COURT OF APPEALS
DECISION
DATED AND FILED

August 17, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP3020-CR **Cir. Ct. No. 2008CM4245**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SABIAN L. YUNCK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: CLARE L. FIORENZA and MARY M. KUHNMUENCH, Judges. *Affirmed*.

¶1 BRENNAN, J.[1] Sabian L. Yunck appeals a judgment, entered after he pled guilty to three counts of knowingly violating a domestic abuse order as a

[1] This appeal is decided by one judge, pursuant to WIS. STAT. § 752.31(2)(f) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

habitual criminal, and orders denying his postconviction motion.[2] Yunck claims that (1) the sentencing court relied on improper factors and (2) his trial counsel was ineffective. We disagree and affirm.

BACKGROUND

¶2 On February 12, 2008, Jamie Zeyen petitioned the Milwaukee County Circuit Court for a domestic abuse injunction, prohibiting Yunck, Zeyen's boyfriend of six years and father of her five-year-old daughter, from contacting Zeyen. Yunck was served with the petition and an injunction hearing was held. On February 26, 2008, the court commissioner granted the domestic abuse injunction, effective until February 26, 2012. The injunction ordered that Yunck: (1) "refrain from committing acts of domestic abuse against [Zeyen]"; (2) "avoid [Zeyen]'s residence or any location temporarily occupied by [Zeyen] now and in the future"; and (3) "avoid contacting or causing any person other than a party's attorney or law enforcement officer to contact [Zeyen] unless [Zeyen] consents in writing. Contact includes contact at work, school, public places, by phone or in writing."

¶3 In July 2008, Zeyen contacted the City of Greenfield Police Department and reported that since the entry of the injunction she had received six letters from Yunck, dated: March 10, 2008; April 16, 2008; April 21, 2008; April 25, 2008; May 13, 2008; and May 30, 2008. Yunck admitted to the police that he wrote and sent the letters to Zeyen and that he knew the injunction

[2] The Honorable Clare L. Fiorenza presided over Yunck's plea and sentencing hearings and ordered the entry of judgment. The Honorable Mary M. Kuhnmuench presided over the ***Machner*** hearing and entered the orders denying Yunck's postconviction motion.

precluded him from contacting Zeyen. Accordingly, on or around July 21, 2008, the State charged Yunck with three counts of knowingly violating a domestic abuse injunction issued under WIS. STAT. § 813.12(4), as a habitual criminal, contrary to WIS. STAT. §§ 813.12(8) and 939.62, for the letters dated March 10, 2008; May 13, 2008; and May 30, 2008.

¶4 On October 14, 2008, Yunck pled guilty to all three charges. In exchange for Yunck's plea, the State agreed to recommend that Yunck serve one year of initial confinement and one year of extended supervision on each of the three counts to be served consecutive to each other and that it would not file additional charges on the other letters and information it had that Yunck had made numerous phone calls to Zeyen since the complaint was filed. The circuit court accepted Yunck's plea and found him guilty.

¶5 The sentencing hearing was held on November 26, 2008. At the sentencing hearing, the State argued that, although Yunck had only been charged with writing three letters, he had written six letters to Zeyen, in violation of the court's order. The State emphasized the deliberateness of Yunck's decision to violate the order by quoting from one of the letters:

> "I [Yunck] know the consequences for this letter, and everybody says just leave you [Zeyen] alone. Well, I just can't." … "Please don't get me in trouble." … ["H]opefully[,] we can at least get these charges dropped and then the damn restraining order. Four years is just ridiculous. I won't hurt you again."

¶6 The State also argued before the sentencing court that Yunck's prior record was aggravated, noting that since the complaint was filed Yunck had made numerous calls to Zeyen's phone and had manipulated his five-year-old daughter

in an attempt to communicate with Zeyen. More specifically, quoting from recordings of several of the phone calls,[3] the State stated as follows:

> And then there are multiple phone calls in which [Yunck] did call back and speak directly with the daughter. And I should note that this is a five-year-old daughter. And on multiple times throughout these phone calls [Yunck] is asking the daughter to communicate with [Zeyen]. For example, he says, "Tell mom to get on the phone." And then you can hear [Zeyen] in the background refusing to get on the phone with him. And then he says, "Tell momma not to take you from me. Tell momma to stop." On another call he says, "Tell mom to stop being difficult." In another call he says, "Tell mom that daddy can't depend on anyone else." And in another call he says, "Ask momma why she wants to keep me in jail longer. Tell momma she needs to stop going to court on me."

¶7 Also demonstrating the aggravated nature of Yunck's crime, the State noted Yunck's previous convictions in 2004 and 2007 for battery to Zeyen, for which he received probation. And the State also noted that at the time Yunck sent the letters subject to the complaint he was serving a seven-month sentence in the House of Correction for a previous violation of the same injunction.

¶8 Defense counsel attempted to explain Yunck's phone calls to Zeyen by expressing his belief that they stemmed from Yunck's desire to contact his daughter and to participate in his daughter's life. Defense counsel also stressed that Yunck had received his high school equivalency degree and had a fairly extensive work history. Further, defense counsel noted that while Yunck did have a criminal record it was not as aggravated as other cases that come through the system.

[3] All of the recordings were provided to defense counsel prior to the sentencing hearing.

¶9 Defense counsel also informed the sentencing court of Yunck's struggle with depression, resulting in the following exchange with the sentencing court:

> [DEFENSE COUNSEL]: … And the problem with these letter-writing cases is that because of whatever disorder … Yunck has -- apparently, he does have a disorder. He's on medication for it.
>
> THE COURT: I think he said depression.
>
> ….
>
> [DEFENSE COUNSEL]: Right. He's got a disorder. So, again, a disorder. And, perhaps, some obsessive behavior and his isolation in jail leading to him trying to reach out to the only person he really has, which is his daughter, and obviously making these -- writing these letters to his ex-girlfriend and at times being angry, at times being pleading.
>
> But, in any event, talking about the actual conduct here, although I know it's ridiculous behavior, that certainly nobody wants … But to have a sense of the scale of what he's done, the fact is, there's characters, individuals walk out of this courtroom every day who have done far worse.

Later during the sentencing hearing, defense counsel again referenced Yunck's depression as a mitigating factor:

> [DEFENSE COUNSEL]: … It's clear that [Yunck] was suffering [when he wrote the letters] -- … Yunck was suffering from depression. I'm wondering as well -- I'm not, certainly, no psychiatrist. But these letters certainly sound like a bit of an obsessive-compulsive type behavior as well and, perhaps -- perhaps the medication he's been taking may have helped him with his compulsion to write letters. It strikes me that that's what's going on here. Sometimes people in the isolation in the jail, they feel like they're just sitting there, nobody -- and nothing is happening and it's like they can't stop themselves. That's what seems like what happened in this particular case.

¶10 Yunck also spoke during sentencing, addressing the phone calls he made to Zeyen following the filing of the complaint. He contended that his persistent phone calls to Zeyen began after she instigated a petition to terminate Yunck's parental rights to their daughter. He noted that his contact with Zeyen ceased after the family court permitted Yunck to have regular contact with his daughter while he was incarcerated. The sentencing court and Yunck then engaged in the following exchange:

> THE COURT: … So you went to court, and you got a right to see your daughter?
>
> [YUNCK]: Right. They appointed someone to bring my daughter out there [the House of Correction] every other Saturday, which is exactly what I was asking.
>
> ….
>
> THE COURT: So you have your five-year-old daughter every other Saturday … going to the jail to visit you?
>
> [YUNCK]: Yes. She's visited them in the past before with her mother.
>
> THE COURT: I guess if you think that's appropriate. That's your decision, sir. Would I bring my five-year-old daughter to the jail every other Saturday because I wanted to see my daughter? I don't think I would do that, but it's your decision. You're the parent. You got a court order regarding that. I don't think seeing dad in custody in the jail would be the best thing.

¶11 Following Yunck's explanation for his actions, the court began sentencing. The court explained to Yunck that it took into consideration "the gravity of the offenses …, [Yunck's] character, and … the interests of our society."

¶12 With respect to the gravity of the charges, the sentencing court described them "as very serious" because they resulted from a direct violation of a

court order and because Yunck had violated the same order before. The sentencing court also described Yunck's actions as "aggravated," explaining to Yunck that

> [Zeyen] wants no contact with you, and you continue it. I find that significant. I find that is an aggravating factor. You'd think if someone was charged with it once they'd go through the proper means to deal with it, but you didn't. You just kept contacting her. You went through your daughter to try to contact her. I find that aggravated. It's not just these three times you called her or wrote to her. Those are the three charged ones. Those are the ones I'm sentencing you on. But that really goes to the character and other issues I have to consider at sentencing. But you went through your daughter to try to contact her, your five-year-old daughter.

¶13 Turning to Yunck's character, the sentencing court noted that Yunck was twenty-nine years old, had an extensive work history, and had received his high school equivalency diploma while imprisoned in a previous case. The sentencing court praised Yunck for taking advantage of his time incarcerated. The court then outlined Yunck's criminal history, including charges for operating a vehicle without the owner's consent, fleeing and eluding police, and several convictions for battering Zeyen.

¶14 When discussing Yunck's character, the sentencing court, again, turned to Yunck's manipulation of his five-year-old daughter:

> THE COURT: … I don't know. I hope that what you just said, that now [that] you see your child, your five-year-old daughter is brought to the House of Correction two Saturdays a month to see you, you're going to leave [Zeyen] alone. I hope that's the case. You know, that goes to your whole issue of character. It's your decision if you want to see your five-year-old daughter, and I understand why you would want to. I could clearly understand why you would want to. Is that in the child's best interest? I don't know.

> I don't know if I would put my five-year-old daughter through that. Going to the House of Correction[] is not the place for anybody to go. Putting her through that because you want to see her[.] I don't know. I don't know what kind of constructive time you can do with that. Maybe she is getting something out of it. I don't know. I don't see her interaction with you. I have no idea. I have a hard time believing that's really in your five-year-old daughter's best interest to be brought over to the House of Correction every other Saturday because you want to see her. It's your decision, sir.
>
> ….
>
> I find it concerning that you would -- talking to your daughter, to "put momma on, put momma on," when [Zeyen] doesn't want to go on. You're putting your five-year-old daughter in the middle of it. That's not appropriate. You don't do that, sir. "Tell momma to stop being difficult." I don't understand that, sir. That's not in the child's best interests, and it goes to your character.

¶15 Finally, the sentencing court turned to the needs of society, stating that society has a right to be protected from individuals like Yunck who repeatedly violate the law. The sentencing court determined that it saw no way to protect society other than sentencing Yunck to prison because "Probation hasn't worked. Jail time hasn't worked. [Yunck] continues to violate." Consequently, the court sentenced Yunck to a two-year sentence on each count—one year of initial confinement followed by one year of extended supervision—to be served consecutive to each other and consecutive to any other sentence.

¶16 Yunck filed a motion for postconviction relief, arguing that the sentencing court had relied on an improper factor when it penalized him for having his daughter visit him while he was incarcerated. Yunck also argued that his trial counsel was ineffective on several grounds. Among other things, Yunck argued that counsel failed to present evidence explaining that Zeyen and Yunck had an informal agreement, whereby Yunck was allowed to contact Zeyen, despite

the injunction, to talk to their daughter. Further, Yunck alleged that his trial counsel was ineffective because counsel presented evidence to the court that Yunck's behavior was "ridiculous" and the result of an "obsessive" "disorder."[4]

¶17 The postconviction court addressed the motion in two stages. First, the court issued a written decision denying Yunck's claim that he was sentenced on an improper factor, but scheduled a ***Machner*** hearing[5] as to his ineffective assistance of counsel claims. At the ***Machner*** hearing, Yunck's postconviction counsel questioned trial counsel and introduced other documentary evidence supporting the ineffective assistance of counsel claim. The postconviction court then denied the ineffective assistance of counsel claim in an oral ruling. Yunck appeals.

DISCUSSION

¶18 Yunck raises two claims on appeal: (1) that the sentencing court relied on an improper factor when it punished him for having his daughter visit him while he was incarcerated; and (2) that his trial counsel was ineffective because he failed to present evidence of an informal agreement between Yunck and Zeyen, permitting Yunck to call Zeyen to speak with his daughter, and told the sentencing court that Yunck's behavior was "ridiculous" and resulted from an "obsessive" "disorder." We address each claim in turn.

[4] On appeal, Yunck has abandoned his other arguments related to his ineffective assistance of trial counsel claims.

[5] "Under ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979), a hearing may be held when a criminal defendant's trial counsel is challenged for allegedly providing ineffective assistance. At the hearing, trial counsel testifies as to his or her reasoning on challenged action or inaction." ***State v. Thiel***, 2003 WI 111, ¶2 n.3, 264 Wis. 2d 571, 665 N.W.2d 305.

I. Sentencing

¶19 Yunck first argues that the sentencing court relied on an improper factor when it penalized him for exercising his constitutional right to make "decisions concerning the care, custody, and control of" his daughter—namely, his choice to have his daughter visit him while he was incarcerated. *See* ***Troxel v. Granville***, 530 U.S. 57, 66 (2000) ("[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."). In response, the State contends that Yunck forfeited this argument by failing to raise it in his postconviction motion. In the alternative, the State argues that the sentencing court did not rely on an improper factor because it did not punish Yunck for exercising a constitutional right, but rather the sentencing court properly recognized and penalized Yunck based upon a nexus between Yunck's criminal conduct and his visits with his daughter.

¶20 To begin, we conclude that Yunck did not forfeit his claim by failing to raise it in his postconviction motion. In his postconviction motion, Yunck asserted that the sentencing court "abused its discretion when it disapproved of … Yunck's character based on improper considerations; namely, that … Yunck wanted to be visited by his daughter while he was incarcerated." Further, Yunck relies on the same case before this court that he relied on before the postconviction court, ***State v. Fuerst***, 181 Wis. 2d 903, 512 N.W.2d 243 (Ct. App. 1994), which generally stands for the proposition that, in some situations, resentencing may be warranted when a sentencing court penalizes a defendant for exercising a constitutional right. *See* ***id.*** at 911-12. While Yunck did not explicitly state in his postconviction motion that his decision to have his daughter visit him was constitutionally protected, the postconviction court recognized that Yunck had

implicitly raised the argument and held that the sentencing court's "comments regarding [Yunck]'s decision to have his young daughter visit him at the House of Correction do not implicate an interference with any constitutionally protected right." Accordingly, we conclude that Yunck has properly preserved this issue for appeal, and we will address the merits of his claim.

¶21 Because sentencing decisions are left to the sound discretion of the sentencing court, we review those decisions only to determine whether the sentencing court erroneously exercised its discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. A sentencing court erroneously exercises its discretion if it bases its decision on "clearly irrelevant or improper factors." ***Id.*** Because "'sentencing decisions of the circuit court are generally afforded a strong presumption of reasonability,'" we "'follow[] a consistent and strong policy against interference with the discretion of the [sentencing] court in passing sentence.'" ***Id.***, ¶18 (bracket and citations omitted).

¶22 Sentencing courts must exercise sentencing discretion on "a 'rational and explainable basis'" and must provide an explanation of their reasoning for imposing a particular sentence on the record. ***Id.***, ¶39 (citation omitted). When determining a sentence, the three primary factors a court considers "are the gravity of the offense, the character of the offender, and the need for protection of the public." ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). In addition, courts also can consider the following factors:

> "(1) Past record of criminal offenses; (2) history of undesirable behavior pattern; (3) the defendant's personality, character and social traits; (4) result of presentence investigation; (5) vicious or aggravated nature of the crime; (6) degree of the defendant's culpability; (7) defendant's demeanor at trial; (8) defendant's age, educational background and employment record; (9) defendant's remorse, repentance and cooperativeness;

> (10) defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention."

Id. at 623-24 (citation omitted). How much weight is given to each factor is within the sentencing court's discretion and may vary from case to case. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). When a sentencing court fails to provide an adequate explanation for its decision, we will search the record for reasons to sustain the sentencing court's exercise of discretion. ***McCleary v. State***, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971).

¶23 Yunck contends that the sentencing court punished him for exercising his constitutional "right to determine the proper parenting of his child." (Bolding omitted.) He compares this case to ***Fuerst***, in which we held that the sentencing court impermissibly considered the defendant's lack of religious beliefs during sentencing, thereby infringing on the defendant's right to religious freedom under the Wisconsin and United States Constitutions. *See* ***id.***, 181 Wis. 2d at 911-12. Yunck argues that, like the sentencing court in ***Fuerst***, here, the sentencing court impermissibly considered Yunck's decision to have his daughter visit him while he was incarcerated, thereby infringing on his right to make "decisions concerning the care, custody, and control of" his daughter, protected under the Due Process Clause of the United States Constitution.[6] *See* ***Troxel***, 530 U.S. at 66.

¶24 We assume, without deciding, that Yunck's decision to have his daughter visit him while he was incarcerated is constitutionally protected.

[6] Yunck does not assert that his decision to have his daughter visit him in jail is protected under the Wisconsin Constitution, and therefore, we see no need to address the matter.

Regardless, we do not find that the sentencing court impermissibly considered this fact.

¶25 First, we conclude, based upon our review of the record, that when determining Yunck's sentence the sentencing court did not base the sentence on Yunck's decision to have his daughter visit him while he was incarcerated. The record shows the principal basis for the sentence was the sentencing court's concern for Yunck's continual disregard for Zeyen's wishes and the injunction order. While it is true that the sentencing court did express concern over whether visiting Yunck while incarcerated was in Yunck's daughter's best interest, the sentencing court repeated many times that the decision was Yunck's to make. There is simply no evidence in the record that the sentencing court ever expressly or implicitly based its sentencing decision on a belief that Yunck deserved to be punished for having his daughter visit him in jail.

¶26 Contrary to this conclusion, Yunck argues the record shows that the sentencing court relied on its negative view of the daughter's visits to the House of Correction because the sentencing court expressly stated that Yunck's decision to have his daughter visit him while incarcerated reflected poorly on his character. We assume Yunck is referring to one of the following references the sentencing court made regarding Yunck's character. The first is clearly in reference to Yunck's repeated violations of the injunction order—the court stating:

> [Zeyen] wants no contact with you, and you continue it. I find that significant. I find that is an aggravating factor. You'd think if someone was charged with it once they'd go through the proper means to deal with it, but you didn't. You just kept contacting her. You went through your daughter to try to contact her. I find that aggravated. *It's not just these three times you called her or wrote to her. Those are the three charged ones. Those are the ones I'm sentencing you on. But that really goes to the character and other issues I have to consider at sentencing.* But you

> went through your daughter to try to contact her, your five-year-old daughter.

(Emphasis added.) The second is in reference to the sentencing court's hope that Yunck would now leave Zeyen alone, stating:

> I don't know. I hope that what you just said, that now [that] you see your child, your five-year-old daughter is brought to the House of Correction two Saturdays a month to see you, you're going to leave [Zeyen] alone. I hope that's the case. *You know, that goes to your whole issue of character.* It's your decision if you want to see your five-year-old daughter, and I understand why you would want to. I could clearly understand why you would want to. Is that in the child's best interest? I don't know.

(Emphasis added.) Yunck's assertion that the sentencing court expressly referenced Yunck's visits with his daughter in jail in conjunction with his character, takes the sentencing court's references to character out of context. In context, it appears clear that the court's references to character are to Yunck's choice to continue contacting Zeyen in violation of the injunction.

¶27 Second, we conclude that to the extent the sentencing court did consider Yunck's relationship with his daughter during sentencing, it did so within the confines of ***Fuerst***. We held in ***Fuerst*** that a sentencing court may consider a defendant's decision to exercise a constitutional right—in this case, Yunck's purported right to make decisions regarding the custody, care, and control of his daughter—"if a reliable nexus exists between the defendant's criminal conduct and the [right asserted]." *See* ***id.***, 181 Wis. 2d at 913. We noted, for example, that "it would be permissible for a court sentencing a defendant convicted of drug offenses to consider the defendant's religious practices as a factor at sentencing if those religious practices involved the use of illegal drugs." ***Id.***

¶28 Here, the sentencing court explicitly admonished Yunck about his decision to go "through [his] daughter to try to contact [Zeyen]" and to "put[] [his] five-year-old daughter in the middle" of the injunction order. Such conduct falls squarely within the spectrum of behavior ***Fuerst*** held was permissible for the sentencing court to consider. *See* ***id.*** at 913. Yunck's use of his daughter to contact Zeyen was not just related to his criminal conduct, it was criminal conduct in and of itself, amounting to an additional violation of the injunction. The sentencing court acted well within its discretion when it considered that conduct, how it reflected on Yunck's character, and how his daughter's regular visits with Yunck would facilitate that criminal behavior in the future.

¶29 Accordingly, we conclude that during sentencing the court did not improperly consider Yunck's purported constitutional right to have his daughter visit him while he was incarcerated.

II. Ineffective Assistance of Trial Counsel

¶30 Next, Yunck asserts that he received ineffective assistance of counsel because his trial counsel: (1) failed to present mitigating evidence during sentencing explaining that Zeyen and Yunck had an informal agreement permitting Yunck to call Zeyen's phone to speak with their daughter; and (2) characterized Yunck's behavior as "ridiculous" and stemming from an "obsessive" "disorder." We will address each in turn.

A. Standard of Review

¶31 A defendant asserting an ineffective assistance of counsel claim must demonstrate that (1) trial counsel's performance was deficient and (2) trial counsel's deficient performance prejudiced the defendant. ***Strickland v.***

Washington, 466 U.S. 668, 687 (1984). Because a successful ineffective assistance of counsel claim requires that the defendant show both deficiency and prejudice, the court need not address both components of the inquiry if the defendant fails to make a sufficient showing on one. ***Id.*** at 697.

¶32 To satisfy a showing of deficient performance, a defendant must allege specific acts or omissions of trial counsel that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. In other words, counsel must have "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** at 687. The right to effective counsel is not a right to the perfect or even best possible defense, but rather it is a right to reasonably effective professional representation given all of the circumstances. ***State v. Harper***, 57 Wis. 2d 543, 557, 205 N.W.2d 1 (1973). There is "a strong presumption that counsel acted reasonably within professional norms," ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990), and we grant great deference to counsel when reviewing claims of ineffective assistance, ***Strickland***, 466 U.S. at 689.

¶33 To prove prejudice, the defendant must demonstrate "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Id.*** at 687. In other words, "[t]he 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." ***Id.*** at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.***

¶34 Whether counsel's performance constitutes ineffective assistance is a mixed question of fact and law. ***Johnson***, 153 Wis. 2d at 127. We will uphold any factual findings by the trial court unless the findings are clearly erroneous. ***Id.***

However, the ultimate conclusion of whether counsel's performance was deficient and prejudicial, such that it constitutes ineffective assistance, is a question of law that we review independently of the trial court. ***Id.*** at 128.

B. Failure to Mention Informal Agreement

¶35 Yunck first contends that his counsel was ineffective because he failed to present "at least a partial explanation for why [Yunck] repeatedly contacted Zeyen—because [Yunck] and Zeyen had an agreement, notwithstanding the injunction, that he had permission to call her cell phone to communicate with his daughter." Yunck further asserts that a police report, documenting interviews with both Yunck and Zeyen, verifies that, at the very least, Zeyen did not refute that the informal agreement had been made.

¶36 During the ***Machner*** hearing, when asked why he did not inform the sentencing court of the alleged informal agreement, Yunck's trial counsel stated that "I think judges actually don't like -- don't like it when defendants and victims in this case make arrangements among themselves. That's not helpful." But trial counsel conceded that he believed "it [was] a close call."

¶37 We conclude that this was a reasonable strategy for trial counsel to pursue. Indeed, some courts may not look favorably upon an informal agreement between an abuser and a victim, permitting the abuser to circumvent a court ordered injunction meant to protect the victim from harm—regardless of the purported purpose. And such an informal agreement, even if one was proven, is not recognized as an exception to the mandatory enforcement of injunctions set forth in WIS. STAT. § 813.12(7)(am)1.-2., which requires a law enforcement officer to enforce an injunction provided he or she has confirmed the injunction's

existence and there is probable cause of a violation. The statute provides no exception for enforcement based on informal agreements between the parties.

¶38 Strategic decisions reasonably based upon law and fact do not amount to ineffective assistance of counsel. *See* ***State v. Hubanks***, 173 Wis. 2d 1, 28, 496 N.W.2d 96 (Ct. App. 1992). "Trial counsel is not ineffective simply because an otherwise reasonable trial strategy was unsuccessful." ***State v. Maloney***, 2004 WI App 141, ¶¶21-23, 275 Wis. 2d 557, 685 N.W.2d 620. Accordingly, we conclude that Yunck's trial counsel's performance was not deficient. *See* ***Strickland***, 466 U.S. at 697.

¶39 Moreover, we conclude that Yunck was not prejudiced by counsel's failure to inform the sentencing court of the purported agreement. First, while Yunck spent several minutes during the sentencing hearing presenting the court with reasons he believed mitigated the impact of the phone calls he made to Zeyen following the filing of the complaint, he never informed the court of his supposed agreement with Zeyen. If he felt that counsel had neglected to inform the court of the fact, Yunck himself could have done so at that time. Second, any informal agreement between Yunck and Zeyen permitting him to call her to speak with their daughter does not explain or mitigate the underlying charges of the complaint; Yunck does not allege that the letters he sent addressed to Zeyen fall within the boundaries of any such informal agreement. Accordingly, even if Yunck were able to convince a court that the alleged informal agreement somehow mitigated his decision to violate the court-ordered injunction, any impact on his sentence would be nominal at best.

C. Characterization of Yunck's Behavior

¶40 Finally, Yunck argues that his trial counsel was ineffective because he characterized Yunck's behavior as "ridiculous" and the result of an "obsessive" "disorder." Yunck describes his counsel's characterization of Yunck's behavior as "a hypothetical diagnosis that could only have given the judge less confidence in Yunck's ability to control or change his behavior." Accordingly, Yunck appears to take issue with the following comments made by his trial counsel during sentencing:

> [DEFENSE COUNSEL]: … And the problem with these letter-writing cases is that because of whatever disorder … Yunck has -- *apparently, he does have a disorder. He's on medication for it.*
>
> THE COURT: I think he said depression.
>
> ….
>
> [DEFENSE COUNSEL]: *Right. He's got a disorder. So, again, a disorder. And, perhaps, some obsessive behavior* and his isolation in jail leading to him trying to reach out to the only person he really has, which is his daughter, and obviously making these -- writing these letters to his ex-girlfriend and at times being angry, at times being pleading.
>
> But, in any event, talking about the actual conduct here, although *I know it's ridiculous behavior*, that certainly nobody wants … But to have a sense of the scale of what he's done, the fact is, there's characters, individuals walk out of this courtroom every day who have done far worse.
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> It's clear that [Yunck] was suffering [when he wrote the letters] -- … *Yunck was suffering from depression.* I'm wondering as well -- *I'm not, certainly, no psychiatrist. But these letters certainly sound like a bit of an obsessive-compulsive type behavior* as well and, perhaps -- perhaps the medication he's been taking may have helped him with his compulsion to write letters. It strikes me that that's what's going on here. Sometimes people in the

> isolation in the jail, they feel like they're just sitting there, nobody -- and nothing is happening and it's like they can't stop themselves. That's what seems like what happened in this particular case.

(Emphasis added.)

¶41 During the ***Machner*** hearing, Yunck's trial counsel explained that his comments were an attempt to demonstrate that Yunck acknowledged his mistakes, but to then put Yunck's behavior in perspective for the sentencing court by explaining the reasoning behind the behavior. Trial counsel stated that, in his experience, the sentencing court did not look favorably upon defendants who make excuses for their actions.

¶42 The postconviction court found that trial counsel's remarks in that regard were reasonable strategy choices and were an attempt to provide an explanation for Yunck's behavior. *See* ***Maloney***, 275 Wis. 2d 557, ¶¶21-23. The postconviction court stated that it didn't "find [trial counsel's] remarks … that … Yunck was obsessed and couldn't help himself to mean [Yunck was] suffering from that diagnosis." But instead, the postconviction court viewed trial counsel's comments as an attempt to mitigate Yunck's sentence by demonstrating that Yunck's inappropriate behavior may stem from his depression, which was diagnosed and for which he was receiving medication, combined with the potential loss of his daughter and lack of structured activity while he was incarcerated. We agree with the postconviction court's analysis.

¶43 Additionally, contrary to Yunck's assertions, his trial counsel never "diagnose[ed]" Yunck with a hypothetical obsessive disorder. In fact, when describing his observation that Yunck exhibited "some obsessive *behavior*"—trial counsel never characterized that behavior as a disorder—he expressly stated that

he was "not a psychiatrist." (Emphasis added.) Instead, Yunck's trial counsel explained to the sentencing court that Yunck had been diagnosed with depression and perhaps exhibited "some obsessive behavior"—a fact exhibited time and again through Yunck's repeated contact with Zeyen despite the injunction.

¶44 Moreover, while Yunck's trial counsel did describe Yunck's conduct as "ridiculous," his trial counsel then went on to immediately state that Yunck's conduct was not as serious as that of others who the court has seen "who have done far worse." This was clearly part of trial counsel's strategy to acknowledge Yunck's mistakes and then to place them in perspective for the sentencing court. This strategy was a reasonable one. *See* ***id.***

¶45 Because we conclude that counsel's performance was not deficient, we need not address the prejudice prong of the ***Strickland*** test. *See* ***id.***, 466 U.S. at 697.

By the Court.—Judgment and orders affirmed.

This opinion will not be published. *See* WIS. STAT. § 809.23(1)(b)4.