COURT OF APPEALS
DECISION
DATED AND FILED

February 27, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2016AP1045-CR
2016AP1046-CR
2016AP1047-CR
2016AP1048-CR
2016AP1049-CR

Cir. Ct. Nos. 2013CF1401
2013CF1860
2013CF3152
2013CF3435
2014CF189

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TERRANCE LAVONE EGERSON,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Milwaukee County: MEL FLANAGAN and MICHELLE ACKERMAN HAVAS, Judges. *Affirmed*.

Before Brennan, P.J., Brash and Dugan, JJ.

¶1 BRENNAN, P.J. Terrance Lavone Egerson seeks to withdraw his guilty pleas, post sentencing, based on his claim of manifest injustice due to the alleged ineffective representation he received from trial counsel.[1] Egerson was initially charged with a total of sixteen felony and misdemeanor charges in five consolidated cases involving his repeated contact with his estranged wife, A.E., in violation of a domestic abuse restraining order, a temporary injunction, and various bail and sentencing no-contact orders. Fifteen of the sixteen charges contained a domestic abuse repeater enhancer. Before trial, as part of a global plea negotiation, the court dismissed all of the domestic abuse repeater enhancers on the six counts to which he was to plead guilty. Then pursuant to the negotiation, Egerson pled guilty to those six counts. The remaining counts were dismissed but read in.

¶2 Egerson's principal ineffectiveness claim is that trial counsel was deficient for failing to file a motion challenging the sufficiency of the complaints as to the fifteen domestic abuse repeater enhancers, which he claims are unsupported in the complaints. Regarding the repeater enhancers, he argues that the relevant statutes require an allegation of physical violence, and none of the complaints alleged that Egerson had committed physical violence. *See* WIS. STAT. §§ 939.621(1)(b) and (2) and 968.075(1)(a) (2015-16).[2] Additionally he claims

[1] The Honorable Mel Flanagan presided over Egerson's plea and sentencing hearings and entered the judgments of conviction. The Honorable Michelle Ackerman Havas denied Egerson's postconviction motion without a hearing.

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

The repeater statute, WIS. STAT.§ 939.621(2), reads as follows:

(continued)

trial counsel was ineffective for failing to move to dismiss the felony bail jumping charge in the second case (2013CF1860) and a count of intentionally violating a no-contact order in the first case (2013CF1401). He argues he was prejudiced by trial counsel's failure to challenge these charges because the repeater enhancers resulted in overcharging, created felonies, and increased his sentencing exposure. He argues that had he been properly charged, his sentencing exposure would only have been twenty years and six months.

¶3 The State responds to his repeater enhancer claim arguing that Egerson has failed to show trial counsel was deficient because the facts in the complaints create reasonable inferences of domestic abuse, supporting the charging of the domestic abuse repeater enhancers. But, more to the point, the State argues, Egerson has failed to allege and prove prejudice on any of his three claims. The State bases that on the following facts. First, Egerson makes no claim that he would *no*t have pled guilty but for trial counsel's ineffectiveness. *See* ***State v. Krawczyk***, 2003 WI App 6, ¶¶28-29, 259 Wis. 2d 843, 657 N.W.2d 77. Second, all of the repeater enhancers were dismissed from the charges to which he pled guilty. Third, Egerson fails to show actual rather than conceivable prejudice

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> (2) If a person commits an act of domestic abuse, as defined in [WIS. STAT. §] 968.075(1)(a) and the act constitutes the commission of a crime, the maximum term of imprisonment for that crime may be increased by not more than 2 years if the person is a domestic abuse repeater. The victim of the domestic abuse crime does not have to be the same as the victim of the domestic abuse incident that resulted in the prior arrest or conviction. The penalty increase under this section changes the status of a misdemeanor to a felony.

because the sentencing exposure he asserts he should have faced, based on the modification he says counsel should have sought, is speculative and conclusory.

¶4 We agree with the State's analysis. Trial counsel was not deficient with regard to the repeater enhancers because the facts in the complaints, and reasonable inferences therefrom, support the enhancers. Likewise, we conclude that Egerson failed to show that trial counsel was deficient on his other two related claims. But more importantly, even if counsel's performance was deficient (which we do not find), Egerson has failed to claim, much less show, any reasonable probability of a different result under the well-established test of ***Strickland***.[3] Accordingly, we affirm.

BACKGROUND

¶5 Each of Egerson's arguments challenges the sufficiency of the complaints in the consolidation of five circuit court cases. We first review the complaints in the consolidated cases.[4]

[3] ***Strickland v. Washington***, 466 U.S. 668 (1984).

[4] The first of the five consolidated cases began with Egerson's April 3, 2013 arrest. Egerson had previous convictions. For purposes of this opinion, when we refer to the first, second, third, fourth and fifth cases, we are referring to the cases consolidated at the trial court that are appealed here.

The First[5] Case:
Phone call to A.E. on March 22, 2013.

¶6 The first complaint charged Egerson with a total of three counts, which would have all been misdemeanors but for the domestic abuse repeater enhancer. He was arrested on this first case on April 3, 2013. Count one charged a violation of a domestic abuse temporary restraining order, as domestic abuse, with a domestic abuse repeater enhancer.[6] It was based on a phone call Egerson made to A.E. on March 22, 2013. The complaint alleged that A.E., with whom he was in the process of a divorce, told police Egerson called her in violation of a domestic abuse temporary restraining order (TRO) and accused her of having sexual relations with another man. The complaint alleged that the TRO was issued in a previous case by Court Commissioner William Honrath, on March 15, 2013, and remained effective until March 28, 2013. It prohibited Egerson from having contact with A.E.

¶7 Based on the March 22, 2013 phone call, the complaint also charged Egerson with two counts of intentionally violating a no-contact order, as domestic abuse, with a domestic abuse repeater enhancer.[7] It alleged that Egerson was prohibited from having contact with A.E. by no-contact orders issued when he was sentenced in his two prior misdemeanor convictions from March 14, 2012:

[5] Milwaukee County Circuit Court Case No. 2013CF1401 (on appeal, 2016AP1045).

[6] WISCONSIN STAT. §§ 813.12(3), 813.12(8)(a), 968.075(1)(a), and 939.621(1)(b) and (2).

[7] WISCONSIN STAT. §§ 941.39 and (2), 939.51(3)(a), 968.075(1)(a), and 939.621(1)(b) and (2).

disorderly conduct and bail jumping.[8] It alleged that Egerson had been convicted of those two domestic abuse misdemeanors, received probation, was ordered to have no contact with A.E., had been revoked, and then received two consecutive sentences for which he was currently serving a jail sentence.

¶8 On April 4, 2013, at his initial appearance, Egerson was ordered to have no contact with A.E. on this first case. The no-contact order warned him that it was "effective immediately" and that he could be charged with bail jumping for violating its provisions. He signed the no-contact order acknowledging receipt on April 4, 2013. The no-contact order expressly stated the following:

> IT IS ORDERED, effective immediately, and also as a condition of release in this case, the defendant have ABSOLUTELY NO CONTACT with the following witness(es) or victim(s), their residence, subsequent residence, their workplace or other locations:
>
> Name
> [A.E.]
>
> "NO CONTACT" means that YOU, the defendant, shall not contact the above person(s) or locations(s) by telephone, in person, through the mail or any delivery service, by pager or fax or computer or any other electrical or electronic device, or through another person. The aforementioned condition of release is set pursuant to Wisconsin Statutes § 969.02(3)(d).
>
> This is an official Order of the Court. NO PERSON OTHER THAN THE COURT MAY CHANGE THIS ORDER.
>
> Any violation of this Court Order is a crime, and can result in immediate arrest. YOU, the defendant, could also be charged with the crime of Bail Jumping in violation of

[8] Milwaukee County Circuit Court Case Nos. 2011CM5728 and 2011CM7406.

> § 946.49, Wis. Stats. This Court Order stays in effect as long as this case continues, unless the Court changes this Order. YOU MUST NOT DISREGARD THIS ORDER.
>
> ….

(Some bolding omitted.)

The Second[9] Case:
Twelve phone calls to A.E. on April 17, 2013.

¶9 The second complaint charged Egerson with three new counts for events that occurred on April 17, 2013. Count one charged a violation of a domestic abuse injunction, as domestic abuse, with a domestic abuse repeater enhancer[10] for phoning A.E. twelve times from jail on April 17, 2013. The injunction had been issued on March 28, 2013,[11] by Court Commissioner Dean Zemel, and it prohibited contact with A.E. and was effective until March 28, 2017. A.E. answered the twelfth call and spoke to Egerson. These calls occurred only thirteen days after Egerson signed the no-contact order in the first case.

¶10 Count two charged felony bail jumping, as domestic abuse, and with a domestic abuse repeater enhancer[12] based on the April 17, 2013 phone calls to A.E., which violated the terms of Egerson's bail condition of no contact in the first case. Because the charges in the first case became felonies with the addition of the domestic abuse repeater enhancer, this bail jumping charge also became a felony.

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[9] Milwaukee County Circuit Court Case No. 2013CF1860 (on appeal, 2016AP1046).

[10] WISCONSIN STAT. §§ 813.12(4) and (8)(a), 968.075(1)(a), and 939.621(1)(b) and (2).

[11] Milwaukee County Circuit Court Case No. 2013FA1617.

[12] WISCONSIN STAT. §§ 946.49(1)(b), 939.50(3)(h), 968.075(1)(a), and 939.621(1)(b) and (2).

¶11 Count three charged Egerson with intentionally violating a no-contact order, as domestic abuse, with a domestic abuse repeater enhancer.[13] It alleged that Egerson violated one of the same no-contact orders from the two prior misdemeanor convictions referred to in the first case.

¶12 As part of the second case, Egerson was ordered to have no contact with A.E. as a condition of his release on bail in a form Order, identical to the one he signed in the first consolidated case. He signed acknowledging receipt of the no-contact order on April 21, 2013, just seventeen days after he signed the no-contact order in the first consolidated case.

¶13 After this second case was issued, in addition to a no-contact order on the second case, Egerson was released from custody on the first case and placed on electronic monitoring with another no-contact order. He signed this new order on May 6, 2013.

The Third[14] Case:
Phone calls to A.E. on May 26 and July 1, 2013.

¶14 The third complaint charged Egerson with four more counts for events that occurred on May 26 and July 1, 2013. He was charged and arrested on this third case on July 12, 2013. Count one charged Egerson with violation of a domestic abuse injunction, as domestic abuse, with a domestic abuse repeater

[13] WISCONSIN STAT. §§ 941.39 and (2), 939.51(3)(a), 968.075(1)(a), and 939.621(1)(b) and (2).

[14] Milwaukee County Circuit Court Case No. 2013CF3152 (on appeal, 2016AP1047).

enhancer.[15] It was based on a call he made to A.E. on May 26, 2013, from the House of Correction in violation of the domestic abuse injunction from 2013FA1617, described above, which was then in effect and remained effective until March 28, 2017. A transcript of the May 26, 2013 phone call revealed Egerson discussed the lengthy prison sentence he could receive based on A.E.'s reports to the police and told her she was ruining his life.

¶15 Count two charged Egerson with violation of a domestic abuse injunction, as domestic abuse, with a domestic abuse repeater.[16] It was based on a call he made to A.E. on July 1, 2013. The phone call was made after his release from custody with bail conditions including the no-contact orders in the first and second cases described above.

¶16 Counts three and four each charged Egerson with felony bail jumping, as domestic abuse, with a domestic abuse repeater enhancer[17] for the July 1, 2013 phone call. Like the felony bail jumping charge in the second consolidated case, these two charges became felonies by operation of the domestic abuse repeater enhancer from the previous charges in the first and second cases. The complaint alleged that each count violated the no-contact orders in the first and second consolidated cases.

[15] WISCONSIN STAT. §§ 813.12(4) and (8)(a), 968.075(1)(a), and 939.621(1)(b) and (2).

[16] WISCONSIN STAT. §§ 813.12(4) and (8)(a), 968.075(1)(a), and 939.621(1)(b) and (2).

[17] WISCONSIN STAT. §§ 946.49(1)(b), 939.50(3)(h), 968.075(1)(a), and 939.621(1)(b) and (2).

The Fourth[18] Case:
Victim intimidation attempts on July 18 and 21, 2013.

¶17 The fourth complaint charged Egerson with four more counts for events that occurred on July 18 and 21, 2013. Count one charged Egerson with felony intimidation of a victim, as domestic abuse, with a domestic abuse repeater enhancer[19] for attempting to dissuade A.E., a victim of a crime, from assisting the prosecution. The complaint alleged that an investigator from the Milwaukee County District Attorney's office listened to a July 18, 2013 call from Egerson's unit at the Milwaukee jail to his mother, Bessie Egerson, in which Egerson told his mother to tell A.E. not to testify against him. Bessie stated that she would talk to A.E. again. A.E. confirmed to the investigator that the voices on the July 18, 2013 call were Egerson and his mother and that Bessie Egerson had been contacting her two to four times a day telling her to be on Egerson's side and defend him. The investigator also listened to a call from Egerson to A.E. on July 21, 2013, in which he asked her to come to court and tell them they have a "harmonious relationship" and to let Egerson out. He stated that he had not been physically violent so she should let him out and reconcile with him.

¶18 Count two charged Egerson with violation of domestic abuse injunction, as domestic abuse, with a domestic abuse repeater enhancer,[20] for violating the domestic abuse injunction described above by the July 21, 2013 call.

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[18] Milwaukee County Circuit Court Case No. 2013CF3435 (on appeal, 2016AP1048).

[19] WISCONSIN STAT. §§ 940.45(4), 939.50(3)(g), 968.075(1)(a), and 939.621(1)(b) and (2).

[20] WISCONSIN STAT. §§ 813.12(4) and (8)(a), 968.075(1)(a), and 939.621(1)(b) and (2).

¶19 Counts three and four charged felony bail jumping, as domestic abuse, with a domestic abuse repeater enhancer,[21] for violating the no-contact order and no-contact condition of bail from the first and second cases.

¶20 At the time that the fourth case was filed, Egerson was out of custody. He appeared in court on August 1, 2013, and posted $2,000.00 cash bail. The case was then set for initial appearance, which was held on August 12, 2013, at which time a new no-contact order, identical to all of the others described above, was issued prohibiting Egerson from contacting A.E. He signed it, acknowledging receipt, on that same date.

The Fifth[22] Case:
Nine phone calls to A.E. from jail on October 9, 2013.

¶21 The fifth complaint charged Egerson with two more counts for phone calls that occurred on October 9, 2013. Count one charged Egerson with knowingly violating a domestic abuse injunction, with a domestic abuse repeater enhancer,[23] for contacting A.E. on October 9, 2013, by having other inmates call her with Egerson yelling to her in the background. A.E. said she received nine calls from Egerson from an unknown number between 9:06 a.m. and 10:22 a.m. on that date. The Milwaukee County Communication IMSD Network Application Specialist confirmed to the District Attorney's investigator that the phone number

[21] WISCONSIN STAT. §§ 946.49(1)(b), 939.50(3)(h), 968.075(1)(a), and 939.621(1)(b) and (2).

[22] Milwaukee County Circuit Court Case No. 2014CF189 (on appeal, 2016AP1049).

[23] WISCONSIN STAT. §§ 813.12(4) and (8)(a) and 939.621(1)(b) and (2).

from which A.E. received those calls was the in-house phone at the Milwaukee County Jail.

¶22 Count two charged Egerson with felony bail jumping,[24] without any domestic abuse charge and without any domestic abuse enhancer. This count was based on the same October 9, 2013 calls, which were prohibited by his bail conditions, including a no-contact order, in the fourth case, which he had acknowledged receiving on August 12, 2013.

General Trial Procedure of the Consolidated Cases

¶23 All five cases were consolidated in the circuit court on February 10, 2014. Trial counsel filed a motion to dismiss the repeater enhancers on April 21, 2014, arguing (differently than here) that the two predicate domestic abuse convictions occurred before the state legislature enacted WIS. STAT. § 939.621 and therefore could not be used to enhance. The trial court denied that motion and it is not part of this appeal.

¶24 As part of a global plea negotiation on all five cases, on April 27, 2014, Egerson signed a Guilty Plea Questionnaire in each consolidated case, stating that he was fifty years old, and had completed high school plus four years of schooling. He acknowledged that the State would move to dismiss the repeater enhancer on the counts he would plead guilty to.

[24] WISCONSIN STAT. §§ 946.49(1)(b) and 939.50(3)(h).

¶25 Egerson pled guilty pursuant to the global plea negotiation and plea form on April 28, 2014. *The court granted the State's motion to dismiss the domestic abuse repeater enhancers on all six counts to which Egerson was to plead guilty*. Then Egerson pled guilty pursuant to the plea negotiation as follows:

- On 2013CF1401, Egerson pled guilty to count one, a misdemeanor, for violating a domestic abuse temporary restraining order. Counts two and three were dismissed but read in.

- On 2013CF1860, Egerson pled guilty to count three, a misdemeanor, for intentionally contacting a victim after a court order. Counts one and two were dismissed but read in.

- On 2013CF3152, Egerson pled guilty to count three, felony bail jumping. Counts one, two, and four were dismissed but read in.

- On 2013CF3435, count one was amended from a felony to a misdemeanor charge of intimidating a witness, as domestic abuse. Egerson then pled guilty to the amended count. He also pled guilty to count three of felony bail jumping. Counts two and four were dismissed but read in.

- On 2014CF189, Egerson pled guilty to count one, a misdemeanor, for knowingly violating a domestic abuse injunction. Count two was dismissed but read in.

¶26 A presentence investigation report was then ordered. On August 26, 2014, new trial counsel filed a post-plea motion to withdraw the guilty pleas prior to sentencing. The trial court denied that motion.

¶27 On November 25, 2014, Egerson was sentenced as follows:

- 2013CF1401: Sixty-nine days in the House of Correction, a *time served* disposition.

- 2013CF1860: Fifty-two days at the House of Correction, a *time served* disposition.

- 2013CF3152: Two years initial confinement and two years extended supervision.

- 2013CF3435: On amended count one, nine months at the House of Correction, a *time served* disposition. On count three, three years initial confinement and three years extended supervision, consecutive.

- 2014CF189: Nine months at the House of Correction, a *time served* disposition.

¶28 On February 1, 2016, Egerson filed a postconviction motion to withdraw his pleas, claiming ineffective assistance of trial counsel. That motion was denied by the postconviction court without an evidentiary hearing and this appeal followed.

STANDARD OF REVIEW

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

¶30 A defendant can demonstrate manifest injustice by showing that he received ineffective assistance of trial counsel. *See* ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). The well-established test of ineffective assistance as set forth in ***Strickland v. Washington***, 466 U.S. 668 (1984) is that the defendant must show that counsel's performance was deficient and that the

deficient performance prejudiced the defense. ***Id.*** at 687. To prevail on the prejudice prong, the defendant must show that he would not have pled guilty but for counsel's ineffectiveness. *See* ***Krawczyk***, 259 Wis. 2d 843, ¶¶28-29.

¶31 To establish deficient performance, the defendant must identify specific acts "outside the wide range of professionally competent assistance" demanded of attorneys in criminal practice. ***Strickland***, 466 U.S. at 690. An attorney does not perform deficiently for failing to make a meritless argument. ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

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

¶33 To be entitled to an evidentiary hearing, the defendant must, in the postconviction motion, "allege[] sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. A circuit court may deny a hearing if the motion fails to allege sufficient facts to raise a question of fact, or only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief. *See* ***Bentley***, 201 Wis. 2d at 309-10.

¶34 On appeal we review ineffective assistance of counsel claims under a mixed standard of review. ***State v. Mayo***, 2007 WI 78, ¶32, 301 Wis. 2d 642, 734 N.W.2d 115. We uphold the circuit court's findings of facts unless they are clearly erroneous. *See* ***id.*** Whether counsel's performance was deficient and prejudicial to the defendant is a question of law we review *de novo*. ***Id.*** Whether the court properly denied an evidentiary hearing is reviewed for erroneous exercise of discretion. *See* ***Allen***, 274 Wis. 2d 568, ¶34. We review statutory construction *de novo*. ***Kania v. Airborne Freight Corp.***, 99 Wis. 2d 746, 758-59, 300 N.W.2d 63 (1981).

DISCUSSION

I. Trial counsel was not deficient in failing to move to dismiss the repeater enhancers in the complaints.

¶35 Egerson first asks us to review his trial counsel's failure to move to dismiss the domestic abuse repeater enhancers in all five complaints on the grounds that the facts supporting them failed to satisfy the statutory definition of domestic abuse in WIS. STAT. § 968.075(1)(a). He argues that the statute requires a physical act and an allegation of violence, both of which are lacking from the complaints. He frames the issue as a challenge to the complaints' sufficiency, only with regard to the repeater enhancers in WIS. STAT. § 939.621(1)(b) and (2).[25]

[25] It is undisputed in this record that all five of the complaints were found sufficient by the court at the initial appearances.

¶36 The test for the sufficiency of a complaint is one of "minimal adequacy." ***State v. Olson***, 75 Wis. 2d 575, 581, 250 N.W.2d 12 (1977) (citation omitted). All that is required of a complaint is that it alleges facts that give rise to a reasonable inference that a crime was probably committed by the defendant. *See* ***State v. Kempainen***, 2015 WI 32, ¶16, 361 Wis. 2d 450, 862 N.W.2d 587. Applied here, we review whether the complaints state facts giving rise to any reasonable inferences that the crimes charged were domestic abuse crimes.

¶37 The first part of Egerson's repeater argument is that none of the complaints alleged a physical act of violence by Egerson, and WIS. STAT. § 968.075(1)(a)4. requires a physical act of violence:

> "Domestic Abuse" means any of the following engaged in by an adult person against his or her spouse or former spouse, against an adult with whom the person resides or formerly resided or against an adult with whom the person has a child in common:
>
> 1. Intentional infliction of physical pain, physical injury or illness.
>
> 2. Intentional impairment of physical condition.
>
> 3. A violation of [WIS. STAT. §] 940.225(1), (2) or (3).
>
> 4. A *physical act* that *may* cause the other person *reasonably to fear imminent engagement in the conduct described under subd. 1., 2. or 3.*

(emphasis added). He contends that phone calls are not "physical acts," quoting a dictionary[26] defining "physical" as "having material existence" and "act" as "the

[26] Merriam Webster's Collegiate Dictionary 877 (10th ed. 1993).

doing of a thing." Then he argues that because the words in a phone call have no material existence a phone call cannot be a physical act.

¶38 Egerson's interpretation of physical act is plainly absurd. A phone call is a physical act. It is using a material thing (phone) to communicate (an act) with a person. We construe statutes for the plain meaning of the words chosen by the legislature. *See* ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶¶44-45, 271 Wis. 2d 633, 681 N.W.2d 110. Additionally, we have recently held in ***State v. Bandy***, Nos. 2014AP1055-CR and 2014AP1056-CR, unpublished slip op. (WI App Oct. 28, 2014)[27] that sending a text communication is a physical act within the meaning of WIS. STAT. § 968.075(1)(a)4. We discern no relevant difference between a text and a phone call in this regard.

¶39 The second part of Egerson's repeater argument is that even if a phone call can satisfy the physical act requirement, the content of the phone calls here, as described in the complaints, failed to support the statute's requirement of an act that "may" cause A.E. to reasonably fear imminent physical pain, injury or illness of impairment of physical condition. He claims that none of the complaints describe any violence or threats by Egerson in any of the charged calls. Therefore, he argues, for this reason as well, the repeater statute was wrongly charged.

¶40 It is a well-settled principal of statutory construction that the word "may" indicates that something is a "possibility." "The word 'may' is ordinarily

[27] "[A]n unpublished opinion issued on or after July 1, 2009, that is authored by a member of a three-judge panel or by a single judge under s. 752.31(2) may be cited for its persuasive value." WIS. STAT. RULE 809.23(3)(b).

used to grant permission or *to indicate possibility*." ***Heritage Farms, Inc. v. Markel Ins. Co.***, 2012 WI 26, ¶32, 339 Wis. 2d 125, 810 N.W.2d 465 (emphasis added; internal citations omitted). Thus, we construe the complaints here to determine if the phone calls objectively had the "possibility" of causing A.E. to reasonably fear imminent harm.

¶41 Another applicable principle of statutory construction requires us to view the words of the statute in the *context* of the whole. ***Kalal***, 271 Wis. 2d 633, ¶46. We applied this principle to this same statutory provision in ***Bandy***. In ***Bandy*** we concluded that the allegations of the defendant's text messages to his girlfriend in the complaint, when viewed in context, "may" have reasonably "caused her to fear more imminent physical harm"—even though they did not contain threats of violence. ***Bandy***, Nos. 2014AP1055-CR and 2014AP1056-CR, ¶31.

¶42 The facts in ***Bandy***, briefly, were that Bandy's live-in girlfriend L.S. obtained a TRO prohibiting him from contacting her. ***Id.***, ¶2. The day after it was served on Bandy, L.S. came home to find Bandy in her home coming out of a rear bedroom. ***Id.***, ¶4. He then left. ***Id.*** She obtained a second TRO and then he sent her a series of text messages that did not overtly threaten violence. ***Id.***, ¶¶5-6. But in the texts he basically begged her to come home and get over her "madness," saying "face reality I aint going no where." ***Id.***, ¶¶29, 31. We found that the fact that Bandy had so quickly disregarded the first TRO, was in her home, and then texting her to get back together because he was not "going no where" showed, in context, a reasonable basis for her to fear the possibility of imminent harm. In ***Bandy*** we relied also on other facts from the record including L.S.'s application

for the TRO, which contained allegations of violence, and Bandy's criminal record at sentencing, which showed a history of domestic violence convictions. ***Id.***, ¶¶21, 23. In that context we concluded that the texts showed that the victim "may" have had a reasonable fear of imminent harm from Bandy. ***Id.***, ¶31.

¶43 We conclude that the facts in the complaints and record here show, in context, that A.E. "may" have reasonably feared imminent harm from Egerson. First, each complaint alleges that Egerson had two prior domestic abuse convictions from 2012. While the complaints do not recite the details of those domestic abuse acts, they do inform that he committed acts of domestic abuse that resulted in conviction. Regardless of what the acts entailed, the fact is that Egerson had previously been convicted of domestic abuse and that he made repeated phone calls to A.E. to get her to drop the charges in this case. That is sufficient to show that A.E. "may" have reasonably feared more domestic abuse. This is especially true given Egerson's flagrant, repeated, and immediate violations of the many no-contact orders detailed in the complaints. In context, these two things alone—his two past domestic abuse convictions and his complete disregard for court orders—support the repeater enhancers here. Again, the pleading requirements are minimal and these allegations are sufficient to meet the standard of "minimal adequacy" for pleading. *See* ***Olson***, 75 Wis. 2d at 581.

¶44 But there are more details in the complaint of the third consolidated case to support the reasonableness of A.E.'s fear. A close reading of the excerpts from the jail transcripts of calls on July 21, 2013, shows A.E. stating that Egerson was violent to her in the past as recently as a year ago. Specifically, when Egerson

attempted to persuade A.E. to come to court and testify that "we been having the harmony type of relationship," she responds:

> No, we haven't been having a harmony type of relationship. Me and you see this relationship in a completely different light. You view it as this happy thing that only was a small hiccup, no. I view it as a torturous last four years, it's been hell.
>
> … [B]ut it hasn't been hell for you. Because all you had was "oh, I'm shaft because of money." No, I got my ass kicked. I got my ass handed to me. I got down talked every day, I'm the one that went through hell, not you. And I'm tired of it.

Further on, Egerson tells A.E. that he is not going to hurt her because he knows the laws. She responds: "Guess what, you knew law seven years ago, sir, you sure did." She continues, "You didn't even care about the law. Every time you touched me you didn't care, because you always knew she wasn't going to do anything." And later she states: "Just because you haven't done a physical thing to me since last year, does not mean that you still aren't abusive."

¶45 Additionally, the record contains even more facts that could have been added to the complaints or used to reissue new charges in the event trial counsel had successfully moved to dismiss the repeater enhancers. For example, the record shows that in the previous misdemeanor battery, domestic abuse (in 2011CM5728), Egerson on September 10, 2011, shoved and choked A.E. after she intervened in an argument between her son and Egerson. Then after he was charged for this violent act, Egerson was ordered to have no contact with A.E. and violated this order on December 21, 2011, when A.E. found him hiding in the basement crawl space. A.E. called police and Egerson was then charged in

2011CM7406 with one count of misdemeanor bail jumping as an act of domestic abuse.

¶46 The record also contains A.E.'s application for the TRO in 2013FA1617 in which she stated that Egerson constantly phoned her (forty-eight times on the previous Wednesday), texted, and emailed her. He stalked her. He told her, "I know everything, don't lie to me, you know what I'm capable of." She reported that in the past he had hit her, punched her, pulled a gun, tried to set her on fire, and thrown objects at her. He had threatened her by referring to a local 2012 triple homicide committed by an estranged husband whose wife had obtained a restraining order. These additional facts in the record demonstrate that trial counsel was not deficient because the repeater enhancers are supported and no motion to dismiss would have been granted.

¶47 But Egerson argues two cases are analogous and support his argument. The first case is ***State v. O'Boyle***, No. 2013AP1004-CR, unpublished slip op. (WI App Feb. 4, 2014)—an unpublished, one-judge, court of appeals decision. He relies on this case for his argument that the complaints fail to support the repeater enhancers. It is completely unpersuasive. First we note that ***O'Boyle*** did not involve the repeater enhancer. It addressed the narrower question of the meaning of the *domestic abuse* definition in WIS. STAT. § 968.075 and WIS. STAT. § 973.055(1)2. The court concluded there that the facts in the complaint did not fit the domestic abuse definition because O'Boyle's actions were not *directed against the victim* as described in the surcharge statute, WIS. STAT. § 973.055(1)2. ***Id.***, ¶24. But secondly, the facts in ***O'Boyle*** are plainly distinguishable. O'Boyle had been told to leave the house of a woman with whom he had a child; he had been

living there with her and her mother. ***Id.***, ¶3. When he came back later, intoxicated, he threw rocks at a window of the house—not *at his live-in girlfriend*—and climbed onto the roof. The court concluded he was a drunk man "attempting to enter the house where he resided." ***Id.***, ¶25. By contrast, Egerson's many phone calls were all directed at A.E. Another significant difference is that, unlike the complaints here, the complaint in ***O'Boyle*** mentioned neither a history of domestic physical violence nor any violation of a no-contact order.

¶48 Egerson also mistakenly relies on ***State v. Edwards***, 2013 WI App 51, 347 Wis. 2d 526, 830 N.W.2d 109. In ***Edwards***, we construed the same statute as here and held that the acts described in the complaint constituted domestic abuse. Nonetheless Egerson cites ***Edwards*** to argue that the statute requires the complaint to describe recent violence. He misconstrues the holding in ***Edwards***, which was that the trial court properly concluded that the disorderly conduct was an act of domestic abuse. ***Id.***, ¶12. The holding was based on facts in the complaint as well as trial testimony that showed that after Edwards had beaten his girlfriend for nearly an hour and she left, he called her six times, threatened suicide, and was found in bed with a cell phone and a knife. ***Id.*** It was the context of the entire event that led to the holding. The court did not hold that an hour-long beating was required for an act to be domestic abuse. Here, the TRO application and the details of the two previous domestic abuse convictions are sufficient to support the charging of the repeater enhancers.

¶49 We repeat that the standard on pleadings is one of "minimal adequacy" and probable cause. *See* ***Olson***, 75 Wis. 2d at 581; ***Kempainen***, 361 Wis. 2d 450, ¶16. We conclude that trial counsel was not deficient for failing

to file a meritless motion to challenge the sufficiency of the complaint as to the repeater enhancers. Trial counsel's failure to bring a meritless motion does not constitute deficient performance. *See* ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987); ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996).

II. Egerson has failed to show prejudice as to trial counsel's failure to move to dismiss the repeater enhancers.

¶50 Egerson's prejudice argument on his repeater claim fails for three reasons: (1) he does not claim, and the record does not show, that he would have gone to trial but for trial counsel's purported ineffectiveness, *see* ***Krawczyk***, 259 Wis. 2d 843, ¶¶28-29; (2) even if he had succeeded in getting the domestic abuse enhancers dismissed, the State had ample other charges and ample other evidence to amend or reissue those enhancers and more charges; and, (3) even if the enhancers were dismissed, he cannot show he would have received a shorter sentence than the one he bargained for.

¶51 First, Egerson failed to meet his burden to show that he would not have pled guilty if trial counsel had not been deficient. ***Id.***, ¶29.[28] *See also* ***Hill v.***

[28] The court held in ***Krawczyk***:

> We conclude that Krawczyk's plea to both felony murder and the underlying armed robbery, the latter conviction having been set aside, does not provide a basis for withdrawal of his plea to felony murder. First and foremost, the record is devoid of any evidence establishing that Krawczyk would not have pled guilty to felony murder (and to the other two offenses of which he remains convicted) had he known of the multiplicity of the felony murder and armed robbery charges. Krawczyk's failure

(continued)

Lockhart, 474 U.S. 52, 60 (1985) (requiring an allegation that, but for the alleged error by counsel, defendant would have pleaded not guilty and insisted on going to trial). He does not mention either case in his reply brief or rebut it in any way, nor does he offer any contrary authority. Consequently, he failed to meet his prejudice burden.

¶52 Although Egerson apparently has conceded that he failed to allege what ***Krawczyk*** requires, he argues instead, based on various assumptions, that there was a reasonable probability of a different result had his lawyer moved to dismiss the repeater enhancers. He assumes first that a motion to dismiss the enhancers would have been successful. We do not agree, as indicated above. But even if the enhancers had been dismissed, the State could have amended the complaints to supplement the facts to supply additional support for the enhancers. And additionally, the State had evidence of other crimes, not charged but mentioned in the complaints, that could have been added as we have shown above. If the complaints had been dismissed, the State could have reissued them as well. Accordingly, for this second reason as well, Egerson has failed to meet his burden of showing "actual," not "conceivable," prejudice. *See* ***Koller***, 248 Wis. 2d 259, ¶9.

¶53 Finally, Egerson argues he sustained prejudice from the lack of a motion to dismiss the repeater enhancers because he faced a greater sentence at the

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> to testify that he would not have pled guilty to felony murder had he known of the multiplicity is not a minor omission.

State v. Krawczyk, 2003 WI App 6, ¶29, 259 Wis. 2d 843, 657 N.W.2d 77.

time he was considering the State's global plea negotiation, which impaired his ability to assess the offer. But this argument is conclusory, based on speculation, and goes nowhere. The negotiation achieved what he claims his lawyer failed to do—namely, it *dismissed the repeater enhancers*. He cannot claim to be prejudiced by his trial counsel's failure to do what the State did for him. Relatedly, he argues that if the repeater enhancers had been dismissed by the court, he would not have been subjected to the two felony bail jumping charges that he ultimately pled guilty to. But even if they had been dismissed, the State had so many charges to choose from for its plea offer that Egerson is simply speculating without basis that the State would have offered a composite of charges with a lesser exposure.

¶54 Another weakness in Egerson's sentence exposure argument is his failure to meet the standard for showing actual prejudice. He conclusorily argues that greater sentencing exposure prejudiced him without showing how that is true. He asserts that the total possible exposure he argues he *should have* faced, but for his trial counsel's deficiency, should have been based on thirteen misdemeanors and one felony—rather than the nine misdemeanors and seven felonies he was actually charged with—and his total exposure on *those* hypothetical counts would have been twenty years and six months. He simply speculates that the reduced exposure would have benefited him. However, speculation fails to meet his burden. Accordingly, for this third reason, Egerson fails to meet his burden of showing "actual," not "conceivable," prejudice. *See* ***Koller***, 248 Wis. 2d 259, ¶9.

III. Trial counsel was not deficient in failing to move to dismiss the felony bail jumping charge in the second case or the intentional contact charge in the first case.

¶55 Egerson also claims trial counsel was deficient for failing to move to dismiss the felony bail jumping charge in the second case on the grounds that he had not been released from custody on the underlying charge, 2013CF1401, at the time of the calls and therefore could not have violated the bail jumping statute.[29] We conclude that this argument fails because the record shows that at the time of the April 17, 2013 phone calls Egerson had been ordered by the court commissioner on April 4, 2013, to have no contact with A.E. as part of the initial appearance in the first case. The record shows that Egerson signed the no-contact order, acknowledging receipt, on that same date of April 4, 2013. The no-contact order warned him on its face that it was "effective immediately" and he could be charged with bail jumping for violating its provisions.

¶56 Egerson's final deficiency argument claims trial counsel should have moved to dismiss one of the two counts of intentionally contacting the victim in the first consolidated case because the two predicate domestic violence convictions were actually only one sentence and therefore could not give rise to two counts. This argument fails because the record shows the sentences were consecutive and thus separate. It also fails because he placed two separate calls. Only one was charged and thus the other call was available to serve as the basis for a charge in an amended or reissued complaint.

[29] WISCONSIN STAT. §§ 946.49(1)(b).

IV. Egerson has failed to show that he suffered prejudice from either the inclusion of the felony bail jumping charge in the second case or the intentionally contact charge in the first case.

¶57 Even assuming deficient performance as to both the felony bail jumping and intentional contact charges, Egerson has failed to show prejudice because both charges were dismissed as part of the plea negotiation. And as described more fully above, Egerson failed to properly claim he would not have pled guilty but for counsel's alleged error, failed to show that the State could not have cured alleged errors in the complaint with other evidence from the record, and failed to show that he would have faced any different sentencing exposure than he did.

¶58 Because we have concluded that trial counsel was not deficient and that, regardless, Egerson has failed to meet his burden of showing any actual prejudice, we conclude that he has failed to establish any manifest injustice. Therefore we deny his ineffective assistance claim and affirm the postconviction court.

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

¶59 In the alternative, Egerson seeks plea withdrawal in the interest of justice under WIS. STAT. § 752.35, based on his claim of ineffective assistance and an undeveloped second argument of fundamental unfairness—an alleged due process violation. WISCONSIN STAT. § 752.35 is only to be used in exceptional cases. ***State v. McKellips***, 2016 WI 51, ¶52, 369 Wis. 2d 437, 881 N.W.2d 258. Egerson's case is not exceptional. He is not claiming innocence, just seeking a shorter sentence. He fails to show a reasonable probability that he would have

rejected the plea and received a shorter sentence. Therefore, he is not entitled to plea withdrawal in the interest of justice. We affirm.

By the Court.—Judgments and order affirmed.

Not recommended for publication in the official reports.