COURT OF APPEALS
DECISION
DATED AND FILED

March 6, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

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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 No. 2017AP381-CR **Cir. Ct. No. 2014CF3516**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KORRY L. ARDELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

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

¶1 BRENNAN, P.J. Korry L. Ardell appeals a judgment of conviction for one count of stalking and an order denying his motion for postconviction relief. The stalking charge was based on Ardell's conduct toward N., a woman who went on three dates with him after they met in 2007 on an online dating site. Ardell

argues that the circuit court erred when it ruled that specific emails Ardell sent in 2014 to a principal for whom N. had worked were admissible to prove that Ardell violated the stalking statute when he "intentionally engage[d]" in a "course of conduct directed at [N.]," specifically "[s]ending material … for the purpose of obtaining information about, disseminating information about, or communicating with the victim, to … an employer, coworker, or friend of the victim."[1] Ardell argues first that those emails were irrelevant and inadmissible because they were not "directed at" N. and because the State produced no evidence that he sent them with the subjective intention of making N. fear bodily injury. He makes the same arguments with regard to the jury instructions—that they failed to state the law correctly on the "directed at" issue and the intent issue—and he argues that he is entitled to a new trial because failure to preserve this issue constituted ineffective assistance of counsel. Finally, he argues that he is entitled to a new trial in the interest of justice under WIS. STAT. § 752.35.

¶2 Giving effect to the plain meaning of the statute, we conclude that the circuit court's evidentiary ruling applied the correct legal standard. A jury could find that the act of sending the emails to the principal was a course of conduct Ardell "intentionally engage[d] in" that was "directed at" N. Contrary to Ardell's interpretation, the words "directed at" do not require the State to prove that the defendant actually intended for the communications to reach the victim. The statute expressly encompasses communications to a third party, and we

[1] WISCONSIN STAT. § 940.32(1)(a)7. (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

decline to interpret the statute so strictly that its purpose is defeated.[2] The unpreserved issues are reviewed under the ineffective assistance rubric, and we reject the argument that trial counsel performed deficiently by failing to raise the arguments raised here because as Ardell acknowledges, no Wisconsin court has held that the statute is interpreted as having the heightened requirements he advocates, and it is well established that it is not deficient performance when counsel fails to make an argument based on a legal interpretation no court has adopted.[3] Finally, this is not the rare or extraordinary case that is appropriate for employing our discretionary reversal powers. We therefore affirm.

BACKGROUND

The 2008 injunction, Ardell's communications with N.'s employer, and his attempt to obtain N.'s personnel records.

¶3 N. met Ardell online and went on three dates with him in 2007. N. then sent him a message asking him not to contact her again. In 2008, N. sought and was granted an injunction prohibiting Ardell from contacting her; it was valid through 2012. In 2008, Ardell was convicted of violating the injunction. The

[2] *See* ***McCarthy v. Steinkellner***, 223 Wis. 605, 614, 270 N.W. 551 (1936) (a statute's "purpose, object, and idea are not to be defeated by an interpretation"). *See also* ***State ex rel. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Railroad Comm.***, 137 Wis. 80, 85-86, 117 N.W. 846 (1908) (a statute should be construed to give effect to its "leading idea" and "if reasonably practicable, brought into harmony with such idea").

[3] *See* ***Ronald J.R. v. Alexis L.A.***, 2013 WI App 79, ¶11 n.5, 348 Wis. 2d 552, 834 N.W.2d 437 (counsel not ineffective for failing to pursue novel arguments); *see also* ***State v. Jackson***, 2011 WI App 63, ¶10, 333 Wis. 2d 665, 799 N.W.2d 461 ("When the law is unsettled, the failure to raise an issue is objectively reasonable and therefore not deficient performance.").

facts underlying the 2008 injunction and the conviction for violating it are not in this record and were excluded from the trial in this matter.[4]

¶4 On November 4, 2012, Ardell sent a letter to N.'s employer, Milwaukee Public Schools (MPS), asking whether it had informed law enforcement of the time in August 2008 when he "provided computer printouts" to an MPS staff member regarding his claim that N. "was involved in prostitution."

¶5 Later that month, Ardell filed a WIS. STAT. § 19.35 open records request with MPS for N.'s personnel records. In December 2012, Ardell sent a letter to MPS inquiring as to the status of his open records request and repeating the allegation that he had given MPS "documentation showing that [N.] was involved in prostitution."

¶6 In February and March 2013, Ardell sent additional letters to MPS; these letters included accusations that N. "may have lied in a [case] involving a child that was sexually assaulted." He alluded to the "severe distress" that the release of personnel records might cause and said that anyone who would experience distress "should not be someone who should be working with children" and that N. "seems rather mentally unstable."

¶7 N. did not give permission for the records to be released, and MPS denied the request. Ardell pursued the denial of the open records request in the circuit court, and the circuit court dismissed the case on May 23, 2013. The record in that case is not before this court.

[4] At Ardell's sentencing hearing, N. described the fear, expense, and inconvenience caused by a pattern of harassment beginning in 2007 when Ardell installed spyware on her computer and gained access to her bank account and email account.

The involvement of N.'s principal, the 2013 injunction, and Ardell's continued contacts.

¶8 On the day the circuit court dismissed the case, ending his open records attempt, Ardell contacted N. and threatened to kill her and then showed up at her home the following morning.

¶9 On May 24, 2013, N., who is an elementary school teacher, went to speak to her principal that morning to update her on what had happened. According to the principal's trial testimony, N. was "shaking, visibly upset and crying" when she told her that Ardell had followed her to school and had threatened her. The principal conferred with her supervisor and released N. from work for the day with "encourage[ment] to get a restraining order for her safety."

¶10 N. applied for a new injunction against Ardell that day. *See* ***Petitioner v. Ardell***, No. 2014AP295, unpublished slip op. ¶¶1, 3-6 (WI App Nov. 13, 2014). A court commissioner granted the injunction. ***Id.***, ¶3. Ardell moved for a *de novo* hearing before the circuit court. ***Id.*** N. and Ardell both testified at the *de novo* hearing. ***Id.***, ¶¶4-5. The circuit court made credibility findings in N.'s favor and issued a final order upholding the injunction on December 10, 2013. ***Id.***, ¶6. Ardell appealed and this court ultimately upheld the final order.[5]

Ardell's contacts with the principal in 2014 and the stalking charge in this case.

¶11 On July 4 and again on July 23, 2014, Ardell sent emails about the 2013 injunction to the principal N. had met with in May 2013; he alleged that N.

[5] This court ultimately affirmed the circuit court's final order. ***Petitioner v. Ardell***, No. 2014AP295, unpublished slip op. ¶¶1, 3-6 (WI App Nov. 13, 2014). Ardell's appeal of the 2013 injunction was pending during the time of the events relevant to this appeal.

had lied to obtain it. These emails are the evidence Ardell unsuccessfully challenged at trial.

¶12 The July 4, 2014 email told the principal that N. had filed "frivolous restraining orders" against him based on "completely false" statements. It included the following statement:

> I was writing to inquir[e] about a former teacher that *I believe you were her direct boss* in the role of principal at Alexander Mitchell Elementary School in Milwaukee.
>
> ….
>
> The reason why I am writing you [is] I believe *you would [have] been her principal on May 24, 2013*…. In the hearing on [] June 7, 2013 for this restraining order she states *her boss sent her home* [to] file the petition for injunction on page 36 of the transcript which I have attached ….

(Emphasis added.)

¶13 The July 23, 2014 email to the principal stated in part that Ardell "became aware" that the principal was "possibly still conspiring with [N.]" on the restraining order. He stated that when he realized this, he felt like it "was the end of the rope." In the email, Ardell also references a phone conversation he had a few days earlier with the principal: "[Y]ou would not tell me if you told [N.] to file a restraining order against me when I called and spoke with you last Tuesday[.]"

¶14 In the same email, Ardell also directly threatened "organized protests" at the principal's school and a lawsuit against her and the school board. He personally attacked the principal in various ways. He stated that a "good principal" would not merely advise an employee to get a restraining order in

response to a death threat but would insist that the person making the threat be arrested, in light of the fact that the employee is "around all these children." He said this proved she was a "terrible principal": "But no you being the terrible principal that you are do not call the authorities to have this immediately investigated." He attached a report of a state evaluation of the principal's prior school and threatened to "maybe see about having a radio ad for this information[.]"

¶15 It closed with a reference to a local police officer killing that he claimed "stemmed from *a woman … [who] filed a false police report*"—the thing he claimed N. and the principal had conspired to do—and stated his intention to pursue the issue "at any cost" and to get the two restraining orders that were granted against him "investigated one way or another." (Emphasis added.)

¶16 Ardell was subsequently charged with stalking[6] with a previous conviction within seven years. As relevant to this appeal, the 2014 charge was based in part on Ardell's communications with the principal.

The trial.

¶17 The case proceeded to trial. Ardell moved *in limine* to exclude the emails to the principal on two grounds.

[6] Ardell was also charged with violating a temporary restraining order and harboring or aiding a felon by destruction of evidence. He was convicted only of the stalking charge, and that conviction is the sole focus of this appeal. Prior to trial, the circuit court ordered that domestic abuse and domestic abuse repeater enhancers be stricken in accordance with an agreement reached by the parties. However, contrary to that order, the judgment of conviction lists the domestic abuse enhancers to the stalking conviction. We direct the clerk of court to enter a judgment of conviction amended in accordance with the circuit court's order. *See* ***State v. Prihoda***, 2000 WI 123, ¶17, 239 Wis. 2d 244, 618 N.W.2d 857 (stating that appellate court has authority to correct clerical errors).

¶18 The first was that the principal "was no longer working with [N.]" due to a job change, that she "was no longer a coworker or employer of [N.] when [Ardell] sent her these emails," and that communications with her therefore did not fall into "any of the categories [in the stalking statute]."

¶19 The second was that "these emails are not part of any course of conduct directed at [N.], nor is there any evidence to suggest that [Ardell] knew or should have known that sending these emails would cause [N.] to suffer serious emotional distress[.]" The circuit court rejected both arguments and denied the motion to exclude the emails to the principal. When the principal testified, she was asked on direct examination about the emails. Trial counsel objected on the grounds of relevance: "This is an email that's directed to a former employer. So the stalking allegation is directed at the alleged victim, [N.]" The circuit court overruled the objection.

¶20 In her testimony, the principal told the jury she had known N. for nine years. She testified that prior to May 23, 2013, she had been aware of the "ongoing situation" with Ardell and had been keeping her own supervisor "in the loop" regarding Ardell's communication with N. She testified that she had a discussion with N. on that day about getting a restraining order. And she testified that after receiving the July 23, 2014 email she notified her school's health director and the school resource officer. She also testified that she "called N. to let her know" about the July 2014 contacts from Ardell.

¶21 The jury convicted Ardell of the stalking charge and the charge of violating a restraining order. Following the verdict, the circuit court dismissed the restraining order count on the State's motion. On the stalking charge, the sole

charge for which Ardell was sentenced, the circuit court imposed two years' confinement and three years' extended supervision.

¶22 Ardell brought a postconviction motion seeking a new trial, arguing that the evidence of the emails to the principal was improperly admitted because the principal was not N.'s employer at the time the communication was made and because the act of sending the communication was not "directed at" N. as it must be to support a stalking conviction. The postconviction motion also argued that trial counsel's failure to timely object to certain jury instructions (on the grounds that the statute requires proof that Ardell subjectively intended the communication to the principal to cause N. to fear bodily injury) constituted ineffective assistance of counsel. It further asserted the right to a new trial in the interest of justice.

¶23 The circuit court denied the motion, and Ardell appeals.

DISCUSSION

I. The circuit court applied the correct standard of law when it admitted Ardell's emails to the principal because communications to a third party can constitute a course of conduct "directed at" N. regardless of whether there is evidence that Ardell subjectively intended the messages to be relayed to N. or to make N. fear bodily injury.

Standard of review.

¶24 Ardell asserts that the circuit court erred when it admitted evidence of his emails to the principal based on an incorrect interpretation of the stalking statute. It is well established that a circuit court's evidentiary rulings are reviewed for erroneous exercise of discretion: "The question on appeal is not whether this court, ruling initially on the admissibility of the evidence, would have permitted it to come in, but whether the trial court exercised its discretion in accordance with

accepted legal standards and in accordance with the facts of record." ***State v. Wollman***, 86 Wis. 2d 459, 464, 273 N.W.2d 225 (1979). An appellate court decides questions of law that arise during its review of an exercise of discretion independently of the circuit court. ***State v. St. George***, 2002 WI 50, ¶37, 252 Wis. 2d 499, 643 N.W.2d 777. The issue presented here is whether the circuit court applied "accepted legal standards" to the facts of record. *See* ***Wollman***, 86 Wis. 2d at 464.

¶25 "We are cognizant that any penal statute must be construed strictly in favor of the defendant." ***State v. Clausen,*** 105 Wis. 2d 231, 239, 313 N.W.2d 819 (1982). "A statute must be construed, however, in light of its manifest object, the evil sought to be remedied." ***Id.*** Our supreme court has stated, "Although we recognize the general rule … that penal statutes are to be strictly construed in favor of the accused, it is equally true that this rule of construction does not mean that only the narrowest possible construction must be adopted in disregard of the purpose of the statute." ***State v. Tronca***, 84 Wis. 2d 68, 80, 267 N.W.2d 216 (1978). A statute's "purpose, object, and idea are not to be defeated by an interpretation[.]" ***McCarthy v. Steinkellner***, 223 Wis. 605, 614, 270 N.W. 551, (1936). A statute should be construed to give effect to its "leading idea" and "if reasonably practicable, brought into harmony with such idea[.]" ***State ex rel. Minneapolis, St. Paul & Sault Sainte Marie Ry. Co. v. Railroad Comm.***, 137 Wis. 80, 85-86, 117 N.W. 846 (1908). "The dominant rule in the construction of statutes is to discover and give effect to the legislative purpose." ***McCarthy***, 223 Wis. at 615. "[W]ords that are not defined in a statute are to be given their ordinary meanings." ***Spiegelberg v. State***, 2006 WI 75, ¶19, 291 Wis. 2d 601, 717 N.W.2d 641. In determining the ordinary meaning of undefined words, "[w]e may consult a dictionary to aid in statutory construction." ***Id.***

¶26 "[I]f the meaning of the statute appears to be plain but that meaning produces absurd results, we may also consult legislative history." ***Teschendorf v. State Farm Ins. Cos.***, 2006 WI 89, ¶15, 293 Wis. 2d 123, 717 N.W.2d 258. "The purpose in this situation is to verify that the legislature did not intend these unreasonable or unthinkable results." ***Id.***

The stalking statute elements.

¶27 "Wisconsin is one of many states that has enacted a stalking law." ***State v. Ruesch***, 214 Wis. 2d 548, 559, 571 N.W.2d 898 (Ct. App. 1997). "It serves significant and substantial state interests by providing law enforcement officials with a means of intervention in potentially dangerous situations before actual violence occurs, and it enables citizens to protect themselves from recurring intimidation, fear-provoking conduct and physical violence." ***Id.***

¶28 The elements of the stalking crime Ardell was charged[7] with are stated as follows in WIS. STAT. § 940.32(2):

> (a) The actor *intentionally engages* in a course of conduct *directed at a specific person* that would cause a reasonable person … to suffer serious emotional distress or to fear bodily injury … or … death ….
>
> (b) The actor knows or should know that at least one of the acts that constitute the course of conduct will cause the specific person to suffer serious emotional distress or place the specific person in reasonable fear of bodily injury … or … death ….

[7] Ardell was also charged with the following enhancer from WIS. STAT. § 940.32, which states, "[w]hoever violates sub. (2) is guilty of a Class H felony if … [t]he actor has a previous conviction for a crime, the victim of that crime is the victim of the present violation of sub. (2), and the present violation occurs within 7 years after the prior conviction." WIS. STAT. § 940.32(2m)(b).

> (c) The actor's acts cause the specific person to suffer serious emotional distress or induce fear in the specific person of bodily injury … or death ….

(Emphasis added.) Section 940.32(1)(a)7. contains the definition of "course of conduct" that is relevant to this case:

> "Course of conduct" means a series of 2 or more acts carried out over time, however short or long, that show a continuity of purpose, including … *[s]ending material* by any means to the victim or, *for the purpose of obtaining information about, disseminating information about,* or communicating with the victim, to a member of the victim's family or household or *an employer, coworker,* or friend of the victim.

(Emphasis added.)

Ardell's statutory arguments.

¶29 The element that is the focus of Ardell's statutory arguments is the first one: a requirement that he "intentionally engage[d]" in a "course of conduct" that was "directed at a specific person"—in this case, N.

¶30 He acknowledges that the course of conduct can include actions to contact or communicate with the victim "directly or indirectly." However, he argues that the jury cannot find that his act of sending the emails to the principal was "directed at" N. without "proof that [he] either intended such requests or information to be passed on to the alleged victim or intended the third party to harass the alleged victim based on the information."

¶31 The statute defines "course of conduct," but it does not define the term "directed at." We may consult a dictionary for a definition. *See* ***Spiegelberg***, 291 Wis. 2d 601, ¶19. Among the definitions Webster's Third New International

Dictionary[8] gives for "direct" is "to engage in or launch hostilely" and to "focus"; these definitions apply when the word "direct" is "used with 'against' or 'at.'" The question is then whether Ardell's act of sending the emails to the principal was "launched hostilely" against N. or was "focused" on N.

¶32 Ardell argues that this finding cannot be made without evidence of his subjective intent. He directs us to a handful of decisions from other jurisdictions interpreting the "directed at" language in similar stalking statutes. The cases deal with a variety of fact patterns, none of which is precisely on point, in which courts are asked to determine whether, for purposes of a stalking or cyberstalking statute, certain conduct was "directed at" the victim. *See, e.g.*, ***Scott v. Blum***, 191 So. 3d 502, 504-05 (Fla. App. 2016) (derogatory internet posts and group emails not "directed at" victim); ***Chevaldina v. R.K./FL Mgmt., Inc.***, 133 So. 3d 1086, 1091-92 (Fla. App. 2014) (derogatory internet blog posts not "directed at" victim); ***David v. Textor***, 189 So. 3d 871, 875 (Fla. App. 2016) (holding that emails and social media posts, "comments [that] are made on an electronic medium to be read by others … cannot be said to be directed to a particular person"); ***LaFaro v. Cahill***, 56 P.3d 56, 59-60 (Ariz. App. 2002) (conversation "overheard" by victim not "directed at" victim); and ***Commonwealth v. Johnson***, 21 N.E.3d 937, 948 (Mass. 2014) (online Craigslist postings that caused third parties to contact victim were "the equivalent of … recruiting others to harass the victims and the victims alone").

[8] Webster's Third New International Dictionary Unabridged 640 (Philip Babcock Gove, et al. eds., 1966).

¶33 Ardell argues that these cases "confirm the plain meaning" of the "directed at" language: that communications "not intended to be transmitted to the alleged victim do not legally qualify." He therefore argues that "absent proof that the defendant … intended such requests or information to be passed on to the alleged victim," there can be no violation of the statute.

¶34 We disagree. First we note that the cases Ardell cites are not controlling precedent here and, more importantly, all are factually distinguishable in that all involve digital or social media postings. Second, nothing in the plain words of the statute requires that the communications be "intended to be transmitted to" the victim, and nothing in the statute requires the State to prove that the defendant subjectively intended the communications to go to the victim.

¶35 The statute does include an "intent" component ("intentionally engages in a course of conduct"), a *mens rea* element common to criminal statutes in order to preclude criminal liability for unintentional conduct. There is no question that Ardell intentionally sent the emails. The statute also requires that he "knows or should know" that the conduct "will cause the specific person to suffer serious emotional distress[.]" *See* WIS. STAT. § 940.32(2)(b). The legislature's use of "should know" makes that element an objective standard, not a subjective one.

¶36 Ardell's argument conflates the requirement that he "intentionally engaged in a course of conduct" with the requirement that the course of conduct be "directed at" N. The requirements are distinct. His attempt to import the "intentionally" requirement into the other element is not consistent with the rest of the language of the statute, in which the legislature expressly made the test an objective one. And he too narrowly defines "directed at" as we explain above. As

to the intent to cause distress element, we conclude that there was ample evidence here from which a jury could reasonably conclude from an objective viewpoint that Ardell intended the communications to the third party to be conveyed to N. and cause her emotional distress. For example, he explicitly stated in both 2014 emails that he accused the principal of working with N. to obtain the restraining order. He clearly believed they still were in contact with each other. He explicitly threatened to engage in public protests at the principal's school in response to her "conspiring" with N. From these facts alone, the jury could reasonably conclude he emailed the principal believing N. would be told or find out and that this demonstrated, objectively, that he intended to cause N. emotional stress.

¶37 We need not decide whether, as Ardell argues, a course of conduct "directed at" a victim "generally does not include" third-party communications; we decide only that it *can* include communication with a third party without proof of the sender's subjective intent, and that the jury could have found that it did include the actions here. Looking at the content of the emails, we conclude that a jury could find that when Ardell sent them, his act was focused on and launched hostilely against N. The purpose of the July 4 email was to tell the principal about N. making false statements and obtaining restraining orders against Ardell on false grounds. The purpose of the July 23 email was to find out whether N. had been encouraged by the principal to petition for the injunction; it referred to a prior phone call when Ardell had asked the principal the same question.

¶38 Ardell's second statutory argument is that the emails to the principal did not satisfy the "course of conduct" definition under WIS. STAT. § 940.32(1)(a)7. because the principal was not, on the dates the emails were sent, a current coworker or employer of N.'s. The course of conduct definition relevant here is "*[s]ending material* by any means to the victim or, *for the purpose of*

obtaining information about, disseminating information about, or communicating with the victim, to a member of the victim's family or household or *an employer, coworker,* or friend of the victim." WIS. STAT. § 940.32(1)(a)7. (emphasis added). Ardell argues that the principal, who had moved to a different school district by the time of the July 2014 emails, no longer fit into any of the categories in the statute and that Ardell's sending material to her therefore could not constitute a course of conduct that violates the stalking statute.

¶39 The statute does not explicitly distinguish between current and former coworkers and employers. It is certainly not unreasonable, in the context of the statute, to read the words "coworker" and "employer" to encompass both current and former coworkers and employers. Alternatively, we could conclude that absent the word "former," the statute must mean that the list is limited to only those who are coworkers and employers at the moment when the third-party communication takes place. Even if we did so conclude, however, the analysis would not end there. In that case, we would turn to the legislative history to determine whether the legislature intended the "unthinkable" result that Ardell's email to N.'s principal—which was sent to her solely because she had been N.'s employer and coworker—should be excluded as evidence solely on the grounds that the principal had accepted a different job before he sent the email. *See* ***Teschendorf***, 293 Wis. 2d 123, ¶15.

¶40 Our supreme court has discussed the stalking statute's legislative history:

> Our analysis is confirmed by the legislative history of stalking statutes in Wisconsin and nationally. Stalking statutes were passed nationwide in the early 1990s in response to several high-profile murders of women who had previously been stalked by their killers. Wisconsin's initial enactment closely tracks much of the language of a

> model statute promulgated in 1993 by the National Institute of Justice.
>
> The Institute noted, "Stalkers may be obsessive, unpredictable, and potentially violent. They often commit a series of increasingly violent acts, which may become suddenly violent, and result in the victim's injury or death." Unlike with other crimes against life and bodily security, the mental state of the victim—as well as the mental state of the perpetrator—is an element of the crime of stalking.… "Since stalking statutes criminalize what otherwise would be legitimate behavior based upon the fact that the behavior induces fear, the level of fear induced in a stalking victim is a crucial element of the stalking offense."
>
> At the time that the model statute was promulgated, nine states permitted enhanced penalties for stalking if the defendant has previously been convicted of another felony. The Institute recommended that states "consider establishing a continuum of charges that could be used by law enforcement officials to intervene at various stages."

State v. Warbelton, 2009 WI 6, ¶¶35-37, 315 Wis. 2d 253, 759 N.W.2d 557 (citations and footnote omitted). In light of the fact that WIS. STAT. § 940.32 was based on the model anti-stalking statute, and in light of its goals of protecting victims from "obsessive, unpredictable, and violent" acts, we conclude that reading the "coworker" and "employer" as excluding all former coworkers and employers would be a meaning that "produces absurd results" because it would protect the wrong person—the perpetrator—by excluding evidence of conduct that the legislature would not have intended to exclude. ***Teschendorf***, 293 Wis. 2d 123, ¶15. We conclude that "the legislature did not intend these unreasonable or unthinkable results." We note that all of Ardell's emails explicitly explain that the reason he is sending them is because of the principal's work relationship with N.

II. Failure to object to the jury instructions or raise due process and free speech arguments on the stalking charge does not constitute deficient performance of trial counsel because no Wisconsin court has addressed the issues Ardell now raises, and it is not deficient performance to fail to raise novel issues.

¶41 Ardell argues that the jury instructions improperly defined the stalking offense in a way that permitted conviction without evidence that Ardell "acted with the subjective intent" to cause N. fear, as he argues the statute requires. He further argues that without such proof of subjective intent, the statute violates his constitutional rights to due process (because he had no notice that the statute would be interpreted in this way) and to free speech (because it criminalizes speech based on the fact that its content is about the victim). These arguments were not made at the circuit court.

¶42 Where an argument has not been preserved, we review the challenge under the rubric of ineffective assistance of counsel. In order to show ineffective assistance of counsel, Ardell must show that counsel performed deficiently and that the deficient performance prejudiced him. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). "First, the defendant must show that counsel's performance was deficient." ***Id.*** "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id*** "Second, the defendant must show that the deficient performance prejudiced the defense." ***Id.*** "Unless a defendant makes both showings, it cannot be said that the conviction … resulted from a breakdown in the adversary process that renders the result unreliable." ***Id.***

¶43 It is well established that a defendant cannot satisfy the deficient performance prong where the claimed deficiency is failure to raise an issue on a point that has not been addressed in the law. *See* ***Ronald J.R. v. Alexis L.A.***, 2013

WI App 79, ¶11 n.5, 348 Wis. 2d 552, 834 N.W.2d 437 (counsel not ineffective for failing to pursue novel arguments); *see also* ***State v. Jackson***, 2011 WI App 63, ¶10, 333 Wis. 2d 665, 799 N.W.2d 461 ("When the law is unsettled, the failure to raise an issue is objectively reasonable and therefore not deficient performance."). Ardell acknowledges that "Wisconsin [c]ourts have yet to address the requirement that the course of conduct be 'directed at' the alleged victim." However, he argues, "basic rules of statutory interpretation, as well as the apparently uniform and common sense interpretation by states with similar statutory language, dictate that the requirement be limited to actions aimed at or targeting the alleged victim." That limitation, he argues, means that "it generally does not include actions such as seeking or obtaining information about the alleged victim from, or imparting such information to, a third party."

¶44 The problem with Ardell's assertion is that no Wisconsin court has ever interpreted the statute as he does. That ends the deficient-performance analysis. Likewise, no Wisconsin court has ruled on the constitutional challenges he now raises. Regardless of the merits of those arguments, the fact that they were raised for the first time on appeal is fatal because under these circumstances, they do not rise to an ineffective assistance of counsel claim.

¶45 Besides that, as to the statutory argument, we note that the statute explicitly *does* include certain third-party communications as stalking conduct *without regard to whether the information sent is conveyed to the victim*: "[s]ending material … to a member of the victim's family or household or an employer, coworker, or friend of the victim" when it is "for the purpose of obtaining information about, disseminating information about, or communicating with the victim[.]" The communications here were very clearly for the purpose of "obtaining information about" N.'s representations about the injunction and

"disseminating information about" her purportedly false statements. The statute's plain language criminalizes sending material for those purposes—obtaining information about and disseminating information about—as well as "communicating with the victim." The emails to the principal had both of those purposes. Because we conclude that "directed at" includes communications "focused on" and "hostilely launched" toward a victim, we conclude that Ardell's statutory jury instruction argument would have failed, which means that it was not deficient performance for trial counsel to fail to make it.

III. To the extent that Ardell argues that he is entitled to a new trial on the grounds of insufficiency of the evidence, his argument fails to recognize the applicable standard of review.

¶46 Ardell repeatedly cites the existence of conflicting trial testimony. He argues first that the emails to the principal cannot support the verdict that requires proof of a course of conduct "directed at" N., and second that there is no other evidence that supports the verdict. He is mistaken on two counts.

¶47 First, as explained above, we reject the argument that the facts in evidence at trial about Ardell's emails to N.'s principal fail to satisfy the requirement of a course of conduct that Ardell "intentionally engaged in" and that was "directed at" N.

¶48 Second, the existence of testimony contrary to the verdict does not affect the standard of review. We view facts in the light most favorable to the verdict, and if more than one inference can be drawn from the evidence, this court must accept the inference drawn by the jury. ***State v. Forster***, 2003 WI App 29, ¶2, 260 Wis. 2d 149, 659 N.W.2d 144. Further, "[t]he rule in Wisconsin is that the jury, *as ultimate arbiter of credibility*, has the power to accept one portion of a witness' testimony, reject another portion and assign historical facts based upon

both portions." ***O'Connell v. Schrader***, 145 Wis. 2d 554, 557, 427 N.W.2d 152 (Ct. App. 1988) (emphasis added). "In short, a jury can find that a witness is partially truthful, partially untruthful and have both of these determinations mean something quite independent of one another." ***Id.*** The jury verdict of guilty requires us to accept the inferences drawn by the jury as to the credibility of the witnesses, and we reject Ardell's arguments to the extent that they rely on evidence the verdict shows the jury rejected.

IV. This is not the extraordinary case in which we exercise our discretionary reversal power.

¶49 Finally, Ardell requests that we exercise our discretion to order a new trial in the interests of justice. We may order a new trial in the interests of justice "if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried[.]" WIS. STAT. § 752.35. However, we do so only in exceptional cases. ***State v. McKellips***, 2016 WI 51, ¶30, 369 Wis. 2d 437, 881 N.W.2d 258. Ardell gives the reasons we have already addressed as the basis for his argument that the real controversy was not fully tried. Because we have rejected his interpretation of the statute and concluded that he did not receive ineffective assistance of counsel, there is no injustice, and extraordinary relief is not warranted in this case. Thus, we decline to exercise our discretionary powers to order a new trial in the interests of justice.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.