**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**June 24, 2003**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 02-2871-CR** **Cir. Ct. No. 01-CF-188**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DAVID L. H.,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Outagamie County: HAROLD V. FROEHLICH, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. David L.H. appeals a judgment convicting him of four counts of second-degree sexual assault of a child. He also appeals an order denying his motion to withdraw his no contest pleas or for resentencing before a different judge. He argues that he is entitled to relief because the State violated the plea agreement, his trial counsel was ineffective when he failed to object to the

State's mischaracterization of the plea agreement and his pleas were not knowingly and voluntarily entered because he did not fully understand the plea agreement. He also argues that the trial court failed to properly exercise its sentencing discretion by not giving reasons for the sentences it imposed. We reject these arguments and affirm the judgment and order.

¶2 The plea agreement indicated that David would plead no contest to the four counts charged in the information. There would be an open sentencing and a joint request for a presentence investigation. Read-in offenses were not mentioned.

¶3 At sentencing, the victim and her family made reference to numerous other incidents and additional victims. The prosecutor then argued that the numerous offenses traumatized the victim and:

> I would ask the Court to remember that, I believe the agreement of counsel, that certain other conduct to which reference is made, conduct with respect to other children, even his own children referred to in the presentence report, is not going to be prosecuted by the district attorney's office, but be treated as a read-in offense. And that means the court take it as true.

Again, when arguing for a no contact provision, the prosecutor stated "with respect to the victim and the victims of the—what may be considered the read-in behavior, there should never be any contact at all."

¶4 Defense counsel corrected the prosecutor's assertion that the allegation of additional offenses could be taken as true. Counsel stated:

> [he] [the prosecutor] made a statement that they may be assumed to be true. And I certainly do not mean to put he and I did speak about this briefly. [After receiving the letters detailing additional allegations] …he informed me that they would not be pursuing them and that he would

> agree to read them in for purposes of -- of no further prosecutions…. However, never was there any admission on David's part or on my part to this behavior. He absolutely denies any sort of sexual activity with any of his other children or any other child, for that matter, and the way this grew about was that that – and I don't want to put words in Mr. Balskus's mouth either, but that he believed he had sufficient ammunition, for lack of a better term, to proceed right now and that he agreed that none of the other matters would be pursued.

¶5 The prosecutor did not materially or substantially breach the plea agreement. *See* ***State v. Howard***, 2001 WI App 137, ¶15, 246 Wis. 2d 475, 630 N.W.2d 244. While the prosecutor may have been technically incorrect referring to the additional allegations as read-in offenses,[1] David was not deprived of a material, substantial benefit by the prosecutor's characterization. The State and the trial court are allowed to consider uncharged and unproven offenses when assessing a defendant's character and behavior patterns. *See* ***Elias v. State***, 93 Wis. 2d 278, 284, 286 N.W.2d 559 (1980). Regardless of the prosecutor's characterization, the trial court already knew of the additional allegations and was allowed to consider them.

¶6 Two effects arise from characterizing consideration of these offenses as "read-ins." One, it suggests that David agreed to the consideration. David's attorney's statement correcting the impression that David admitted the additional allegations renders the prosecutor's misstatement harmless. No material and substantial breach of a plea agreement occurs when the prosecutor's misstatement is promptly corrected and the mistake does not taint the entire sentencing

[1] A "read-in crime means any crime that is uncharged or is dismissed as part of a plea agreement that the defendant agrees to be considered by the court at the time of sentencing." *See* WIS. STAT. § 973.20 (2001-02). David did not agree to that consideration.

proceeding. *See* ***State v. Knox***, 213 Wis. 2d 318, 323, 570 N.W.2d 599 (Ct. App. 1997). Two, the State is precluded from later charging read-in offenses. Any agreement by the prosecutor not to charge these additional offenses benefits David.

¶7 David has established neither deficient performance nor prejudice from his trial counsel's conduct at sentencing. His counsel could not prevent the trial court from hearing allegations of uncharged offenses. *See* ***State v. Leitner***, 2002 WI 77, ¶45, 253 Wis. 2d 449, 646 N.W.2d 341. Counsel appropriately informed the court that David did not agree to a consideration of these offenses and did not admit committing them.

¶8 David has not established any basis for withdrawing his pleas based on a lack of full understanding of the plea agreement. Although the plea agreement did not mention read-in offenses, the State was free to present uncharged offenses to establish his character regardless of whether he agreed. David has not established any manifest injustice that arises from characterizing the additional offenses as read-ins rather than merely uncharged offenses. The prosecutor's gratuitous promise not to prosecute the uncharged offenses and David's attorney's correction of any impression that he admitted the offenses result in no prejudice to David nor establish a manifest injustice justifying withdrawing the pleas.

¶9 Finally, there is no basis for disturbing the trial court's discretionary sentencing decision. The court sentenced David to twenty years' confinement and ten years' extended supervision on count one and probation on the remaining counts. The sentencing court recognized the seriousness of the offenses, the harm to the victim and the need to protect society. The record shows that, at a

minimum, David repeatedly sexually assaulted a child over a six-month period causing the child to suffer from inflammatory disease and bacterial infection, and damaging her relationship with her mother. David targeted and victimized a vulnerable girl. The presentence investigation states that he attempted to shift the blame for his behavior to his wife and minimized his culpability. He showed no remorse for the pain inflicted on the victim. The sentences are not so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.