COURT OF APPEALS
DECISION
DATED AND FILED

June 18, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2557-CR **Cir. Ct. No. 2010CF200**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WILLIAM F. BOKENYI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Polk County: MOLLY E. GALEWYRICK, Judge. *Reversed and cause remanded with directions.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. William Bokenyi appeals a judgment of conviction and an order denying his motion for resentencing. Bokenyi argues the State breached the plea agreement during his sentencing hearing by arguing for a

harsher sentence than it agreed to recommend. He also contends his trial attorney was ineffective by failing to object to the State's sentencing remarks. We conclude the State's sentencing remarks materially and substantially breached the plea agreement, and Bokenyi's attorney was ineffective by failing to object. We therefore reverse and remand for resentencing before a different judge.

BACKGROUND

¶2 A criminal complaint charged Bokenyi with ten crimes arising from an incident that occurred at Bokenyi's apartment on August 1, 2010. According to the complaint, Bokenyi repeatedly threatened to kill his wife, Sherri, and their son. Sherri and the child barricaded themselves in a bedroom and called 911. When officers arrived at the apartment, they observed that Bokenyi was holding two knives. Bokenyi refused to drop the knives and instead slammed the apartment door. After hearing Bokenyi again threaten to kill Sherri, officers kicked down the door and entered the apartment. Bokenyi, who was still holding the knives, began to approach the officers. After Bokenyi ignored the officers' command to drop the knives, one of the officers fired his Taser. The Taser's probes struck Bokenyi in the chest, and the Taser activated, but it did not seem to have any effect on him. Bokenyi then took a step toward the officers, and one of the officers shot him.

¶3 Pursuant to a plea agreement, Bokenyi pled guilty to three of the charged crimes: first-degree recklessly endangering safety, felony intimidation of a victim, and failure to comply with an officer's attempt to take him into custody. The seven remaining charges were dismissed and read in for sentencing purposes. The State agreed to cap its sentence recommendation "at the high end range of the PSI [Pre-Sentence Investigation]." The PSI recommended three to four years' initial confinement and three to four years' extended supervision on the first-

degree recklessly endangering safety charge. On the other two counts, the PSI recommended that the court withhold sentence and place Bokenyi on probation for five and three years, respectively, concurrent with each other and both consecutive to his sentence on the first count.

¶4 At the sentencing hearing, the circuit court began by reciting the penalty classifications and the maximum terms of imprisonment for each of Bokenyi's convictions, including the respective maximum terms of initial confinement and extended supervision. In total, Bokenyi faced twenty-six years' imprisonment, including fourteen years' initial confinement.

¶5 The court then asked whether Sherri, who was by then divorced from Bokenyi, wished to make a statement. The prosecutor responded by reading a letter Sherri had written, which stated:

> It has been a long wait for this day, yet I'm still nervous and scared. I want [Bokenyi] to serve time due to him that justifies his behavior. But also I want him to get help while he is in prison. Myself and our son … are afraid for the day [Bokenyi] will get let out because we are unsure of what he would be capable of doing. I prefer that we could live fearlessly while our son … [who is] only 11 is growing and in school.

¶6 The State proceeded to its sentencing argument. The State first discussed the seriousness of the offenses, describing in detail Bokenyi's conduct on the night the offenses took place. The prosecutor then stated:

> The three convictions that he is being sentenced on today [are] a first[-]degree reckless endangerment, a 12 and a half year felony, and intimidation of a victim, a 10 year felony[,] and failure to comply with a law enforcement officer, a 3 and a half year felony. I think the felony classifications obviously indicate the extreme seriousness of these offenses that night. But to be honest, I don't think they really do them justice in terms of how serious this was.

The prosecutor noted that Bokenyi had a history of "homicidal thoughts or ideations" toward his wife and son, so "although these are three felonies and these are very serious crimes, I don't think to be honest with you that they even come close to telling what could have happened that night … and just in and of itself the seriousness of what did happen that night." The prosecutor also stated that the involvement of weapons and the presence of the couple's child exacerbated the seriousness of Bokenyi's offenses.

¶7 The prosecutor then discussed Bokenyi's character, noting that Bokenyi had behaved violently on at least one other occasion in the past. The prosecutor also observed that Bokenyi had a history of mental illness, including suicidal and homicidal thoughts.

¶8 The prosecutor weighed the need to protect the public against Bokenyi's rehabilitative needs and concluded the protection of the public should be the ultimate aim of Bokenyi's sentence. Specifically, the prosecutor asked the court to impose a sentence that would protect Sherri and her son. The prosecutor stated:

> They have a right, as she says in her letter, to live fearlessly while their son is growing up and in school. She has a right to live not in fear that Mr. Bokenyi, when he gets out, is going to come looking for her and to finish what he's attempted at least one other time before.

¶9 Additionally, the prosecutor described an incident that occurred while Bokenyi was in presentence custody, stating:

> What is again perhaps the most frightening for me is to read an incident report from the Polk County Jail on February 11th of 2011. A jailer by the name of Laurie Flandrena, worked a long time at the jail, indicates that on the above date I was doing med pass in the maximum part of the jail. Inmate Bokenyi came out for the evening meds and I asked him how he was doing. He stated okay, but he

> was still here and that he could not wait for the time that he was out of here so he could "shoot up some cops." I asked him why he would do that. He said they all deserved it. And making conversations with him I stated that wouldn't he rather just get out and enjoy being out [than] risk coming back in. He stated that next time he would not be coming back, and he would also shoot anyone who got in his way while he was shooting at the cops.

The prosecutor concluded, "There is an absolute necessity to protect the public from William Bokenyi."

¶10 The State then made its sentencing recommendation. Consistent with the plea agreement, it recommended four years' initial confinement and four years' extended supervision on the first-degree recklessly endangering safety conviction. On the two remaining counts, the State recommended that the court withhold sentence and impose probationary terms consistent with the recommendations in the PSI.

¶11 The court ultimately sentenced Bokenyi to concurrent terms of imprisonment on each of the three convictions. The controlling sentence, imposed on the conviction for first-degree recklessly endangering safety, consisted of seven years and five months of initial confinement and five years of extended supervision. The court also sentenced Bokenyi to five years' initial confinement and five years' extended supervision on the intimidation of a victim conviction, and one year initial confinement and one year extended supervision on the conviction for failing to comply with an officer.

¶12 Bokenyi moved for resentencing. He argued the prosecutor's sentencing remarks breached the plea agreement and his trial attorney was ineffective for failing to object. At the postconviction hearing, Bokenyi's trial attorney testified he did not object to the prosecutor's arguments or consult with

Bokenyi about objecting because he did not think the prosecutor breached the plea agreement. The circuit court agreed that the prosecutor's comments did not constitute a material and substantial breach, and it therefore denied Bokenyi's postconviction motion. Bokenyi now appeals.

DISCUSSION

¶13 On appeal, Bokenyi renews his argument that the State's sentencing remarks breached the plea agreement. As in the circuit court, he concedes he cannot directly challenge the State's remarks because his trial attorney failed to object to them. *See* ***State v. Howard***, 2001 WI App 137, ¶¶12, 21, 246 Wis. 2d 475, 630 N.W.2d 244. Instead, he argues his attorney was ineffective by failing to object and by failing to consult with him about whether to make an objection. When we review an ineffective assistance claim based on a failure to object to a breach of the plea agreement, we first consider whether the State actually breached the agreement. ***Id.***, ¶12. If so, we then consider whether counsel provided ineffective assistance. ***Id.***

I. Breach of the plea agreement

¶14 A defendant has a constitutional right to the enforcement of a negotiated plea agreement. ***State v. Smith***, 207 Wis. 2d 258, 271, 558 N.W.2d 379 (1997). A defendant who alleges the State has breached a plea agreement must show, by clear and convincing evidence, that a breach occurred and that the breach was material and substantial. ***State v. Deilke***, 2004 WI 104, ¶13, 274 Wis. 2d 595, 682 N.W.2d 945. A breach is material and substantial if it "violates the terms of the agreement and deprives the defendant of a material and substantial benefit for which he or she bargained." ***State v. Bowers***, 2005 WI App 72, ¶9, 280 Wis. 2d 534, 696 N.W.2d 255. Because the facts of this case are undisputed, whether the

State materially and substantially breached the plea agreement is a question of law that we review independently. *See* ***State v. Wills***, 193 Wis. 2d 273, 277, 533 N.W.2d 165 (1995).

¶15 Bokenyi does not argue that the State failed to make the sentence recommendation the plea agreement required. Instead, he contends the prosecutor's sentencing remarks undermined the State's recommendation by implying that Bokenyi deserved a harsher sentence. A prosecutor need not enthusiastically recommend a plea agreement, but he or she "may not render less than a neutral recitation" of the agreement's terms. ***State v. Poole***, 131 Wis. 2d 359, 364, 394 N.W.2d 909 (Ct. App. 1986). In other words, "the State may not accomplish through indirect means what it promised not to do directly, and it may not covertly convey to the trial court that a more severe sentence is warranted than that recommended." ***State v. Hanson***, 2000 WI App 10, ¶24, 232 Wis. 2d 291, 606 N.W.2d 278.

¶16 Thus, when a plea agreement requires the State to cap its sentence recommendation, the prosecutor must walk a "fine line" at sentencing. ***Id.***, ¶27. "On the one hand, the State must obviously abide by its agreement to cap its sentencing recommendation. But on the other, the State is free to argue for an appropriate sentence within the limits of the cap." ***Id.*** A prosecutor may therefore provide the court with negative information about a defendant in order to justify the State's recommendation, but the prosecutor crosses the line by "mak[ing] comments that suggest the prosecutor now believes the disposition he or she is recommending pursuant to the agreement is insufficient." ***State v. Liukonen***, 2004 WI App 157, ¶11, 276 Wis. 2d 64, 686 N.W.2d 689.

¶17 In Bokenyi's case, the prosecutor crossed the line in three respects. First, the prosecutor materially and substantially breached the plea agreement when he recited the maximum penalties for Bokenyi's convictions and then stated the felony classifications for those offenses "indicate[d] the extreme seriousness of [the] offenses" but did not "really do them justice in terms of how serious this was." Shortly thereafter, the prosecutor again stated that while Bokenyi's crimes were "three felonies" and were "very serious crimes," that did not adequately describe the seriousness of the offenses.

¶18 The circuit court found the prosecutor's remarks did not breach the plea agreement because the prosecutor was referring simply to the "classification system" for felonies, not to the maximum penalties that could have been imposed for Bokenyi's convictions. The court stated, "He's not talking about the 26 years not doing justice to the crimes. … [H]e's specifically talking about the A through I classification system not doing justice to how serious the conduct was in this particular case." The court's reasoning is both factually and legally flawed.

¶19 From a factual standpoint, the prosecutor did not merely refer to the felony classifications for Bokenyi's crimes. He specifically recited the maximum terms of imprisonment for each of the three convictions. From a legal standpoint, there is no support for the distinction the circuit court drew between the felony classifications and the maximum penalties prescribed for each class. The very reason the felony classification system exists is to specify the maximum penalties applicable to different crimes. The classes of felonies are distinguished solely by the maximum penalties that may be imposed. *See* WIS. STAT. § 939.50

("Classification of felonies.").[1] Thus, for all intents and purposes, to say that the felony classification for a particular offense does not do justice to the offense's seriousness is the same as saying that the applicable maximum penalty does not do justice to the seriousness of the offense.

¶20 The clear message of the prosecutor's remarks was that the maximum penalties for Bokenyi's convictions, which totaled twenty-six years of imprisonment, were insufficient given the seriousness of Bokenyi's conduct. The prosecutor's remarks therefore undermined the State's recommendation that Bokenyi be sentenced to only eight years' imprisonment. After all, if the State believed sentences totaling twenty-six years were insufficient punishment for Bokenyi's crimes, an eight-year-sentence was certainly inadequate.

¶21 The prosecutor also materially and substantially breached the plea agreement by endorsing Sherri's request that she and her son be able to live without fear of Bokenyi being released from custody until her son, who was then eleven years old, reached adulthood. As Bokenyi concedes, the prosecutor did not breach the plea agreement merely by reading Sherri's letter at the beginning of the sentencing hearing. *See* ***State v. Harvey***, 2006 WI App 26, ¶42, 289 Wis. 2d 222, 710 N.W.2d 482 ("[A] victim of a crime has an absolute right to make a statement at sentencing."). Nevertheless, we agree with Bokenyi that the prosecutor crossed the line when he later repeated and endorsed Sherri's request during his sentencing argument. *C.f.* ***State v. Williams***, 2002 WI 1, ¶¶45-48, 249 Wis. 2d 492, 637

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

N.W.2d 733 (prosecutor breached plea agreement by adopting negative information from PSI and from defendant's former wife as her own opinion).

¶22 After stating that protection of the public should be the ultimate aim of Bokenyi's sentence, the prosecutor asked the court to fashion a sentence that would specifically protect Sherri and her son. He then stated, "[Sherri and her son] have a right, as she says in her letter, to live fearlessly while [her] son is growing up and in school." These remarks clearly conveyed to the court that the prosecutor agreed with Sherri that Bokenyi should be confined until Sherri's son reached adulthood. However, as the prosecutor had previously reminded the court, Sherri's son was only eleven at the time of sentencing. Consequently, the court would have had to sentence Bokenyi to over six years of initial confinement to fulfill Sherri's request, without accounting for any presentence credit Bokenyi would receive. By endorsing Sherri's request, the prosecutor therefore undermined the State's recommendation that the court impose an eight-year sentence including only four years of initial confinement.

¶23 Lastly, the prosecutor materially and substantially breached the plea agreement during his discussion of the jail incident report from February 11, 2011, in which Bokenyi threatened to "shoot up some cops" and anyone else who got in his way. Bokenyi concedes the prosecutor had a duty to bring this information to the sentencing court's attention. *See* ***State v. Duckett***, 2010 WI App 44, ¶9, 324 Wis. 2d 244, 781 N.W.2d 522 (prosecutor has a duty to provide court with relevant sentencing information). However, we agree with Bokenyi that the prosecutor breached the plea agreement by editorializing about the jail incident report in a way that undercut the State's eight-year sentence recommendation.

¶24 The prosecutor began his discussion of the jail incident report by stating the report was "perhaps the most frightening for me[.]" He then relayed the report's contents and concluded, "There is an absolute necessity to protect the public from William Bokenyi." By describing Bokenyi's comments about killing police officers and others as "the most frightening" and by asserting the public absolutely needed to be protected from Bokenyi, the prosecutor suggested a significant sentence was necessary to protect the public from Bokenyi—one more significant than would result from Bokenyi's pleas to the three counts at issue. The prosecutor's comments were therefore inconsistent with the State's recommendation that Bokenyi receive only an eight-year sentence on the first-degree recklessly endangering safety count and probationary dispositions on the other two counts.

¶25 The State likens this case to ***State v. Ferguson***, 166 Wis. 2d 317, 479 N.W.2d 241 (Ct. App. 1991), arguing that the prosecutor's description of Bokenyi's threats as "most frightening" "pales in comparison to the 'editorializing' in ***Ferguson*** that this court found not to have breached the plea agreement." In ***Ferguson***, the defendant pled guilty to two offenses in connection with the sexual assault of his twelve-year-old stepdaughter. ***Id.*** at 318-19. The State agreed to recommend imposed and stayed sentences, with a twenty-year probationary term. ***Id.*** at 319. The State was free to ask the court to impose the maximum term—twenty years—for each of the imposed and stayed sentences. ***Id.*** Consistent with the plea agreement, the State recommended that the court impose and stay twenty-year sentences for both offenses and order twenty years' probation. ***Id.*** at 320. However, during its sentencing argument, the State characterized the defendant's crimes as "the most perverted of all perverted sex acts" and stated, "[T]his is the sickest case that I have seen or read about. If I refer

to this defendant as 'sleaze,' I think that would be giving him a compliment." ***Id.*** at 319-20. The defendant argued these comments undercut the State's recommendation and therefore breached the plea agreement. ***Id.*** at 321.

¶26 We concluded the State's remarks did not breach the plea agreement because the prosecutor's strong language supported the State's recommendation that the court impose and stay the maximum sentence for each conviction. ***Id.*** at 324. We reasoned that, to convince the court to impose "the maximum allowable sentence," the prosecutor needed to highlight the aggravating sentencing factors. ***Id.*** Conversely, the prosecutor in this case was bound to recommend only eight years of imprisonment, which is far less than the maximum twenty-six years Bokenyi faced. The prosecutor's editorial comments about the jail incident report were not necessary to justify the State's recommendation. The reasoning we employed in ***Ferguson*** is therefore inapplicable here.

¶27 The State argues its comments about the jail incident report were intended to support its initial confinement recommendation of four years. The State's comments were made in anticipation of the defense's recommendation that the court sentence Bokenyi to only eighteen months' initial confinement, which was essentially time served, plus a period of extended supervision with mental health treatment as a condition. However, the State could have accomplished this purpose without breaching the plea agreement by either softening its comments or making it clear that its remarks were offered to discredit the defense's recommendation and support a four-year term of initial confinement. We have previously recognized that, when presenting negative information to the sentencing court, a prosecutor may avoid breaching the plea agreement by "effectively communicat[ing] to the sentencing court" that he or she still believes the State's sentence recommendation is appropriate. *See* ***Liukonen***, 276 Wis. 2d

64, ¶16. The prosecutor did not do so in Bokenyi's case. Without this explanation, the State's comments about the incident report undercut its sentence recommendation and materially and substantially breached the plea agreement.

II. Ineffective assistance

¶28 We have concluded the State materially and substantially breached its plea agreement with Bokenyi in three respects. As a result, we next consider whether Bokenyi received ineffective assistance of counsel when his attorney failed to object to the breaches. *See* ***Howard***, 246 Wis. 2d 475, ¶12.

¶29 Ordinarily, to prevail on an ineffective assistance claim, a defendant must establish both that counsel performed deficiently and that the deficient performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). However, if a defendant establishes that his or her attorney performed deficiently by failing to object to a material and substantial breach of the plea agreement, we presume counsel's deficient performance was prejudicial. ***Howard***, 246 Wis. 2d 475, ¶¶25-26. Thus, to show that he received ineffective assistance, Bokenyi must establish only that his attorney performed deficiently by failing to object to the State's breaches.

¶30 Whether an attorney's conduct amounts to deficient performance presents a question of law that we review independently. ***State v. Sprang***, 2004 WI App 121, ¶25, 274 Wis. 2d 784, 683 N.W.2d 522. An attorney's performance is deficient if it falls below an objective standard of reasonableness. ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. In particular, an attorney's failure to object to a material and substantial breach of the plea agreement constitutes deficient performance unless the attorney did so for a valid strategic

reason and consulted with the defendant about the decision not to object. *See* ***Sprang***, 274 Wis. 2d 784, ¶¶26-29; ***Howard***, 246 Wis. 2d 475, ¶29.[2]

¶31 Bokenyi's trial attorney did not have a valid strategic reason for failing to object to the State's breaches of the plea agreement. Instead, counsel testified at the postconviction hearing he simply did not think the prosecutor's comments breached the agreement, so he did not believe he had any legal basis to make an objection. Counsel's failure to recognize the State's breaches fell below an objective standard of reasonableness. A long line of cases holds that the State breaches the plea agreement when its sentencing remarks undercut the bargained-for recommendation by insinuating that the defendant deserves a harsher sentence. *See, e.g.*, ***Williams***, 249 Wis. 2d 492, ¶¶42-44; ***Liukonen***, 276 Wis. 2d 64, ¶11; ***Hanson***, 232 Wis. 2d 291, ¶24. While it may not always be clear whether a prosecutor's remarks breach the plea agreement, the prosecutor's remarks in this case were particularly egregious, and Bokenyi's attorney should have recognized that a breach occurred. We therefore conclude counsel performed deficiently by failing to object.

¶32 In addition, Bokenyi's attorney did not consult with him about the decision not to object. The State concedes that, under ***Sprang***, this constitutes deficient performance. *See* ***Sprang***, 274 Wis. 2d 784, ¶¶27-29. The State argues ***Sprang*** was wrongly decided, but this court lacks the power to overrule, modify,

[2] For instance, in ***State v. Sprang***, 2004 WI App 121, ¶¶26-27, 274 Wis. 2d 784, 683 N.W.2d 522, we concluded defense counsel had a valid strategic reason for failing to object to a breach of the plea agreement because: (1) he was "not certain" that a breach occurred; (2) based on his experience, he believed the sentencing judge would exercise independent judgment and would not be unduly swayed by the prosecutor's comments; and (3) he was concerned about which judge would be assigned if a new sentencing were ordered.

or withdraw language from a previously published court of appeals' decision. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). We are therefore bound by ***Sprang***.

¶33 Because Bokenyi's attorney performed deficiently by failing to object to the State's material and substantial breaches of the plea agreement, we presume counsel's deficient performance prejudiced Bokenyi. *See* ***Howard***, 246 Wis. 2d 475, ¶¶25-26. Bokenyi therefore received ineffective assistance of counsel, and he is entitled to resentencing before a different judge. *See* ***id.***, ¶37. Accordingly, we reverse the judgment of conviction and the order denying postconviction relief, and we remand for resentencing.

By the Court.—Judgment and order reversed and cause remanded with directions.

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