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cannot address it on appeal. We also do not determine whether Gary's Implement is entitled to retain the sums paid at the trustee's sale pursuant to its rights granted by the deed of trust. Such a finding requires inquiry beyond whether Bridgeport Tractor is owed restitution based on reversal of the original judgment. Because these matters have not been fully litigated, we note that our present determination does not preclude the parties from raising such claims in the case currently pending in district court.

The facts underlying Bridgeport Tractor's cross-appeal indicate that this is not a proper case for restitution on the basis of a judgment subsequently reversed as we have recognized it. Therefore, the district court did not abuse its discretion in overruling Bridgeport Tractor's motion for restitution. For the foregoing reasons, we find Bridgeport Tractor's assignments of error on cross-appeal to be without merit.

VI. CONCLUSION

We find that jury instruction No. 7 does not amount to prejudicial error and that Wenande's expert testimony was properly admitted at trial. We also find that the district court did not err in denying Bridgeport Tractor's motion for restitution. Therefore, we affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DONALD L. SIDZYIK, APPELLANT.

795 N.W.2d 281

Filed April 1, 2011. No. S-10-278.

1. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
2. **Effectiveness of Counsel: Records: Appeal and Error.** The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. The determining factor is whether the record is sufficient to adequately review the question.
3. **Appeal and Error: Words and Phrases.** Plain error will be noted only where an error is evident from the record, prejudicially affects a substantial right of a litigant, and is of such a nature that to leave it uncorrected would cause a

miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.

4. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
5. **Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to relief based on a claim of ineffective assistance of counsel, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense in his or her case.
6. **Effectiveness of Counsel: Proof.** The two prongs of the ineffective assistance of counsel test, deficient performance and prejudice, may be addressed in either order.
7. **Postconviction: Effectiveness of Counsel: Records: Appeal and Error.** In order to raise the issue of ineffective assistance of trial counsel where appellate counsel is different from trial counsel, a defendant must raise on direct appeal any issue of ineffective assistance of trial counsel which is known to the defendant or is apparent from the record, or the issue will be procedurally barred on postconviction review.
8. **Trial: Effectiveness of Counsel: Appeal and Error.** Appellate courts have generally reached ineffective assistance of counsel claims on direct appeal only in those instances where it was clear from the record that such claims were without merit or in the rare case where trial counsel's error was so egregious and resulted in such a high level of prejudice that no tactic or strategy could overcome the effect of the error, which effect was a fundamentally unfair trial.
9. **Plea Bargains.** When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.
10. **Effectiveness of Counsel: Proof.** To demonstrate that his or her counsel's performance was deficient, a defendant must show that counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area.
11. **Trial: Effectiveness of Counsel: Presumptions.** In determining whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably.
12. **Trial: Attorneys at Law: Appeal and Error.** An appellate court affords trial counsel due deference to formulate trial strategy and tactics.
13. **Sentences: Appeal and Error.** An abuse of discretion in imposing a sentence occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result.
14. **Sentences.** In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors.
15. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.
16. ____. In imposing a sentence, a judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or

her past criminal record or law-abiding conduct, the motivation for the offense, the nature of the offense, and the amount of violence involved in the commission of the crime.

Petition for further review from the Court of Appeals, IRWIN, SIEVERS, and CARLSON, Judges, on appeal thereto from the District Court for Douglas County, PATRICIA A. LAMBERTY, Judge. Judgment of Court of Appeals affirmed.

Chad M. Brown and Jeremy C. Jorgenson for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

This case is before us on a petition for further review in which appellant, Donald L. Sidzyik, claims that the Nebraska Court of Appeals erred with respect to three sentencing issues. Sidzyik was convicted in Douglas County District Court of second degree sexual assault based on a plea agreement. At the sentencing hearing, the State failed to remain silent as had been promised in the plea agreement and instead commented that its position was stated in the presentence investigation (PSI), which recommended a substantial period of incarceration. Sidzyik was sentenced to 18 to 20 years' incarceration, with credit for 33 days served.

On direct appeal to the Court of Appeals, Sidzyik claimed that he received ineffective assistance of trial counsel based on his counsel's failure to object when the State did not stand silent at sentencing, that the district court committed plain error when it proceeded with sentencing after the breach of the plea agreement, and that the sentence imposed was excessive. The Court of Appeals summarily affirmed Sidzyik's conviction and sentence.

Sidzyik petitioned for further review. We granted the petition. We determine that the record is insufficient to determine the ineffective assistance of counsel claim, that there was no

plain error, and that the sentence imposed was not an abuse of discretion. Accordingly, we affirm.

STATEMENT OF FACTS

Sidzyik was originally charged with first degree sexual assault on a child, his biological daughter. The sexual assault covered by the amended information is alleged to have occurred between January 1, 2005, and December 31, 2006, while the victim was between the ages of 12 and 14. In a plea agreement, the State had agreed to amend the charge to second degree sexual assault. At the plea hearing, the prosecutor acknowledged that as part of the plea agreement, he would stand silent at sentencing. Sidzyik pled no contest.

At the sentencing hearing, a different prosecutor stated:

> I am covering the case for [the prosecutor who had previously appeared in the case,] who is on military leave right now. With regard to the matter, he wanted the Court to know the State's position is stated in the PSI and we would submit on the PSI. I had the opportunity to speak with the victim and the victim's family. They will rest on the documentation they've provided to the Court at this point . . . .

Sidzyik's counsel did not object to this statement. Sidzyik was sentenced to 18 to 20 years' imprisonment for the conviction of second degree sexual assault, which is a Class III felony.

The PSI was lengthy and, in summary, stated: "Based upon the seriousness of the original charge, this officer believes [Sidzyik] is not an appropriate candidate for probation. This officer would . . . recommend the Court sentence [Sidzyik] to a substantial period of incarceration under the statutory penalties for the conviction of Sexual Assault 2nd Degree-III Felony."

On direct appeal to the Court of Appeals, Sidzyik was represented by new counsel and claimed that (1) trial counsel was ineffective when he failed to object to the State's breach of the plea agreement, (2) the sentencing court committed plain error when it sentenced him after the alleged breach of the plea agreement, and (3) the sentence imposed was excessive. The State moved for summary affirmance pursuant to Neb. Ct. R. App. P. § 2-107(B)(2) (rev. 2008). The Court of

Appeals sustained the motion and summarily affirmed without opinion.

Sidzyik petitioned for further review. We granted the petition.

ASSIGNMENTS OF ERROR

On further review, Sidzyik claims that the Court of Appeals erred when it summarily affirmed his conviction and sentence, because trial counsel was ineffective when he failed to object at the sentencing to the State's breach of the plea agreement, the district court committed plain error when it proceeded to sentencing Sidzyik after the State breached the plea agreement, and the sentence imposed was excessive.

STANDARDS OF REVIEW

[1] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010).

[2] The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. See *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010). The determining factor is whether the record is sufficient to adequately review the question. *Id.*

[3] Plain error will be noted only where an error is evident from the record, prejudicially affects a substantial right of a litigant, and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *Id.*

[4] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Fuller*, 278 Neb. 585, 772 N.W.2d 868 (2009).

ANALYSIS

Ineffective Assistance of Counsel: Failure to Object to Breach of Plea Agreement.

The first issue for our determination on further review is whether the Court of Appeals erred when it rejected Sidzyik's claim of ineffective assistance of trial counsel and summarily affirmed Sidzyik's conviction and sentence. At the Court of

Appeals and again before this court, Sidzyik claims he received ineffective assistance of trial counsel at his sentencing hearing when his counsel failed to object when, in contravention of the State's plea agreement to stand silent at sentencing, a prosecutor stated that the State's position was contained in the PSI, which included victim impact statements. The PSI recommended a substantial period of incarceration.

Sidzyik indicates that if he is successful in establishing trial counsel's ineffectiveness, he would be entitled to withdraw his plea or to specific performance in the form of a resentencing before a different judge, at which sentencing the State would stand silent. The State notes that Sidzyik received a considerable advantage from the plea agreement when the charge was reduced from first degree to second degree sexual assault, thereby reducing the range of penalties from a maximum of 50 years' incarceration to a maximum of 20 years' incarceration. See Neb. Rev. Stat. §§ 28-319, 28-320(2), and 28-105 (Reissue 2008). The State also suggests that Sidzyik suffered no prejudice when his counsel did not object and that relief would be pointless because "there is little hope of a lesser sentence" before a different judge. The State acknowledges that the record does not show trial counsel's reasoning for not objecting. We conclude that the record on appeal is not sufficient to decide Sidzyik's claim of ineffective assistance of counsel and that therefore, the Court of Appeals did not err when it rejected this assignment of error.

[5,6] In order to establish a right to relief based on a claim of ineffective assistance of counsel, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense in his or her case. See *State v. Vo*, 279 Neb. 964, 783 N.W.2d 416 (2010). The two prongs of this test, deficient performance and prejudice, may be addressed in either order. *Id.*

[7] Sidzyik had different counsel on appeal, and in order to raise the issue of ineffective assistance of trial counsel where appellate counsel is different from trial counsel, a defendant must raise on direct appeal any issue of ineffective assistance

of trial counsel which is known to the defendant or is apparent from the record, or the issue will be procedurally barred on postconviction review. See *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010).

[8] The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. *Id*. The determining factor is whether the record is sufficient to adequately review the question. *Id*. We have generally reached ineffective assistance of counsel claims on direct appeal only in those instances where it was clear from the record that such claims were without merit or in the rare case where trial counsel's error was "'so egregious and resulted in such a high level of prejudice [that] no tactic or strategy can overcome the effect of the error, which effect was a fundamentally unfair trial.'" *Id*. at 607-08, 780 N.W.2d at 34 (quoting *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007)).

[9] In *Santobello v. New York*, 404 U.S. 257, 262, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971), the U.S. Supreme Court stated that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." The failure of the State to remain silent in violation of a plea agreement is a material breach.

We have previously considered *Santobello* and written about violations of plea agreements and the redress afforded defendants for such violations in *State v. Birge*, 263 Neb. 77, 638 N.W.2d 529 (2002), and *State v. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003). In *Birge*, the State failed to remain silent at sentencing as promised in connection with a plea agreement. The defendant's attorney objected to the State's violation of the plea agreement, but did not move to withdraw the plea. We explained on direct appeal in *Birge* that where the State breaches a plea agreement and defense counsel objects to the breach, the defendant can seek to withdraw the plea at the sentencing hearing or seek specific performance of the plea agreement by way of a sentencing before a different judge. With respect to the available outcomes on appeal, we concluded

that where the breach has been preserved by an objection, the defendant is entitled on appeal to specific performance of the agreement, which would take the form of resentencing, before a different judge, wherein the State remains silent. However, if counsel did not move to withdraw the plea at the time of the objection, this form of recovery is waived on direct appeal based on alleged violation of a plea agreement. *Id.*

In *Gonzalez-Faguaga*, we addressed a breach of a plea agreement where no objection had been made at sentencing, raised in a motion for postconviction relief in the form of a claim of ineffective assistance of counsel. Accordingly, this court examined the issue using the two prongs of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), deficient performance by the defendant's counsel and prejudice.

Contrary to the State's suggestion in its brief in the instant case, in addressing the prejudice prong of the ineffective assistance of counsel claim in *Gonzalez-Faguaga*, we observed that the focus should not be on whether the judge would have imposed a different sentence had the State remained silent. This observation is derived from *Santobello*, and we relied in part on *State v. Carrillo*, 597 N.W.2d 497 (Iowa 1999).

In *Gonzalez-Faguaga*, we reasoned that instead of focusing on whether the sentence would have been different, the focus regarding prejudice should be on whether counsel's alleged deficient performance prevented the defendant from protecting the bargain he had struck with the State in exchange for his plea and thus rendered the proceedings "'fundamentally unfair.'" 266 Neb. at 79, 662 N.W.2d at 589. We observed that a proper objection by counsel would have led to a different outcome at the trial level in the sense that the defendant would have had the opportunity at trial to either withdraw his plea or seek a resentencing in a proceeding not tainted by the State's recommendation. *State v. Gonzalez-Faguaga, supra.* See, similarly, *State v. Carrillo, supra*.

[10-12] In addressing the deficient performance prong of the ineffective assistance of counsel claim in *State v. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003), we noted that to demonstrate that his or her counsel's performance was

deficient, a defendant must show that counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area. See *State v. Haas*, 279 Neb. 812, 782 N.W.2d 584 (2010). We also noted that in determining whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably. *State v. Gonzalez-Faguaga, supra*. We afford trial counsel due deference to formulate trial strategy and tactics. See *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010). In *Gonzalez-Faguaga*, we observed that it is difficult to imagine what possible advantage a defendant could gain by his or her counsel's choosing not to object when the State, contrary to the plea agreement, failed to remain silent at the sentencing. Nevertheless, we concluded that given the possibility that not objecting was a deliberate trial strategy, an evidentiary hearing was needed to establish alleged deficient performance by the defendant's counsel.

Unlike the instant case, neither *State v. Birge*, 263 Neb. 77, 638 N.W.2d 529 (2002), nor *Gonzalez-Faguaga, supra*, was a direct appeal asserting ineffective counsel where defense counsel did not object at sentencing when the State violated its agreement to stand silent. This is our first opportunity to address a failure to object to a breach on direct appeal, and we take guidance from *Birge* and *Gonzalez-Faguaga* in resolving the current appeal.

In this case, the parties agree that as part of the plea agreement, the State agreed to stand silent at sentencing. However, it is clear from the record that rather than remain silent, the prosecutor at sentencing stated, "[T]he State's position is stated in the PSI and we would submit on the PSI" and made other comments referring the court to the PSI for elaboration. The PSI is lengthy and in no uncertain terms recommended that Sidzyik receive a substantial period of incarceration. The prosecutor's statements therefore articulated a position, and the State thus failed to stand silent at sentencing. Accordingly, there was a material breach of the plea agreement. For completeness, we note that we are cognizant that the prosecutor at sentencing was different from the prosecutor at the plea hearing. This change in staffing does not excuse the breach. In *Santobello v. New York*, 404 U.S. 257, 262, 92 S. Ct. 495, 30 L. Ed. 2d 427

(1971), the Court found such circumstances to be of no consequence because "[t]he staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right hand is doing' or has done."

The record shows that the State breached its plea agreement with Sidzyik and that Sidzyik's counsel did not object to this breach. In *State v. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003), we left open the possibility, albeit rare, that trial counsel could choose not to object to the State's breach to retain or gain an advantage. We stated: "If the State commits a material breach of a negotiated plea agreement, it would be a rare circumstance when a lawyer with ordinary training and skill in the area of criminal law would not inform the court of the breach." *Id*. at 77, 662 N.W.2d at 588.

It is not clear from the record in the instant case whether Sidzyik's counsel did not object to the breach of the plea agreement based on trial strategy. Accordingly, the record is not sufficient to adequately review the question of ineffectiveness of trial counsel raised in this appeal. See *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010). We cannot say that the Court of Appeals erred when it did not find counsel was ineffective.

Plain Error.

Sidzyik claims that the district court committed plain error when it proceeded with sentencing after the State failed to stand silent in contravention of the plea agreement. The Court of Appeals did not err when it rejected this assignment of error.

Plain error will be noted only when an error is evident from the record, prejudicially affects a substantial right of a litigant, and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation and fairness of the judicial process. *State v. Young, supra*; *State v. Drahota*, 17 Neb. App. 678, 772 N.W.2d 96 (2009), *reversed on other grounds* 280 Neb. 627, 788 N.W.2d 796 (2010). We have concluded above that the record on appeal is not sufficient to decide Sidzyik's ineffective assistance of counsel claim relative to the sentencing hearing. It is not clear

that the record shows that the error of which Sidzyik complains resulted in a "'fundamentally unfair trial.'" See *State v. Young*, 279 Neb. at 608, 780 N.W.2d at 34. It logically follows that plain error is not evidenced from the record.

In *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971), the Court observed that the case with which it was confronted resulted from the failure of the prosecutor to adhere to the promises made in the negotiation of the plea. With regard to imposition of a sentence despite the prosecutor's failure to remain silent, the Court said: "[T]he fault here rests on the prosecutor, not on the sentencing judge." *Id.*, 404 U.S. at 263. Similarly, there was no plain error committed by the district court in the instant case, and the Court of Appeals did not err when it rejected this assignment of error.

Excessive Sentence.

[13] Sidzyik claims that the district court abused its discretion by imposing an excessive sentence. The Court of Appeals did not err when it rejected this assignment of error. An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Fuller*, 278 Neb. 585, 772 N.W.2d 868 (2009). An abuse of discretion in imposing a sentence occurs when a sentencing court's reasons or rulings are clearly untenable and unfairly deprive the litigant of a substantial right and a just result. *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006).

Sidzyik's sentence is within the statutory limits. Second degree sexual assault is a Class III felony. § 28-320(2). A Class III felony is punishable by a maximum of 20 years' imprisonment, a $25,000 fine, or both and a minimum of 1 year's imprisonment. § 28-105(1). Sidzyik was sentenced to a period of 18 to 20 years' incarceration with credit for 33 days previously served.

[14-16] In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. *State v. Nelson*, 276 Neb. 997, 759 N.W.2d 260 (2009). The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances

surrounding the defendant's life. *Id*. In imposing a sentence, a judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, the motivation for the offense, the nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Davis*, 277 Neb. 161, 762 N.W.2d 287 (2009).

The details of Sidzyik's profile and the crime are amply set forth in the PSI. To summarize, Sidzyik's date of birth is January 14, 1970. The victim was born in 1993. The amended information alleged first degree sexual assault between January 2005 and December 2006. Sidzyik pled no contest to second degree sexual assault.

According to the PSI, Sidzyik has used a variety of controlled substances since his teenage years. He indicated he used methamphetamine while out on bond, 2 days prior to his evaluation for sentencing purposes. He was assessed as a moderate to high risk for sexual reoffending and a poor candidate for community-based treatment. He has been the subject of protective orders and has an extensive history of alcohol-related offenses. He claims he does not have any recollection of the offenses. He suggests he may have been on drugs if the offenses occurred.

Numerous statements from family members are included in the PSI. The victim indicated that she was sexually assaulted over a period of years. The victim reports mental health issues for which she is being treated. Essays written by the victim reflect her ongoing efforts to cope with these issues.

At the sentencing hearing, the sentencing judge commented upon and considered the facts and circumstances of Sidzyik's life and the crime of which he was convicted. The sentencing judge remarked: "Frankly, you know, father figure, I mean, this whole thing offends me. It offends me because you've accepted no responsibility, you've done nothing about treatment, and clearly, even while this matter is — you're out on bond, you continue to go use meth."

The sentencing judge considered the factors, including Sidzyik's age, mentality, education, and family; the nature of the offenses; his criminal history; and statements from the

victim. The district court did not abuse its discretion in the sentence imposed. The Court of Appeals did not err when it rejected this assignment of error.

CONCLUSION

In this case on further review, raising various sentencing issues, we conclude that the record is insufficient to rule on Sidzyik's claim of ineffective assistance of counsel. The record shows that the sentencing court did not commit plain error when it proceeded to sentence Sidzyik after the State failed to remain silent at the sentencing hearing, in breach of the plea agreement, and that the sentence imposed was not an abuse of discretion. The Court of Appeals did not err when it affirmed Sidzyik's conviction and sentence.

AFFIRMED.

WRIGHT, J., not participating.