COURT OF APPEALS
DECISION
DATED AND FILED

August 28, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2172-CR

Cir. Ct. Nos. 2001CM10640
2003CF803

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRUCE L. COHEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: PATRICIA D. McMAHON and WILLIAM W. BRASH III, Judges.[1] *Affirmed*.

[1] The Honorable Patricia D. McMahon presided over this case through trial and sentencing. Due to judicial rotation, the Honorable William W. Brash III heard and decided Cohen's postconviction motion.

¶1 KESSLER, J.[2] Bruce L. Cohen appeals from a judgment in which a jury convicted him of nine counts of violation of a restraining order and two counts of bail jumping-misdemeanor, all as a habitual criminal, in violation of WIS. STAT. §§ 813.125(7), 946.49(1)(a) and 939.62, and from an order denying his postconviction motion. Cohen filed a postconviction motion requesting "a new trial and/or resentencing and/or sentence modification and/or sentence credit." The motion was denied. On appeal, Cohen asserts that he is entitled to a new trial because he was denied his due process rights when the trial court quashed his subpoena of an agent of the Federal Bureau of Investigation; and he was denied effective assistance of counsel. Cohen also argues that the trial court erroneously exercised its discretion when it sentenced him to fourteen years' imprisonment for his conviction of eleven misdemeanors. Because we determine that the trial court did not deny Cohen his due process rights when it quashed Cohen's subpoena of the FBI agent, that Cohen received effective assistance of counsel, and that the trial court did not erroneously exercise its discretion in sentencing Cohen, we affirm.[3]

BACKGROUND

¶2 This case involves an ended love affair, the end of which one party refused to accept. In 1994, Cohen and the victim, Debbie Kroeger, began an extra-marital affair. In approximately late 1997 or early 1998, after both of their

[2] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[3] Although we affirm the trial court's quashing of the defendant's subpoena of FBI Special Agent Michael Johnson, we do so for a different reason. *See* ***Rolland v. County of Milwaukee***, 2001 WI App 53, ¶6, 241 Wis. 2d 215, 625 N.W.2d 590 ("an appellate court may affirm a trial court's correct ruling irrespective of the trial court's rationale") (citation omitted).

marriages had ended or were in the process of ending, Kroeger also ended her relationship with Cohen. Subsequently, Cohen began to excessively telephone and send letters to Kroeger. Kroeger found these calls and letters unwelcome and in early 1999, she sought and received a temporary restraining order against Cohen (TRO I). On her way to her car immediately following the court granting Kroeger this TRO, Cohen violated TRO I by calling Kroeger on her cell phone. Kroeger reported this to police (along with a second telephone call from Cohen received by Kroeger while she was at the police station reporting the first call, and which was responded to by a police officer there). Cohen was charged with two counts of violating a harassment restraining order and three counts of bail jumping-misdemeanor, and on June 14, 1999, he pled guilty/no contest to the two restraining order violations, and to one of the bail jumping charges, with the two remaining charges dismissed on the prosecutor's motion. Cohen was sentenced to thirty days in the House of Correction for one count of violating TRO I, and to twenty-day periods of incarceration for each of the second count of violating TRO I and the bail jumping count.

¶3 In 2001, after the expiration of TRO I, Kroeger again began receiving letters from Cohen and thereafter sought and received a second temporary restraining order against Cohen (TRO II). After TRO II was issued, Kroeger brought a number of letters to the Glendale Police Department (dated between September 11, 2001 and November 21, 2001) that she claimed were from Cohen; however, these letters were all computer-generated and did not contain Cohen's signature. Glendale Police Detective Troy Nitschke was assigned to investigate Kroeger's claims. These letters comprised the basis for the seven misdemeanor counts for violation of harassment restraining order charged against Cohen in 2001CM10640 to which he pled not guilty in December 2001. Cohen

was placed in the Home Detention Program of In-House Correctional Services (In-House custody) in lieu of posting cash bail in this December 2001 case.

¶4 While Cohen was under In-House custody, a condition of his bail was that he was to have no contact with Kroeger. On November 26, 2002, Kroeger received a letter which she believed was from Cohen, and which she turned over to the Glendale Police Department on November 27. On February 1, 2003, when Kroeger was leaving a grocery store, she heard a comment about "mean people" and turned around and saw Cohen behind her on the sidewalk in front of the store she had just exited. She did not notice whether Cohen followed her out of the store. Kroeger immediately contacted the Glendale Police Department, which investigated the matter by contacting the grocery store and obtaining a surveillance video. The two-minute video showed Cohen in the store's vestibule, then moving into the store, then moving back into the vestibule and staying there until Kroeger passed through to exit the store.

¶5 Thereafter, a search warrant for Cohen's residence was issued and all the computers in his home were seized for evaluation by the State Crime Lab. A computer in the living room of Cohen's residence was on when the search warrant was executed, and pictures were taken of the computer from various angles before the officers turned off the computer and dismantled it for transport. The desktop screen/wallpaper of the computer was photographed and showed that the following shortcuts were on the screen: "Convict the Bitch" and "Kroeger Says." Cohen's high school-age son testified at trial that he recognized one of these desktop shortcuts as having been on the computer before it was seized.

¶6 Based upon the November 2002 letter and the February 1, 2003 incident at the grocery store, Cohen was charged with: stalking, a felony; two

counts of violation of harassment restraining order; and two counts of bail jumping-misdemeanor. The two pending cases were consolidated for trial.

¶7 Prior to trial, the State moved *in limine* to allow admission of all the earlier letters, telephone calls and police reports relating to the calls and letters as other acts evidence for the purpose of establishing an essential element of the stalking charge. After a hearing, the trial court found that this evidence was admissible for this limited purpose. The 1999 letters were now admissible as other acts evidence for the limited purpose of establishing an element of the stalking charge.

¶8 Cohen learned that Glendale Police Officer Carrie Doss, who had investigated the 1999 letters, allegedly submitted those letters to the FBI for a threat analysis. After learning that Doss, though on the State's witness list, was not being called by the State, and was not because she was on vacation, Cohen subpoenaed FBI Special Agent Michael Johnson to testify regarding the FBI's report on the letters. The United States Attorney's office moved to quash the subpoena, telling the trial court that Johnson had no recollection that any report about these letters was ever made. The State represented that Nitschke, as primary investigator on the case, was not aware of any report or analysis of the 1999 letters. Based upon these representations, the trial court quashed the subpoena.

¶9 After a four-day trial, the jury acquitted Cohen of the stalking charge, the only felony charged. However, the jury convicted Cohen of all eleven misdemeanors, which involved the 2001 and 2002 letters and the grocery store incident. The trial court then sentenced Cohen to a total of fourteen years in state prison allocated as follows:

COUNT	CHARGE	SENTENCE LENGTH	SENTENCE CONDITIONS
Count 1	Violating TRO II With Habitual Criminality Enhancer (max. sentence: up to 3 years)	State Prison: 1 year	As to counts 1 through 7, each count consecutive to one another and to any other sentence with 0 credit for days served
Count 2	Violating TRO II With Habitual Criminality Enhancer (max. sentence: up to 3 years)	State Prison: 1 year	See Count 1
Count 3	Violating TRO II With Habitual Criminality Enhancer (max. sentence: up to 3 years)	State Prison: 1 year	See Count 1
Count 4	Violating TRO II With Habitual Criminality Enhancer (max. sentence: up to 3 years)	State Prison: 1 year	See Count 1
Count 5	Violating TRO II With Habitual Criminality Enhancer (max. sentence: up to 3 years)	State Prison: 1 year	See Count 1
Count 6	Violating TRO II With Habitual Criminality Enhancer (max. sentence: up to 3 years)	State Prison: 1 year	See Count 1
Count 7	Violating TRO II With Habitual Criminality Enhancer (max. sentence: up to 3 years)	State Prison: 1 year	See Count 1
Count 8	Stalking	Acquitted – N/A	N/A
Count 9	Violating TRO II With Habitual Criminality Enhancer	State Prison: 18 months	As to counts 9 and 10 consecutive to

	(max. sentence: up to 2 years)		each other and to any other sentence with credit for 0 days time served.
Count 10	Bail Jumping-Misdemeanor Misd. A With Habitual Criminality Enhancer (max. sentence: up to 2 years)	State Prison: 18 months	As to counts 9 and 10 consecutive to each other and to any sentence. (Court order dated 08-18-2006 grants 13 days of sentence credit on this case.)
Count 11	Violating TRO II With Habitual Criminality Enhancer (max. sentence: up to 2 years)	State Prison: Confinement: 18 months Extended Supervision: 6 months	As to counts 11 and 12 consecutive to each other and to any other sentence with 0 days credit for time served. (add'l conditions listed on judgment of conviction)
Count 12	Bail Jumping-Misdemeanor Misd. A With Habitual Criminality Enhancer (max. sentence: up to 2 years)	State Prison: Confinement: 18 months Extended Supervision: 6 months	See count 11

¶10 Cohen's motion for a new trial argued that the trial court had failed to correctly apply the evidentiary rule regarding other acts evidence; that Cohen received ineffective assistance of counsel to which he was entitled under both the federal and Wisconsin constitutions; and that Cohen had been denied due process by discovery violations by the State relating to its denial that an FBI threat analysis report existed on the 1999 letters, which led the trial court to quash

Cohen's subpoena of Johnson and denied Cohen his confrontation rights. The motion also argued that the trial court had erroneously exercised its discretion when it sentenced Cohen in that "[i]t failed to even acknowledge the minimum custody standard" and "imposed an excessively harsh sentence far out of proportion to the conduct for which Mr. Cohen was convicted." Finally, Cohen argued in his motion that the trial court failed to give him sentence credit to which he was entitled pursuant to WIS. STAT. § 973.155.

¶11 Due to judicial rotation, Cohen's postconviction motion was heard and decided by the Honorable William W. Brash III. During postconviction motion briefing and the hearing, the State conceded that since the trial, it had learned that the FBI had in fact done a threat analysis of the 1999 letters, and that the FBI could not determine whether there was or was not a threat in the letters. This conclusion had been orally reported to Doss, who testified that she was told: "[T]hey weren't able to determine if there was any threats in there. He couldn't say that there wasn't a threat, but he couldn't say that there was a threat."[4] The State noted, however, that Johnson only acted as a middle-man between the FBI analyst and Doss, which explained why he had had no recollection of the referral or of a report when he was subpoenaed.

¶12 The trial court held a hearing on Cohen's postconviction motion, which included a ***Machner***[5] hearing on Cohen's claims of ineffective assistance of

[4] Repeatedly in his brief, in spite of Doss's testimony, Cohen describes the FBI conclusion as though it affirmatively absolved the letters of a threatening character. The finding was described, for instance, as that the 1999 letters "contained no evidence of a threat" or "there was no evidence in the letters that Cohen posed a threat of physical violence to Debra."

[5] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

counsel. Attorneys Galang and Owens testified. Doss testified that she had forwarded to the FBI, to Johnson, a group of letters given to her by Kroeger. She testified that she received a follow-up call from the FBI some weeks later, and that the FBI told her that its analysts could not determine whether there was or was not a threat in the letters. Doss testified that she did not document this second call from the FBI. Doss testified that at the time that she received the FBI information, she most likely would have informed her supervisor, not Nitschke, and that the information would have flowed in that way. Doss also testified that she had no specific recollection of discussing the FBI's results with Nitschke, but that "it would seem natural through the course of an investigation that [she] would have told him" what occurred in her investigations.

¶13 Nitschke testified about the State's representation that there was no FBI report at the motion to quash as follows:

> [DEFENSE COUNSEL]: And you were present, I believe, when [the State] told Judge McMahon, speaking of you, he said "Detective Nitschke has advised me based on his review of everything at the Glendale Police Department there was no assessment done or received by him." Were you present when [the State] made that representation to Judge McMahon?
>
> ….
>
> [NITSCHKE]: I probably was, yes.
>
> [DEFENSE COUNSEL]: And if that had been incorrect, would you have felt a duty to correct it?
>
> [NITSCHKE]: Yes.
>
> [DEFENSE COUNSEL]: So when [the State] told Judge McMahon that, you believed that to be correct?
>
> [NITSCHKE]: My understanding was there was no report from the FBI. I think that's what I told [the State].

[DEFENSE COUNSEL]: Okay.… You were in charge of the investigation, and your direct supervisor was Lieutenant Daniel H-e-r-l-a-c-h-e, Herlache.

Detective Daniel -- Lieutenant Daniel Herlache and Detective Nitschke advised me -- that's [the State] speaking -- Detective Nitschke advised me he did speak with Officer Doss about this. Nothing was received. It was just something she discussed with somebody at the FBI as a possibility, but nothing was ever done about it.

Were you present when [the State] made that representation to Judge McMahon?

[NITSCHKE]: I believe I was, yes.

[DEFENSE COUNSEL]: And was that a correct representation?

[NITSCHKE]: Yes.

[DEFENSE COUNSEL]: Did you talk to Officer Doss, who just got off the stand moments ago, did you talk to her about this topic before trial?

[NITSCHKE]: Yes.

[DEFENSE COUNSEL]: She told you that she just discussed it with the FBI, but nothing was ever done about it?

[NITSCHKE]: Yes. I believe when we were going through the preparation, we had talked about it, and she said, yes, there was a phone conversation, and she told me basically what the gist of that conversation was.

[DEFENSE COUNSEL]: You just heard her testify that she sent the letters to the FBI in Quantico, correct?

[NITSCHKE]: Yes.

[DEFENSE COUNSEL]: She sent them to the FBI here in Milwaukee?

[NITSCHKE]: I assume she sent them some.

[DEFENSE COUNSEL]: You heard her testify she sent them to the FBI?

[NITSCHKE]: Yes.

> [DEFENSE COUNSEL]: Didn't you tell [the State] and he told the judge she just talked to the FBI, but nothing was ever done about it?
>
> [NITSCHKE]: My understanding is nothing was done. There was no report generated.
>
> [DEFENSE COUNSEL]: You didn't say there was no report generated, you just said they talked about them, but nothing was ever done?
>
> [NITSCHKE]: My understanding by that was there was no report generated.

Nitschke also testified that he first became aware that Doss had physically sent the letters to the FBI during the trial.

¶14 The trial court granted Cohen's request for sentencing credit, then addressed the issue of the quashed subpoena. The trial court noted that under controlling case law, *i.e.*, ***Brady v. Maryland***, 373 U.S. 83 (1963), a defendant has a constitutional right to receive material exculpatory evidence that is in the possession of the State. The trial court correctly explained that:

> Exculpatory evidence is, of course, material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome or ultimate decision as released or as -- as rendered with regards to a matter.
>
> ….
>
> [P]rejudice must have ensued.
>
> ….
>
> The mere possibility that an item of undisclosed information might have helped the defense does not establish materiality in the constitutional sense.

¶15 At no time during the proceedings had Johnson recalled either receiving the letters for a threat analysis or communicating the FBI's informal

analysis of them to the Glendale police. The trial court concluded that Cohen had not established the materiality of the excluded evidence (Johnson's testimony) which did not involve the charges as to which a new trial was being sought.

¶16 The trial court considered Cohen's claims of ineffective assistance of counsel and concluded that based upon the trial transcripts and the ***Machner*** hearing, it could not find that counsel's alleged failures to object were not strategic decisions. The court concluded, therefore, that Cohen had not established the facts as required by ***Strickland v. Washington***, 466 U.S. 668 (1984), and denied Cohen's motion as to his ineffective assistance of counsel claims.

¶17 As to Cohen's sentencing claim, the trial court, after reading the sentencing transcript more than once, concluded that it "couldn't find and does not find that there was a misapplication of ***McCleary***[6] or an abuse of discretion with regards to this matter so as to warrant, under that standard, a resentencing on these matters" (footnote added). This appeal followed. Additional facts are provided in the discussion section of this opinion as necessary.

DISCUSSION

I. Due process right to confrontation claim

¶18 Under the Confrontation Clauses of the United States and Wisconsin constitutions, criminal defendants have a compulsory process right to subpoena witnesses at trial. U.S. CONST., amend. VI;[7] WIS. CONST., art. I, § 7;[8] ***State ex rel.***

[6] ***McCleary v. State***, 49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971).

[7] The Sixth Amendment to the United States Constitution states: "[i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." U.S. CONST., amend. VI.

Green Bay Newspaper Co. v. Circuit Court, 113 Wis. 2d 411, 420, 335 N.W.2d 367 (1983). This is not an unqualified right, however. ***Id.*** at 420. Rather, "'a defendant suffers no constitutional deprivation when he is limited to subpoenaing witnesses who can offer relevant and material evidence on his behalf.'" ***Id.*** (citation omitted). Although the testimony sought "may be relevant, a defendant has no right to produce it if the impact of the exclusion of the evidence will be too insignificant to have any bearing upon the question to which the evidence goes." ***Id.*** at 425 (footnote omitted). Ordinarily, a trial court's decision to admit evidence is discretionary. ***State v. Hale***, 2005 WI 7, ¶41, 277 Wis. 2d 593, 691 N.W.2d 637. However, "whether the admission of such evidence violates a defendant's right to confrontation is a question of law subject to independent appellate review." ***Id.***

¶19 Cohen argues that quashing his subpoena of the FBI agent was a structural error,[9] not subject to the harmless error test and, as such, he is entitled to a new trial. In making that argument, Cohen ignores the limited purpose of the 1999 letters and any testimony related to them. The State argues that any error in quashing the subpoena of Johnson, if any existed, was harmless. Thus, because the 1999 letters, and an inconclusive threat analysis of them, was only admissible as to the stalking charge, and the jury was so instructed, the State argues that the jury's acquittal of Cohen for stalking establishes that any error was harmless.

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[8] Article I, §7 to the Wisconsin Constitution states: "[i]n all criminal prosecutions, the accused shall enjoy the right … to meet the witnesses face to face." WIS. CONST., art. I, § 7.

[9] The United States Supreme Court has defined such "structural" errors as those errors which "deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.…'" ***Neder v. United States***, 527 U.S. 1, 8-9 (citing ***Rose v. Clark***, 478 U.S. 570, 577-78 (1986)).

¶20 The 1999 letters were admitted as other acts evidence for the limited purpose of the stalking charge under WIS. STAT. § 940.32, which required proof of intention to harm. *See* WIS. STAT. § 904.04(2).[10] The jury was specifically instructed that the 1999 letters could only be considered in relation to the stalking charge. Kroeger had acknowledged that the 1999 letters were not threatening her any harm. Cohen's counsel argued that the 1999 letters were non-threatening, thus they differed from the 2001 letters which, according to the theory of the defense, were created by Nitschke, in a conspiracy with Kroeger, to "frame" Cohen.

¶21 If the beneficiary of an error proves beyond a reasonable doubt that the error complained of did not contribute to the verdict, the error was harmless. ***State v. Mayo***, 2007 WI 78, ¶47, __ Wis. 2d __, 734 N.W.2d 191. Here, the State is the beneficiary of any error, and it is undisputed that Cohen was acquitted of the only charge to which the information sought in the quashed subpoena applied. The State has proven beyond a reasonable doubt that the quashed subpoena caused Cohen to suffer no constitutional deprivation and accordingly, Cohen is not entitled to a new trial on this basis. ***Id.***

[10] WISCONSIN STAT. § 904.04(2), which governs admissibility of other acts evidence, states in pertinent part:

> **(2)** OTHER CRIMES, WRONGS, OR ACTS. (a) Except as provided in par. (b), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

II. Ineffective assistance of counsel

¶22 In order to prove an ineffective assistance claim, the defendant must satisfy a two-part test: the defendant must prove both that counsel's performance was deficient and that the deficient performance was prejudicial. ***Strickland***, 466 U.S. at 687; ***State v. Pitsch***, 124 Wis. 2d 628, 369 N.W.2d 711 (1985) (adopting ***Strickland***'s two-prong test for analyzing ineffective assistance of counsel claims); *see also* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996) (test for ineffective assistance of counsel as set forth in ***Strickland*** and ***Johnson*** to be applied to challenges of ineffectiveness under the Wisconsin Constitution); ***State v. Johnson***, 133 Wis. 2d 207, 222-23, 395 N.W.2d 176 (1986) (expanding on use of the ***Strickland*** test).

¶23 An attorney's performance is deficient if the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990) (quoting ***Strickland***, 466 U.S. at 687). Performance is deficient if it falls outside the range of professionally competent representation. ***Pitsch***, 124 Wis. 2d at 636-37. We measure performance by the objective standard of what a reasonably prudent attorney would do in similar circumstances, *see* ***id.*** (citing ***Strickland***, 466 U.S. at 688), and we indulge in a strong presumption that counsel acted reasonably within professional norms. ***Pitsch***, 124 Wis. 2d at 637. We review the attorney's performance with great deference and "the burden is placed on the defendant to overcome the strong presumption that counsel acted reasonably within professional norms." ***Johnson***, 153 Wis. 2d at 127. Generally, "when a defendant accepts counsel, the defendant delegates to counsel the … tactical decisions an attorney must make during a trial." ***State v. Brunette***, 220 Wis. 2d 431, 443, 583 N.W.2d 174 (Ct. App. 1998) (citation

omitted). "Review of the performance prong may be abandoned '[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of prejudice….'" ***State v. Moats***, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990) (citing ***Strickland***, 466 U.S. at 697).

¶24 As to prejudice, it is not enough for a defendant to merely show that the alleged deficient performance had some conceivable effect on the outcome. ***State v. Erickson***, 227 Wis. 2d 758, 773, 596 N.W.2d 749 (1999). Rather, the defendant must show that, but for counsel's error, there is a reasonable probability that the result of the trial would have been different. ***Id.*** "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland***, 466 U.S. at 694.

¶25 A claim of ineffective assistance of counsel presents a mixed question of fact and law. ***State v. O'Brien***, 223 Wis. 2d 303, 324, 588 N.W.2d 8 (1999). Upon appellate review, we will affirm the trial court's findings of historical fact concerning counsel's performance unless those findings are clearly erroneous. ***Id.*** at 324-25. However, the ultimate question of ineffective assistance is one of law, subject to independent review. ***Id.*** at 325.

¶26 Cohen argues that his counsel was ineffective when counsel failed to: (1) take steps to timely obtain evidence regarding the FBI's threat analysis of some of the 1999 letters; (2) object to the State's expert's testimony that no one "planted" evidence on Cohen's computer's hard drive; (3) object to Nitschke's testimony regarding Cohen's refusal to answer police questions; and (4) object to "impermissible other acts evidence that Cohen had made harassing telephone calls to his ex-wife." Cohen contends that the cumulative effect of these errors "either

unfairly damaged Cohen's theory of defense or improperly bolstered the State's theory."

a. Failure to investigate

¶27 Cohen argues that his counsel failed to investigate so as to timely obtain evidence regarding the FBI's threat analysis of some of the 1999 letters. Cohen further argues that because of this failure, trial counsel had to attempt a last-minute subpoena of the FBI agent. Cohen also claims that during the motion to quash, Nitschke deliberately lied to the trial court when he told the State's attorney that no threat analysis had been conducted by the FBI. Cohen argues that if his subpoena had not been quashed, Nitschke's lie would have become apparent to the jury during the testimony of Johnson, which would have affected the jury's view of Nitschke's credibility.[11] The validity of this claim is belied by the testimony of both Nitschke and Johnson.

¶28 Nitschke testified at both the trial and at the ***Machner*** hearing that *he was unaware* of any report being received. He describes his knowledge of the FBI involvement as "[i]t was just something [Doss] discussed with somebody at the FBI as a possibility, but nothing was ever done about it." Doss's police reports indicate only that she forwarded the letters to the FBI, but the police records do not include, and Doss testified that she did not document, what response was received. Assistant United States Attorney Jonathan Koenig represented during the hearing on the motion to quash that Johnson had told him that he had no

[11] Cohen asserts as part of his defense that Nitschke intentionally fabricated his testimony about both the 1999 letter threat analysis and about what Nitschke observed and photographed on Cohen's computer.

memory of the referral and no knowledge of the analyst's conclusion. Moreover, even after it was determined that an analysis of the letters had been done, Johnson continued to have no independent memory of them. Cohen has not shown how receiving information about the inconclusive threat analysis prior to or during the trial would have likely persuaded the jury that Cohen did not violate the harassment injunction fourteen times (which would be necessary to change the outcome of the charges of which Cohen was convicted).

b. Failure to obtain transcript

¶29 Cohen further argues that the failure to obtain the harassment hearing transcript prior to trial was ineffective assistance of counsel. Cohen claims that the transcript was available in May of 2003 (two months prior to trial), that counsel knew it was available, and that counsel did not obtain the transcript until during trial on July 22, 2003. Cohen does not explain what he would have done with the information in the transcript had he obtained it sooner, and he did not request an adjournment to allow him to take whatever action he believed the transcript required.

¶30 During the ***Machner*** hearing, Galang testified that he requested all of the harassment hearing transcripts in order to obtain testimony which could be used to impeach Kroeger, but that the transcripts arrived sporadically. Galang noted that according to his file, he first received a faxed invoice from the court reporter in May 2003. Although it was his practice that the client, Cohen, pay all expenses, in this instance the evidence showed that a check had been issued to the court reporter for the transcript from Galang's business account on June 22, 2003, advancing the cost for the transcript. Galang received the actual transcript on July 22, 2003, with a copy of the invoice marked paid, which is in the file.

¶31 We conclude that Cohen has not shown that either trial counsel's performance was deficient because of the delay in obtaining the transcript or, if deficient, that Cohen was prejudiced by the delay. Nothing in his arguments on this issue persuades us that there is a reasonable probability that the result of the trial would have been different had Cohen received the transcript some weeks or days earlier. *See* ***Erickson***, 227 Wis. 2d at 773.

c. Failure to object to various trial testimony

¶32 Cohen complains of a number of occasions during the trial where he believes his counsel was ineffective for failing to object to particular portions of testimony. First, he claims that counsel should have objected to Nitschke's testimony that "Cohen called the police names, spit on them, and was red in the face, and 'it was obvious that he was not going to make a statement.'" Cohen asserts this statement is an impermissible comment on his exercise of his right to remain silent. In hindsight, at the ***Machner*** hearing, trial counsel agreed that he thought the statement may have been objectionable.

¶33 Cohen takes the testimony out of context. The challenged statement occurred in an exchange between the State's counsel and Nitschke, at the conclusion of the State's direct examination:

> [STATE]: Did he direct any derogatory remarks toward you?
>
> [NITSCHKE]: Yes, he did.
>
> [STATE]: What was the nature of those remarks?
>
> [NITSCHKE]: Just a triad [sic] of -- do you want me to tell you some of the things he was calling me or --
>
> [STATE]: If you could.

> [NITSCHKE]: He called me a "Dirty pig. Fuck you." Just kept going on, and his face just was red with rage, and as he's shouting at me, he's calling me a, "Dirty pig. Fuck you. Liar," the spit is flying out because he's getting so worked up. Finally I -- it was obvious he wasn't going to make any statement, so we asked him to go to a holding cell, and on his way there, he said something, "I hope you sleep at night," or "I hope you can sleep at night," and I said to him, "Yeah, I sleep quite well," and he said, "I bet it's with her," so I'm assuming he meant Debra Kroeger.
>
> [STATE]: That is all the questions I have.

¶34 In the context in which this statement occurred, it is reasonable for an experienced trial lawyer to decide not to object to the "he wasn't going to make any statement" portion of Cohen's reported comments for fear of emphasizing to the jury the surrounding rude and antisocial conduct in which his client was engaging. Cohen has not shown that the failure to object was deficient performance by his counsel or how the trial outcome would have been different if his counsel had objected to this testimony. Therefore, Cohen has not met the first prong of the ***Strickland*** test.

¶35 Cohen next argues that trial counsel's failure to object to the State's expert's testimony that no one "planted" evidence on Cohen's computer's hard drive constituted ineffective assistance of counsel. The State's expert witness on computers testified about planting evidence on the computer:

> [STATE]: Mr. Koch, based upon your review of all the evidence in this case, would it have been possible in your expert opinion for somebody to have planted this evidence on that computer in let's say December of 2001?
>
> [EXPERT WITNESS]: It's certainly possible that information could have been planted; but given the complexity of the information that I've located, both in the Windows shortcut files, the technical aspects of that entry in the Internet history, as well as finding these fragments which essentially are out on the free space on the drive, which are essentially just data just sitting out there waiting to be overwritten by the next file that comes along, given

> that time span, it's pretty unlikely -- extremely unlikely that any tampering with the evidence could have occurred.

The following exchange is the subject of Cohen's allegation of ineffective assistance of counsel:

> [STATE]: So in your opinion to a reasonable degree of scientific certainty, was that done in this case? Did somebody plant this evidence on this computer following its seizure on February 11, 2003?
>
> [EXPERT WITNESS]: In my opinion, this information was created via the method of creating a document, editing a document, and it was done undoubtedly in late 2002.

¶36 It is well-established that an expert witness may express an opinion, even if it is on an ultimate issue to be decided by the factfinder.[12] The Wisconsin Rules of Evidence specifically permit expert testimony in the form of opinion on ultimate issues to be decided by the jury.[13] In viewing the record of the testimony in its entirety, we conclude that the expert's testimony was clearly admissible. Failure to object to admissible evidence does not constitute deficient performance of counsel.

¶37 Cohen also challenges counsel's failure to object to Kroeger's testimony, which Cohen describes as a failure to "object to impermissible other

[12] ***Rabata v. Dohner***, 45 Wis. 2d 111, 122, 172 N.W.2d 409 (1969), held that "[i]t is well-established law in Wisconsin that an expert may give an opinion in answer to a direct, as contrasted to, a hypothetical question, where the facts upon which he relies are either undisputed or are the result of firsthand knowledge."

[13] WISCONSIN STAT. § 907.02 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." WISCONSIN STAT. § 907.04 states: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

acts evidence that Cohen had made harassing telephone calls to his ex-wife." That characterization is inaccurate and misleading. The actual testimony was:

> [DEFENSE COUNSEL]: When did Detective Nitschke start investigating this case?
>
> [MS. KROEGER]: I have no idea what year that was.
>
> I think he was connected with another case with his ex-wife. I think because he was familiar, he took on this one as well; but I'm not really sure what year it was or –
>
> I remember working with a Debra (sic) Doss I think it was right in the beginning.

Trial counsel did not object to this testimony.

¶38 This testimony is not "impermissible other acts evidence that Cohen had made harassing telephone calls to his ex-wife." Rather, the testimony was an off-hand reference to the victim's belief that there was a previous case involving Cohen's former wife, but about which no facts were disclosed to the jury. During the ***Machner*** hearing, Attorney Galang explained his failure to object as a strategic decision:

> [STATE]: To narrow in more specifically on these questions and answers that trouble me on Page 25 of the July 22, 2003, transcript, you were cross examining Debra Kroeger and you asked her: "When did Detective Nitschke start investigating this case? She answered: I have no idea what year that was. I think he was connected with another case with his ex-wife. I think because he was familiar, he took this on.
>
> Well, when he talks about Detective Nitschke investigating another case about Mr. Cohen's ex-wife at some point, did you think that that was irrelevant or prejudicial?
>
> [DEFENSE COUNSEL]: I'd have to look to see the rest of the questions and answers surrounding that. I think that might be an instance where, you know, objecting or

> making a statement at that point, if she goes away from that statement, just continues or may have gone against more than it would have helped Mr. Cohen.

¶39 Considering all of the testimony about which Cohen complains, we conclude that he has not shown that counsel's performance was deficient and that he was prejudiced by the specific testimony to the extent that he was deprived of his Sixth Amendment rights.

d. Cumulative effect of alleged errors

¶40 Finally, Cohen argues that the cumulative effect of what he considers errors is ineffective assistance, as described in ***State v. Thiel***, 2003 WI 111, ¶62, 264 Wis. 2d 571, 665 N.W.2d 305. Specifically, the ***Thiel*** court stated:

> [W]hether the aggregated errors by counsel will be enough to meet the Strickland prejudice prong depends upon the totality of the circumstances at trial, not the "totality of the representation" provided to the defendant. The fundamental purpose of the Sixth Amendment's guarantee of effective assistance of counsel is not to assess the overall performance of counsel but to ensure that the adversarial process functions fairly and reliably.

Id. (citations and footnotes omitted).

¶41 In order to demonstrate that counsel's deficient performance is constitutionally prejudicial, "[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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland***, 466 U.S. at 694. "The focus of this inquiry is not on the outcome of the trial, but on 'the reliability of the proceedings.'" ***Thiel***, 264 Wis. 2d 571, ¶20 (quoting ***Pitsch***, 124 Wis. 2d at 642).

¶42 Based upon our review of the record as discussed above, we conclude that in the aggregate the errors alleged by Cohen do not establish ineffective assistance of counsel under ***Strickland*** and ***Thiel*** because neither individually nor cumulatively do they undermine our confidence in the outcome or in the reliability of the proceedings**.**

III. Sentencing

¶43 Cohen argues that the trial court erroneously exercised its discretion when it sentenced him to consecutive sentences on all counts.

¶44 When a defendant challenges his or her sentence, "the defendant has the burden to show some unreasonable or unjustifiable basis in the record for the sentence at issue." ***State v. Lechner***, 217 Wis. 2d 392, 418, 576 N.W.2d 912 (1998). The standards we employ in reviewing an imposed sentence are well-settled:

> A circuit court exercises its discretion at sentencing, and appellate review is limited to determining if the court's discretion was erroneously exercised. This court stated in *McCleary* [*v. State*], 49 Wis. 2d [263,] 281, 182 N.W.2d 512 [(1971)], that "[a]ppellate judges should not substitute their preference for a sentence merely because, had they been in the trial judge's position, they would have meted out a different sentence."

State v. Brown, 2006 WI 131, ¶19, 298 Wis. 2d 37, 725 N.W.2d 262. "On appeal, we will 'search the record to determine whether in the exercise of proper discretion the sentence imposed can be sustained.'" ***Lechner***, 217 Wis. 2d at 419 (citation omitted).

¶45 The primary sentencing factors are the gravity of the offense, the character of the offender, and the need for public protection. ***McCleary v. State***,

49 Wis. 2d 263, 276, 182 N.W.2d 512 (1971). The trial court's obligation is to consider the primary sentencing factors and to exercise its discretion in imposing a reasoned and reasonable sentence. *See* ***State v. Larsen***, 141 Wis. 2d 412, 426-28, 415 N.W.2d 535 (Ct. App. 1987). A sentence is unduly harsh and thus an erroneous exercise of discretion when it is "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975); *see also* ***State v. Giebel***, 198 Wis. 2d 207, 220, 541 N.W.2d 815 (Ct. App. 1995) (We review an allegedly harsh and excessive sentence for an erroneous exercise of discretion.).

¶46 The maximum sentence permitted on the counts of which Cohen was convicted, with the habitual criminality penalty enhancer, was twenty-nine years of incarceration.[14] The trial court considered it important that each count was an act by Cohen to intentionally defy a previous court order. The trial court imposed consecutive sentences, but did not impose the maximum number of years available. Rather, as to counts 1-7, 9 and 10, the maximum totaled twenty-five years, but the court imposed only ten years. As to counts 11 and 12, the trial court imposed the maximum of two years of imprisonment for each count.

¶47 The trial court, in discussion preceding the sentence, first noted the three primary sentencing factors—"seriousness of the offense,[15] the character of

[14] Only the last two counts involve conduct which fell under the Truth-In-Sentencing provisions.

[15] Kroeger had obtained multiple restraining orders against Cohen and Cohen had violated the orders multiple times, had been convicted of doing so, and had done so again even (continued)

the defendant and the needs of the community." The court considered the impact of Cohen's actions on the victim, and how the impact of Cohen's conduct had a "ripple effect on the community," and commented that "[t]here is an argument that [Cohen] finally gets it, but it's still [Kroeger's] fault for not explaining her reasons to [Cohen's] satisfaction." The trial court discussed Cohen's character, including mitigating factors,[16] and aggravating factors.[17] The court discussed Cohen's lack of remorse and failure to accept responsibility.[18] The court considered Cohen's demeanor on surveillance videotape and the fact that the letters were unsigned, and concluded "all of that pattern of behavior shows somebody who knew what they were doing and trying to avoid taking responsibility."

¶48 The court explained the cumulative totals of fourteen years of imprisonment:

> I think this gives a period of time that the victim can have some security and knowing that you won't be harassing her further.

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after being convicted. The court also noted that in this very case, Cohen had violated both the restraining order and his bail by continuing to contact Kroeger.

[16] Cohen was educated and a productive citizen, with a good business.

[17] Cohen's prior record of violating the restraining and bail orders as to Kroeger, and Cohen's violation of a restraining order by a different victim.

[18]

> What is telling is the lack of remorse today. The defendant says he understands, he gets it, that he never meant to hurt anybody, that he's afraid of going to jail.
>
> But jail was in the cards with the first conviction, the second conviction, throughout. The threat of jail has always been there, but that hasn't been a sufficient deterrent. That hasn't been a sufficient incentive to encourage the defendant to accept responsibility for his own conduct.

> I think it reflects the outrage of the community for the nature of this concentrated campaign, campaign of harassment.
>
> I think the fact that you've been a productive citizen and intelligent citizen cuts both ways. You knew what you were doing. You made a decision. It was a campaign to harass and evade detection.
>
> Hopefully, you'll continue treatment that you need because you will return to the community….

¶49 Because the trial court considered the appropriate sentencing factors, and explained its reasoning for the length of the sentences imposed, the trial court did not erroneously exercise its discretion in sentencing Cohen.

By the Court.—Judgment and order affirmed.

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