door open sometime between 7:30 and 8:00 p.m. that evening, "so [he] knew [Hodkiewicz] was backing his truck in." Thorson testified he texted Hodkiewicz and then went over to Hodkiewicz's garage sometime between 8:00 and 8:30 p.m., and they talked for sixty to ninety minutes.

¶11 S.P. testified she found an anonymous note inside her mailbox in January 2012 saying "u r dun," and on another occasion during the same time frame she found a live cat inside her mailbox. Around the same time, her dog went missing and was found thirty miles away. On February 1, 2012, S.P. discovered garden shears stuck into the driver's seat of her vehicle and a meat fork stuck into J.'s car seat. Hodkiewicz denied involvement in these incidents.

¶12 In March 2012, S.P. moved in with her parents. She testified that, around that time, she began receiving a large number of calls on her cellphone from a restricted or unknown number. At some point, S.P. began to pick up the calls in an attempt to determine who was making them. On July 13, 2012, the caller stated, "[You] can change hair color, can't change fat ass." S.P. recognized the caller's voice as Hodkiewicz's. On July 20, 2012, the caller stated, "[Y]ou're a stupid bitch, you're going to fucking …" before S.P. hung up. S.P. again recognized the caller's voice as Hodkiewicz's. In a July 27, 2012 call, the caller told S.P. to "tell court and [J.'s] father" that she was "fucking nuts." S.P. testified

she could not identify the caller's voice on that occasion because she was at work and it was difficult to hear. Also in July 2012, S.P. received a text message stating, "U need 2 shut ur fat mouth wile u can think ur winning try me bitch."

¶13 Pulaski Police Department investigator Mark Hendzel explained at trial that police traced some of the harassing phone calls and texts S.P. received to a specific TracFone. Hendzel further explained that TracFones, also known as "dump phones," are prepaid cellphones with unreliable subscriber information and are often used by individuals seeking to avoid detection. Hodkiewicz denied activating or using the TracFone that was used to call and text S.P. Moreover, he testified he was in custody at the Shawano County Jail on a probation hold on May 12, 2012, the date the TracFone was activated.

¶14 In late July 2012, S.P. moved from her parents' home to an apartment in Pulaski. On August 6, 2012, she found some flowers outside the door of her apartment. S.P. testified she "assumed that somebody either left [the flowers] in the wrong spot or they were … from the apartment complex." However, on August 10, 2012, she received a phone call in which the caller asked, "Did you get them?" When S.P. did not respond, the caller said, "[Y]ou did," and then laughed. S.P. testified she recognized the caller as Hodkiewicz. Hodkiewicz denied delivering flowers to S.P. or calling her on August 10, 2012.

¶15 S.P. testified she again found flowers outside her apartment on September 26, 2012. On November 5, 2012, she found the words "Fuck U Bitch" scratched into the driver's side door of her vehicle. In June 2013, S.P. reported to police that her vehicle's rear view mirror had been "ripped off." Again, Hodkiewicz denied involvement in each of these incidents.

¶16 On the night of July 1-2, 2013, J. was staying with Hodkiewicz at Hodkiewicz's parents' residence. S.P. testified she fell asleep on the couch in her apartment at around 10:30 p.m. She had taken Percocet because she was recovering from hand surgery, and she admitted the events of that evening where somewhat "fuzzy." At some point, S.P. woke up and went into the bathroom. As she turned on the bathroom light, she felt something—possibly a rubber tube—being wrapped around her neck. She also felt something over her mouth that "tasted like powder" or latex. A struggle ensued, during which S.P. testified she saw Hodkiewicz's reflection in the bathroom mirror. S.P. lost consciousness and later woke up lying on the bathroom floor, naked from the waist down.

¶17 Hodkiewicz testified he was at his parents' home with J. on the night of July 1-2, 2013. Hodkiewicz's mother testified she saw Hodkiewicz go to bed at about 9:30 p.m. on July 1, and she next saw him at 6:40 a.m. the following morning. She did not hear Hodkiewicz leave the house during the night. Hodkiewicz's father testified he returned home from a meeting at 10:20 p.m. on July 1 and saw Hodkiewicz's truck parked near the family's home. He testified he did not hear Hodkiewicz leave the house until 5:00 a.m. the next morning.

¶18 The jury found Hodkiewicz guilty of each of the nine counts charged in the Second Amended Information. The circuit court imposed concurrent and consecutive sentences totaling eight years' initial confinement and thirteen years' extended supervision. Hodkiewicz subsequently moved for postconviction relief. Following a hearing, the circuit court denied those portions of Hodkiewicz's postconviction motion that are relevant to this appeal.

DISCUSSION

¶19 Hodkiewicz raises a number of arguments on appeal, which we address as follows. First, we consider Hodkiewicz's arguments regarding the improper admission of hearsay testimony. Next, we address his arguments regarding the State's alleged presentation of false testimony. We then address Hodkiewicz's argument that his trial attorney was deficient by failing to introduce prior statements regarding Hodkiewicz's alibi for the December 9, 2011 attack on S.P. Finally, we address Hodkiewicz's arguments regarding newly discovered evidence, reversal in the interest of justice, and double jeopardy. Ultimately, we conclude Hodkiewicz is entitled to a new trial on Counts 2 and 3 because his trial attorney was ineffective by failing to object to hearsay testimony that S.P. received a particular phone call on her work phone. However, we affirm the circuit court in all other respects.

I. Hearsay testimony

¶20 On appeal, Hodkiewicz argues three distinct categories of hearsay testimony were improperly admitted at his trial, in violation of his constitutional right to confrontation. Hodkiewicz concedes his trial attorney did not object to any of this hearsay testimony; however, he argues we should nevertheless grant him relief under the doctrine of plain error. In the alternative, he asserts his trial attorney was ineffective by failing to object. We address each of Hodkiewicz's three proffered categories of hearsay testimony in turn.

A. Hendzel's "activation number" testimony

¶21 At trial, investigator Hendzel testified the TracFone that was used to make some of the phone calls and texts to S.P. was activated on May 12, 2012.

He testified the "activation number" that was used to activate the phone was the phone number of the Little Rapids Paper Corporation, where Hodkiewicz was employed. Although Hodkiewicz testified he was in jail on May 12, 2012, Hendzel testified he had learned, in speaking to TracFone's technical support, that the activation number for a TracFone is not necessarily the phone number from which an individual is calling when he or she calls the company to activate a phone. Rather, it simply is a secondary phone number the person is required to provide to the company at that time.

¶22 Hodkiewicz argues Hendzel's testimony regarding the information he received from TracFone's technical support about TracFone activation numbers was hearsay. Hodkiewicz further asserts the admission of this hearsay testimony violated his constitutional right to confrontation and, as such, was plain error.[2] "The plain error doctrine allows appellate courts to review errors that were otherwise waived by a party's failure to object." ***State v. Jorgensen***, 2008 WI 60, ¶21, 310 Wis. 2d 138, 754 N.W.2d 77. To qualify as plain error, an error must be "obvious and substantial." ***Id.*** (quoting ***State v. Sonnenberg***, 117 Wis. 2d 159, 177, 344 N.W.2d 95 (1984)). If the defendant demonstrates that an unobjected-to error was fundamental, obvious, and substantial, the burden shifts to the State to show the error was harmless. ***Id.***, ¶23. To do so, the State must prove beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. ***Id.***

[2] The State does not dispute that Hendzel's testimony was hearsay, or that the admission of his testimony violated Hodkiewicz's right to confrontation.

¶23 Here, assuming without deciding that the admission of Hendzel's testimony regarding TracFone activation numbers was an obvious and substantial error, we nevertheless conclude the error was harmless beyond a reasonable doubt. It is undisputed that Hodkiewicz was in jail when the TracFone was activated. It is also undisputed the activation number for the TracFone was the telephone number for Hodkiewicz's employer. Hodkiewicz contends that, without Hendzel's testimony that the activation number for a TracFone is merely a secondary number provided by the individual activating the phone, the jury would likely have assumed the phone was activated from Hodkiewicz's place of employment. Consequently, Hodkiewicz asserts that, absent Hendzel's testimony, the jury would likely have concluded Hodkiewicz did not activate the TracFone because he was in jail at the time of activation.

¶24 However, evidence regarding how and where the TracFone was activated was not nearly as important at trial as other strong evidence connecting Hodkiewicz to the harassing phone calls made to S.P. The evidence showed the TracFone in question was used to call S.P.'s cellphone 146 times between June 16, 2012 and August 19, 2012, including over fifty times on June 27 alone. There were no calls from the TracFone during that time period to any telephone other than S.P.'s cellphone. The person making the calls continued calling, even though S.P. refused to answer most of the time. On the occasions when S.P. did answer, she recognized the caller as Hodkiewicz. Moreover, the jury heard evidence indicating that S.P. and Hodkiewicz were in the midst of a contentious divorce and child custody dispute during the time period in which these calls were made, and there was no evidence presented to indicate that anyone other than Hodkiewicz had a motive to harass S.P. via incessant phone calls and threatening text messages. All of this evidence strongly supports a finding that, regardless of who

activated the TracFone, Hodkiewicz used it to making harassing phone calls to S.P.

¶25 In addition, evidence was admitted at trial indicating that Hodkiewicz's employer allowed its employees to use its landline telephone while at work. Furthermore, Hodkiewicz conceded at trial that his coworkers had conversations about the fact that Hodkiewicz would be better off if S.P. were "under the ground," meaning dead. This evidence supports a reasonable (and compelling) inference that one of Hodkiewicz's coworkers activated the TracFone for him on May 12, 2012, using their employer's phone.

¶26 On these facts, it is clear beyond a reasonable doubt a rational jury would have found Hodkiewicz guilty of the charges that were premised on harassing phone calls to S.P., even absent Hendzel's hearsay testimony regarding the nature of TracFone activation numbers.[3] We therefore reject Hodkiewicz's argument that the admission of that testimony constituted plain error entitling him to a new trial.

¶27 Hodkiewicz's alternative argument that his trial attorney was ineffective for failing to object to Hendzel's testimony also fails. Whether an attorney rendered ineffective assistance is a mixed question of fact and law. ***State v. Nielsen***, 2001 WI App 192, ¶14, 247 Wis. 2d 466, 634 N.W.2d 325. We will uphold the circuit court's findings of fact unless they are clearly erroneous. ***Id.***

[3] Hodkiewicz does not develop any argument that the admission of Hendzel's testimony regarding TracFone activation numbers warrants a new trial on Counts 4 through 9, none of which pertained to any phone calls made to S.P.

However, whether the defendant's proof is sufficient to establish ineffective assistance is a question of law that we review independently. ***Id.***

¶28 To prevail on an ineffective assistance claim, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, the defendant must point to specific acts or omissions by counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To demonstrate prejudice, the defendant must show there is "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." ***Id.*** at 694. If a defendant fails to make a sufficient showing on one prong of the ***Strickland*** test, we need not address the other. ***Id.*** at 697.

¶29 Hodkiewicz cannot establish that he was prejudiced by his trial attorney's failure to object to Hendzel's testimony regarding TracFone activation numbers. As discussed above at paragraphs 24 and 25, there was strong evidence connecting Hodkiewicz to the harassing phone calls made to S.P., and even without Hendzel's testimony, the jury could have reasonably inferred that Hodkiewicz had a coworker activate the TracFone for him. Under these circumstances, it is not reasonably probable the result of Hodkiewicz's trial would have been different had his trial counsel objected to Hendzel's testimony. Hodkiewicz has therefore failed to demonstrate that his trial attorney's failure to object to Hendzel's testimony constituted ineffective assistance.

B. Hendzel's "special privileges" testimony

¶30 It is undisputed that Hodkiewicz was in custody in the Shawano County Jail when the TracFone was activated and when seventeen of the calls from the TracFone to S.P.'s cellphone were made. However, Hendzel testified he had "received information" that Hodkiewicz had multiple relatives working in the Shawano County Jail who had provided him with "special privileges," including "getting out of his cell and having access to phones." Again, Hodkiewicz asserts the admission of this hearsay testimony violated his constitutional right to confrontation and was therefore plain error requiring a new trial.[4]

¶31 Once again, assuming without deciding the admission of Hendzel's special privileges testimony was obvious and substantial error, we conclude Hodkiewicz is not entitled to relief because the error was harmless. On cross-examination, Hendzel conceded it would have been a "criminal act" for any jail employee to provide Hodkiewicz with special treatment. Hendzel further conceded he had not investigated whether Hodkiewicz received special treatment, and he had no personal knowledge as to whether Hodkiewicz had access to a phone while in jail. Hodkiewicz repeatedly denied in his trial testimony that he had access to a phone while in custody. In addition, Hodkiewicz's trial attorney emphasized in his closing argument that the State had failed to present any evidence that Hodkiewicz received special treatment in jail, including access to a phone. The record therefore shows that Hodkiewicz significantly undermined

[4] The State does not dispute that Hendzel's "special privileges" testimony was hearsay, or that its admission violated Hodkiewicz's constitutional right to confrontation.

Hendzel's testimony that Hodkiewicz received special privileges, including phone access, while in jail.

¶32 Moreover, even assuming that, without Hendzel's testimony, the jury would have concluded Hodkiewicz did not activate the TracFone or use it to place seventeen of the calls to S.P., it is nevertheless clear the jury would have convicted Hodkiewicz of all the counts alleged in the Second Amended Information. Counts 4 through 9 were unrelated to any phone calls S.P. received. Count 4 alleged that Hodkiewicz intentionally damaged S.P.'s property on November 5, 2012, by scratching the words "Fuck U Bitch" into the door of her vehicle. Counts 5 through 9 pertained to the break-in and physical assault that S.P. testified occurred on the evening of July 1-2, 2013. None of these counts required the State to prove that Hodkiewicz activated the TracFone or used it to place any of the harassing phone calls to S.P. Thus, the jury would have reached the same verdicts on Count 1 and Counts 4 though 9, even absent Hendzel's "special privileges" testimony.

¶33 With respect to Count 1, stalking, the State was required to prove that: (1) Hodkiewicz intentionally engaged in a course of conduct—that is, two or more acts carried out over time that show a continuity of purpose—directed at S.P.; (2) the course of conduct would have caused a reasonable person to suffer serious emotional distress or to fear bodily injury or death to herself or a member of her family; (3) Hodkiewicz's acts caused S.P. to suffer serious emotional distress or fear bodily injury or death to herself or a member of her family; and (4) Hodkiewicz knew or should have known that at least one of the acts constituting the course of conduct would cause the requisite emotional distress or fear. *See* WIS JI—CRIMINAL 1284 (2013). The State amply proved these elements, even without any evidence regarding the calls S.P. received from the

TracFone. Those calls were only a small part of an extended course of conduct that included multiple violent assaults and incidents of property damage, as well as other calls from restricted or unknown numbers. In fact, the State specifically asserted in its closing argument at trial that the jury could find Hodkiewicz guilty of stalking based solely on the physical assault that occurred on December 9, 2011, and the break-in and assault that occurred on July 1-2, 2013. On this record, it is clear beyond a reasonable doubt the jury would have found Hodkiewicz guilty of stalking absent Hendzel's "special privileges" testimony.

¶34 Count 2, unlawful use of a telephone, pertained to the August 10, 2012 call to S.P., in which the caller inquired, "Did you get them?" in an apparent reference to the flowers that had been left outside S.P.'s apartment four days earlier. Count 3, disorderly conduct, pertained to the act of leaving the flowers. Whether Hodkiewicz made the August 10 call to S.P. is relevant to both of these counts. *See infra* ¶¶41-42. However, there is no evidence in the record that Hodkiewicz was in jail on August 10, 2012. Thus, whether Hodkiewicz had access to a phone while in jail is irrelevant to whether he made the August 10 call. Under these circumstances, we are convinced beyond a reasonable doubt that the jury would have found Hodkiewicz guilty of Counts 2 and 3 even absent Hendzel's "special privileges" testimony. Because the jury would have convicted Hodkiewicz of each of the nine charges without Hendzel's testimony, any error in admitting that testimony was harmless.

¶35 We also reject Hodkiewicz's argument that his trial attorney was ineffective by failing to object to Hendzel's "special privileges" testimony. For the same reasons explained above, it is not reasonably probable the result of Hodkiewicz's trial would have been different had counsel objected to Hendzel's

testimony. Consequently, Hodkiewicz cannot demonstrate he was prejudiced by counsel's failure to object. *See* ***Strickland***, 466 U.S. at 694.

C. Hendzel's testimony regarding the August 10, 2012 call

¶36 As discussed above, S.P. testified she received a telephone call on August 10, 2012, in which the caller, whom she recognized as Hodkiewicz, asked, "Did you get them?" When S.P. did not respond, the caller said, "[Y]ou did," and laughed. S.P. testified she understood the caller to be referring to flowers that had been left outside her apartment four days earlier.

¶37 Hodkiewicz denied leaving flowers at S.P.'s apartment or calling her on August 10, 2012. Moreover, S.P.'s cellphone records showed that the only two calls she received on August 10 at the relevant time were from the father of her older son. However, in the State's rebuttal case, Hendzel testified S.P. told him she received the August 10 call on "[h]er phone at work." When the State subsequently asked, "So it was a call that she received *on her work phone*?" Hendzel responded, "That is what [S.P.] stated." (Emphasis added.)

¶38 We agree with Hodkiewicz that his trial attorney was ineffective by failing to object to Hendzel's testimony that S.P. told him she received the August 10 call on her work phone. Hendzel's testimony in that regard was clearly hearsay—that is, "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *See* WIS. STAT. § 908.01(3).[5] Hearsay is generally inadmissible, *see*

[5] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

WIS. STAT. § 908.02, and the State does not argue any exception to the hearsay rule permitted the admission of Hendzel's testimony regarding the August 10 call, *see* WIS. STAT. § 908.03. Moreover, the State does not dispute Hodkiewicz's assertion that the admission of Hendzel's testimony violated his constitutional right to confrontation. Hodkiewicz's trial attorney conceded at the postconviction hearing that he had no strategic reason for failing to object to Hendzel's testimony, and the State does not argue there was any valid reason for counsel's failure to do so. Under these circumstances, we conclude trial counsel performed deficiently by failing to object to Hendzel's testimony.[6]

¶39 The State asserts that, even if Hodkiewicz's trial attorney performed deficiently by failing to object to Hendzel's testimony, Hodkiewicz cannot establish that he was prejudiced with respect to Count 1 and Counts 4 through 9. We agree with the State that Hodkiewicz cannot establish prejudice with respect to those counts, none of which required proof that Hodkiewicz placed the August 10, 2012 call to S.P. Moreover, we observe Hodkiewicz does not dispute the State's

[6] The circuit court concluded trial counsel's failure to object was not deficient because Hendzel's testimony was admissible under the rule of completeness. The rule of completeness "require[s] that a statement be admitted in its entirety when this is necessary to explain the admitted portion, to place it in context, or to avoid misleading the trier of fact, or to ensure a fair and impartial understanding of the admitted portion." ***State v. Sharp***, 180 Wis. 2d 640, 653-54, 511 N.W.2d 316 (Ct. App. 1993) (quoting ***United States v. Marin***, 669 F.2d 73, 84 (2nd Cir. 1982)).

Here, Hendzel's rebuttal testimony that S.P. told him she received the August 10 call on her work phone was not offered to provide *context* for S.P.'s testimony regarding the call. Rather, it was offered to supplement the *content* of S.P.'s testimony—S.P. never testified whether she received the August 10 call on her cellphone or some other phone, and Hendzel's testimony was offered to establish that she actually received the call on her work phone. This was not a situation in which Hendzel's testimony was offered to clarify a prior statement, which was not introduced in its entirety, in order to avoid misleading the trier of fact. We therefore reject the circuit court's conclusion that Hendzel's testimony was admissible under the rule of completeness and that, as a result, Hodkiewicz's trial attorney was not deficient by failing to object.

assertion that counsel's error in failing to object to Hendzel's testimony regarding the August 10 call did not affect the jury's verdicts on Count 1 and Counts 4 through 9. We therefore conclude that, despite counsel's error in failing to object, Hodkiewicz is not entitled to a new trial on those counts.

¶40 The State concedes, however, that if Hodkiewicz's trial attorney performed deficiently by failing to object to Hendzel's testimony regarding the August 10 call, then Hodkiewicz is entitled to a new trial on Counts 2 and 3 because counsel's error prejudiced Hodkiewicz with respect to those counts. We agree with the State's concession.

¶41 Count 2 required the State to prove that, on August 10, 2012, Hodkiewicz made a telephone call in which he did not disclose his identity, with the intent to abuse or threaten any person at the called number. *See* WIS JI—CRIMINAL 1904 (2008). Although S.P. testified she recognized Hodkiewicz's voice during the August 10 call, Hodkiewicz testified he did not make that call, and S.P.'s cellphone records showed that the only two calls she received on that date during the relevant time period were from the father of her older son. The fact that S.P.'s cellphone records failed to corroborate her testimony that Hodkiewicz made the August 10 call was extremely damaging to the State's case on Count 2. Hendzel's testimony repaired that damage by suggesting that S.P. received the August 10 call on her work phone, rather than her cellphone. However, absent Hendzel's testimony, we conclude it is reasonably probable the jury would have reached a different verdict on Count 2. In other words, the admission of Hendzel's testimony undermines our confidence in the jury's verdict on that count. *See* ***Strickland***, 466 U.S. at 694.

¶42 In Count 3, the State alleged Hodkiewicz committed disorderly conduct by placing flowers outside S.P.'s apartment on August 6, 2012. The State presented no direct evidence that Hodkiewicz left the flowers in question, and Hodkiewicz denied doing so. However, the State argued Hodkiewicz had "acknowledged" leaving the flowers during the August 10 phone call to S.P. Whether Hodkiewicz actually made the August 10 call was therefore directly relevant to the State's claim that Hodkiewicz left the flowers at S.P.'s apartment on August 6. Again, absent Hendzel's hearsay testimony that S.P. received the August 10 call on her work phone, it is reasonably probable the jury would have concluded Hodkiewicz was not responsible for the August 10 call. Consequently, trial counsel's failure to object to Hendzel's testimony regarding the August 10 call also prejudiced Hodkiewicz with respect to Count 3. *See* ***id.***

¶43 In summary, Hodkiewicz has established that his trial attorney performed deficiently by failing to object to Hendzel's testimony regarding the August 10 call, and that counsel's failure to object prejudiced Hodkiewicz's defense with respect to Counts 2 and 3. We therefore reverse Hodkiewicz's convictions those on counts, along with the related portions of the order denying postconviction relief, and remand for further proceedings.[7]

[7] Hodkiewicz alternatively argues the admission of Hendzel's testimony that S.P. received the August 10, 2012 call on her work phone was plain error. However, Hodkiewicz does not explain how the admission of Hendzel's testimony in that regard affected the jury's verdicts on Count 1 and Counts 4 through 9, none of which required proof that Hodkiewicz made the August 10 call. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not address undeveloped arguments). Moreover, we have already determined Hodkiewicz is entitled to a new trial on Counts 2 and 3 because his trial attorney was ineffective by failing to object to Hendzel's testimony. Under these circumstances, we need not address Hodkiewicz's alternative argument that the admission of Hendzel's testimony was plain error with respect to Counts 2 and 3. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (court of appeals need not address all issues raised by the parties if one is dispositive).

II. Presentation of false testimony

¶44 On cross-examination, Hodkiewicz acknowledged that Hendzel had asked him during an interview whether he "remembered saying something or having a conversation wherein [he] indicated that [his] life would be easier if [S.P.] was under the ground, referring to her being dead." The following exchange then took place between the prosecutor and Hodkiewicz:

> Q You denied it; isn't that correct, Mr. Hodkiewicz?
>
> A I'm not sure what you mean by denied it.
>
> Q You said there never was such a conversation. Isn't that right, Mr. Hodkiewicz?
>
> A I'm not sure what you're talking about, sir.
>
> Q I'm talking about your saying to coworkers, or whoever, that your life would be easier if [S.P.] was dead, six feet under in the ground, and you were asked that by Officer Hendzel; isn't that right?
>
> A Yes, I was.
>
> Q And you initially denied that?
>
> A Correct.
>
> Q And then later, when he confronted you with the fact that they actually talked to someone who had heard such a conversation, then you admitted it; isn't that right, Mr. Hodkiewicz?
>
> A There was some people at work talking that way, yes.
>
> Q There were other people talking about the fact that your life would be easier with [S.P.] underground, not you? That was you that was talking about that, Mr. Hodkiewicz, isn't that right?
>
> A No, it's not.

¶45 Hodkiewicz refused to name the coworkers who allegedly stated his life would be easier if S.P. were underground. He testified there was "some joking about it at work," but he "was avoiding that" because it "wasn't going to help [him] in any way, shape, or form." He denied admitting to Hendzel that he personally had joked about S.P. being underground.

¶46 During the State's rebuttal case, Hendzel testified Hodkiewicz had initially denied during an interview that he told his coworkers he would be better off if S.P. were underground. However, Hendzel testified Hodkiewicz subsequently admitted making that comment, but claimed it was a joke.

¶47 Hodkiewicz asserts Hendzel's rebuttal testimony that Hodkiewicz admitted making a comment about being better off if S.P. were underground was false. He cites Hendzel's report regarding the interview in question, which states:

> I asked HODKEIWICZ [sic] if he remembered any conversation taking place when someone made the comment that life would be easier if [S.P.] was under the ground, referring to her being dead. HODKIEWICZ denied ever making such statement but admitted that this may have been said by co-workers, stated a second time that he never made such statements and said that this was nothing more than a joke. HODKIEWICZ stated that this type of statement may have been made. I asked HODKIEWICZ to be honest with me about the conversations. HODKIEWICZ said that this was nothing more than a joke.

Hodkiewicz also cites the video recording of the interview, which shows that Hodkiewicz never expressly admitted personally making any comment about being better off if S.P. were underground.

¶48 Based on Hendzel's report and the video recording of the interview, Hodkiewicz argues the State knew or should have known Hendzel's rebuttal testimony was false. Hodkiewicz asserts the State's knowing presentation of false

testimony violated his constitutional right to due process. *See* ***State v. Nerison***, 136 Wis. 2d 37, 54, 401 N.W.2d 1 (1987) ("Due process prevents a prosecutor from relying on testimony the district attorney knows to be false, or later learns to be false."). Hodkiewicz concedes his trial counsel did not object to Hendzel's testimony. However, he argues the admission of Hendzel's testimony was plain error, or, in the alternative, his trial attorney was ineffective for failing to object.[8]

¶49 We reject these arguments for two reasons. First, the circuit court found that Hendzel's rebuttal testimony was not false, explaining:

> The evidence set forth by Hodkiewicz here does *not* demonstrate that Investigator Hendzel lied about this statement …. The evidence demonstrates that Hodkiewicz initially denied *any* conversation wherein a reference to [S.P.] being "underground" was made. He later told Investigator Hendzel, however, that others may have made the statement *or* that it was nothing more than a joke. While Hodkiewicz may never have explicitly admitted that he did make such a statement to Investigator Hendzel, his answers to Investigator Hendzel's question about the alleged conversation clearly changed over the course of the conversation. This shift in Hodkiewicz's answers could reasonably have been construed as an admission by Investigator Hendzel, and thus his testimony was not false but merely indicative of what he remembered of his conversation with Hodkiewicz.

The circuit court's factual finding that Hendzel's testimony was not false is not clearly erroneous. Consequently, the admission of Hendzel's testimony did not violate Hodkiewicz's right to due process. Hodkiewicz has therefore failed to

[8] Hodkiewicz also asserts he is entitled to a new trial because the State knew or should have known Hendzel's testimony that S.P. received the August 10, 2012 call on her work phone was false. Because we have already concluded Hodkiewicz is entitled to a new trial on Counts 2 and 3 due to his trial attorney's failure to object to Hendzel's testimony in that regard, we need not address his additional argument that he is entitled to relief because the testimony was false. *See* ***Turner***, 268 Wis. 2d 628, ¶1 n.1.

show that the admission of Hendzel's testimony was plain error, or that his trial attorney performed deficiently by failing to object to Hendzel's testimony.

¶50 Second, even assuming Hendzel's testimony was false, Hodkiewicz is not entitled to a new trial. "Due process requires a new trial if the prosecutor in fact used false testimony which, in any reasonable likelihood, could have affected the judgment of the jury." ***Nerison***, 136 Wis. 2d at 54. Here, given the acrimonious nature of the divorce and child custody proceedings between Hodkiewicz and S.P., the jury would not have been surprised to learn that Hodkiewicz, either in jest or otherwise, lamented to one or more coworkers that he would be better off if S.P. were dead. In light of the other evidence presented at trial regarding the parties' contentious relationship, it is not reasonably likely the admission of Hendzel's testimony regarding that statement affected the jury's verdicts. Hodkiewicz is therefore not entitled to a new trial on due process grounds. *See* ***id.*** Moreover, because it is not reasonably likely the jury would have reached a different result absent Hendzel's testimony, Hodkiewicz has failed to show he was prejudiced by his trial attorney's failure to object. *See* ***Strickland***, 466 U.S. at 694.

III. Ineffective assistance regarding Hodkiewicz's alibi for the December 9, 2011 attack

¶51 As noted above, S.P. testified at trial that she was attacked in her garage on the evening of December 9, 2011, and she recognized the assailant as Hodkiewicz based on his voice.[9] Hodkiewicz denied all involvement in the

[9] During its closing argument at trial, the State asserted the jury could find Hodkiewicz guilty of Count 1 (stalking) based in part on the December 9, 2011 attack. However, the State asserts on appeal that none of the charges against Hodkiewicz were based on the December 9 attack, and evidence regarding that attack was introduced only as other acts evidence.

December 9 attack and presented an alibi: his neighbor, Kyle Thorson, testified he heard Hodkiewicz's garage door open sometime between 7:30 and 8:00 p.m. on December 9, and he went over to Hodkiewicz's garage between 8:00 and 8:30 p.m. and talked to Hodkiewicz for sixty to ninety minutes.

¶52 During the State's rebuttal case, detective Wade Wudtke testified that, at some point, Hodkiewicz helped him prepare a timeline of Hodkiewicz's whereabouts on December 9, 2011. The timeline, which was introduced into evidence at trial, did not indicate that Hodkiewicz was with Thorson at any point that day. Wudtke testified that, had Hodkiewicz mentioned meeting with Thorson on December 9, Wudtke would have included that event in the timeline.

¶53 Hodkiewicz claims the record shows that both Hodkiewicz and Thorson provided statements to police "three to four days after the [December 9] incident" that were consistent with Thorson's trial testimony. Hodkiewicz asserts his trial attorney was aware of these statements prior to trial but nevertheless failed to introduce them to "rebut the false implication" from Wudtke's testimony that Hodkiewicz's alibi was a recent fabrication. Hodkiewicz argues trial counsel's failure to introduce these prior statements constituted ineffective assistance.

¶54 We disagree. Regardless of whether trial counsel performed deficiently by failing to introduce Hodkiewicz's and Thorson's prior statements at trial, we conclude Hodkiewicz was not prejudiced by counsel's failure to do so. Hodkiewicz's statement provides, in relevant part:

> I was asked questions as to where I was on 12-09-11. I had informed Deputy Verbrigghe that I was with my son, [J.], … at approximately 800 P.M. I also informed Deputy Verbrigghe that Kyle Thorson had observed me in my garage. Kyle text messaged me earlier in the night [and] came over later.

Thorson told police he "observed the exterior lights on" at Hodkiewicz's home between 7:00 and 7:30 p.m. on December 9 and "text messages between both parties were sent." Thorson then "observed the light on" in Hodkiewicz's garage at about 9:00 p.m. and "went over to visit" Hodkiewicz at about 10:00 p.m.

¶55 It is not reasonably probable the result of Hodkiewicz's trial would have been different had his trial attorney introduced these statements, which do not provide anything remotely resembling an ironclad alibi. Hodkiewicz's statement does not indicate with any specificity at what times Thorson "observed" Hodkiewicz in his garage, texted him, or "came over." Furthermore, accepting Thorson's statement as true, the jury could have reasonably concluded Hodkiewicz left his home sometime between 7:00 and 7:30 p.m. on December 9, when Thorson noticed that Hodkiewicz's exterior lights were on, and returned at 9:00 p.m., when Thorson noticed a light on inside Hodkiewicz's garage. This would have given Hodkiewicz ample time to commit the assault described by S.P.

¶56 Moreover, the admission of Hodkiewicz's and Thorson's statements would have done nothing to change the fact that, when subsequently questioned by detective Wudtke, Hodkiewicz failed to mention seeing Thorson at any point on December 9. In addition, Thorson's statement to police that he "went over to visit" Hodkiewicz at about 10:00 p.m. was inconsistent with his trial testimony that he went to Hodkiewicz's garage between 8:00 and 8:30 p.m. On these facts, it is not reasonably probable the jury would have reached a different result on any of the nine charges had Hodkiewicz's trial counsel introduced Hodkiewicz's and Thorson's prior statements. *See* ***Strickland***, 466 U.S. at 694. Hodkiewicz's

ineffective assistance claim therefore fails because he cannot demonstrate he was prejudiced by counsel's alleged error.[10]

IV. Newly discovered evidence

¶57 Following Hodkiewicz's trial, detective Troy Ugoretz investigated whether Hodkiewicz had received special privileges while an inmate in the Shawano County Jail. After completing his investigation, Ugoretz issued a report stating, in relevant part:

> I was unable to find anyone that stated that they saw Eric Hodkiewicz receive any special treatment or privileges. I have no evidence that any special treatment or privileges were ever given for any inmate in the Shawano County Jail. I have evidence of only one phone call being given to Eric Hodkiewicz on an unrecorded phone line, however that call was marked down in the log as to the procedure of the Shawano County Jail.
>
> I was unable to find any evidence of a crime or policy violation by the staff of the Shawano County Jail.

¶58 Hodkiewicz argues the results of Ugoretz's investigation constitute newly discovered evidence entitling him to a new trial. The decision to grant or deny a motion for a new trial based on newly discovered evidence is committed to the circuit court's discretion. ***State v. Avery***, 2013 WI 13, ¶22, 345 Wis. 2d 407, 826 N.W.2d 60. We will not reverse the circuit court's decision unless the court

[10] Hodkiewicz also asserts he was prejudiced by the cumulative effect of his trial attorney's alleged errors. *See* ***State v. Thiel***, 2003 WI 111, ¶59, 264 Wis. 2d 571, 665 N.W.2d 305 ("[P]rejudice should be assessed based on the cumulative effect of counsel's deficiencies."). We have granted Hodkiewicz a new trial on Counts 2 and 3, based on trial counsel's failure to object to Hendzel's rebuttal testimony that S.P. received the August 10, 2012 phone call on her work phone. Hodkiewicz's other claimed errors, whether considered individually or together, do not convince us he is entitled to a new trial on the remaining seven counts.

applied the incorrect legal standard or made a decision not reasonably supported by the facts of record. ***Id.***, ¶23.

¶59 To obtain a new trial based on newly discovered evidence, a defendant must prove four elements by clear and convincing evidence: "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." ***Id.***, ¶25 (quoting ***State v. Plude***, 2008 WI 58, ¶32, 310 Wis. 2d 28, 750 N.W.2d 42). If the defendant makes this showing, the circuit court must determine whether there is a reasonable probability a different result would be reached in a new trial. ***Id.*** "A reasonable probability of a different result exists if there is a reasonable probability that a jury, looking at both the old and the new evidence, would have a reasonable doubt as to the defendant's guilt." ***Id.***

¶60 Here, the circuit court concluded Hodkiewicz was not entitled to a new trial because it was not reasonably probable a new trial including evidence regarding Ugoretz's investigation would produce a different result. The court reasoned Ugoretz's conclusions were "not strong enough for a jury to completely disregard the possibility that Hodkiewicz had access to a phone while incarcerated," particularly in light of Ugoretz's "acknowledgement that he may not have been able to interview everyone with information related to this matter." The court also observed that, regardless of the results of Ugoretz's investigation, the jury would still have to consider S.P.'s "identification that Hodkiewicz was the one making the harassing phone calls." Finally, the court observed the new evidence "would not have completely foreclosed the possibility that Hodkiewicz committed the crimes he was convicted of" because, although the evidence showed Hodkiewicz was in jail when the TracFone was activated and when some

of the calls to S.P. were made, other harassing calls were made to S.P. during periods when Hodkiewicz was not incarcerated. Ultimately, the court concluded the "question of who activated the TracFone is of limited value compared to the voluminous evidence presented by both parties in this case."

¶61 The circuit court applied the proper legal standard when considering Hodkiewicz's newly discovered evidence claim, and its decision is reasonably supported by the facts of record. *See* ***id.***, ¶23. Accordingly, the court did not erroneously exercise its discretion by denying Hodkiewicz's motion for a new trial based on newly discovered evidence.

V. Interest of justice

¶62 Hodkiewicz next argues he is entitled to a new trial in the interest of justice, under WIS. STAT. § 752.35, because the real controversy was not fully tried due to the cumulative effect of the errors discussed above. To obtain relief on this basis, Hodkiewicz must show that "the jury was precluded from considering 'important testimony that bore on an important issue' or that certain evidence which was improperly received 'clouded a crucial issue' in the case." ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998) (quoting ***State v. Hicks***, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996)).

¶63 We decline to exercise our formidable power of discretionary reversal in this case. *See* ***State v. Sugden***, 2010 WI App 166, ¶37, 330 Wis. 2d 628, 795 N.W.2d 456 (court of appeals' power of discretionary reversal is formidable and should be exercised only in exceptional cases). We have granted Hodkiewicz a new trial on Counts 2 and 3, based on our conclusion his trial attorney was ineffective by failing to object to Hendzel's testimony that S.P. received the August 10, 2012 call on her work phone. We do not believe the

remainder of the errors cited by Hodkiewicz so clouded any crucial issue in the case as to prevent the real controversy from being fully tried.

¶64 First, questions regarding how and where the TracFone was activated and whether Hodkiewicz had access to a phone while in jail were not nearly as important at trial as the other evidence tying Hodkiewicz to the harassing phone calls S.P. received. Second, Hendzel's testimony that Hodkiewicz admitted saying he would be better off if S.P. were underground would not have been particularly surprising to the jury, given the acrimonious nature of the parties' divorce and custody dispute. Third, Hodkiewicz's trial attorney was not ineffective by failing to introduce Hodkiewicz's and Thorton's statements to police regarding Hodkiewicz's whereabouts during the December 9, 2011 attack on S.P. because those statements did not establish that Hodkiewicz could not have committed that crime. In fact, Thorson's statement actually supports a reasonable conclusion that Hodkiewicz could have been the perpetrator. Fourth and finally, for the reasons discussed above at ¶60, it is not reasonably probable a new trial including the results of Ugoretz's investigation would produce a different result on any of the nine charges against Hodkiewicz. On the whole, Hodkiewicz's alleged errors, considered either separately or together, do not establish that this is the type of "extraordinary case" warranting discretionary reversal. *See* ***id.***

VI. Double jeopardy

¶65 In his final argument on appeal, Hodkiewicz contends his convictions and consecutive sentences for both bail jumping (Count 9) and the underlying offense of strangulation and suffocation (Count 7), violated his constitutional right to be free from double jeopardy. However, Hodkiewicz concedes this argument is contrary to ***State v. Henning***, 2004 WI 89, ¶39, 273

Wis. 2d 352, 681 N.W.2d 871, in which our supreme court stated, "In Wisconsin, bail jumping and the crime underlying a bail jumping charge are distinct and separate offenses for purposes of the Double Jeopardy Clause." We have no authority to overrule, modify, or withdraw language from a supreme court opinion. ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). We therefore reject Hodkiewicz's double jeopardy argument.

By the Court.—Judgment and order affirmed in part; reversed in part and cause remanded for further proceedings.

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