STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2012AP2557-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WILLIAM F. BOKENYI,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE POLK COUNTY CIRCUIT COURT, THE HONORABLE MOLLY E. GALEWYRICK, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

STATEMENT OF THE CASE

Given the nature of the arguments raised in the brief of defendant-appellant William F. Bokenyi, the State exercises its option not to present a statement of the case. *See* Wis. Stat. § (Rule) 809.19(3)(a). The relevant facts and procedural history will be discussed in the argument section of this brief.

ARGUMENT

Pursuant to a plea agreement that resulted in seven charges being dismissed and read in (7:1-2; 61:3), Bokenyi was convicted of first-degree recklessly endangering safety, felony intimidation of a victim, and failure to comply with an officer's attempt to take him into custody (34:1; 61:17). The sole issue he raises on appeal is whether his trial counsel was ineffective for failing to object to comments the prosecutor made at sentencing that, Bokenyi contends, represented an "end run" around the agreed-upon sentencing recommendation.

For the reasons discussed below, the prosecutor's comments did not violate the plea agreement. Because the failure to raise a meritless objection does not constitute ineffective representation, *see State v. Reynolds,* 206 Wis. 2d 356, 369, 557 N.W.2d 821 (Ct. App. 1996), Bokenyi's attorney was not ineffective for failing to object to those comments.

Even if this court were to agree with Bokenyi that the prosecutor's comments crossed the "fine line" between acceptable and

unacceptable argument, *see* Bokenyi's brief at 8, Bokenyi does not explain why counsel's failure to object constituted deficient performance – why it "amounted to incompetence under 'prevailing professional norms.'" *Harrington v. Richter*, 131 S.Ct. 770, 788 (2011). He argues that "[i]f this court concludes that the prosecutor's comments did constitute a breach of the plea agreement, it should also conclude that counsel was deficient for failing to object or, at a minimum, for failing to consult with Mr. Bokenyi about whether he wanted to object." Bokenyi's brief at 20. However, Bokenyi does not develop any argument to support his claim that counsel performed deficiently by failing to object under these circumstances, where the decision to object required the exercise of professional judgment about whether the prosecutor's argument crossed a fine line. This court does not address inadequately developed arguments. *See State v. Flynn*, 190 Wis. 2d 31, 58, 527 N.W.2d 343 (Ct. App. 1994).

Nevertheless, the State agrees with Bokenyi that under *State v. Sprang*, 2004 WI App 121, 274 Wis. 2d 784, 683 N.W.2d 522, trial counsel's failure to consult with Bokenyi about not objecting provides an independent basis for finding that counsel performed deficiently. *See id.*, ¶30. The State believes, however, that *Sprang* was wrongly decided.

The court held in *Sprang* that even if defense counsel did not perform deficiently by failing to object to the prosecutor's breach of the plea agreement at the sentencing hearing, counsel did perform deficiently by failing to consult with the defendant about foregoing an objection. *See id.*, ¶29. The court reasoned that "the strategic decision by Sprang's defense counsel to forego an

objection to the State's breach of the plea agreement without consulting Sprang was tantamount to entering a renegotiated plea agreement without Sprang's knowledge or consent." *Id*. The court considered that situation to be comparable to *State v. Woods*, 173 Wis. 2d 129, 496 N.W.2d 144 (Ct. App. 1992), a case in which the plea agreement called for the State to seek a two-year consecutive sentence but "just prior to sentencing and without the defendant's knowledge, defense counsel and the prosecutor agreed that the State would ask for a two- to three-year sentence." *Sprang*, 274 Wis. 2d 784, ¶28.

The State respectfully suggests that that comparison was flawed. *Woods* involved an explicit renegotiation of the plea agreement. *Sprang*, in contrast, involved counsel's failure to object to the prosecutor's sentencing argument.

Because a plea agreement is analogous to a contract, courts draw upon contract principles in determining the rights of the parties to a plea agreement. *See State v. Bowers*, 2005 WI App 72, ¶9, 280 Wis. 2d 534, 696 N.W.2d 255. Under contract law, "the existence of an agreement which is in substitution or modification of a previous contract must be established in the same way as any other contract." *Kohlenberg v. American Plumbing Supply Co.,* 82 Wis. 2d 384, 393, 263 N.W.2d 496 (1978). "'No one will be held to have surrendered or modified any of his contract rights unless he is shown to have assented thereto in a manner that satisfies the requirements of a valid contract.'" *Id*. (quoted source omitted). While assent to a contract modification may be implied from the acts of one party that are in accordance with the terms of a change proposed by the other

party, silence does not constitute acceptance of a proposed contract modification. *See* 17A C.J.S. *Contracts*, § 561 (2011). The failure to object to the prosecutor's sentencing argument may result in a forfeiture of the objection, which is why examining the issue under an ineffective assistance rubric is appropriate, but it does not constitute an affirmative assent to a modification of the plea agreement.

The flaw in *Sprang*'s holding is particularly apparent when it is applied to the factual setting exemplified by this case, in which defense counsel's failure to object was based on his belief that there was no legal basis for an objection (65:15). It is one thing to require counsel to consult with the defendant when counsel recognizes that the prosecutor's argument arguably breached the plea agreement but decides to forego an objection. But when counsel does not object because he or she does not believe there is any legal basis for an objection, what is there to consult about with the defendant?

The State recognizes, of course, that this court is bound by *Sprang* and its progeny such as *State v. Liukonen*, 2004 WI App 157, 276 Wis. 2d 64, 686 N.W.2d 689. *See Cook v. Cook,* 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). The State's purpose in asserting its contention that *Sprang* was wrongly decided is to preserve the issue should this case reach the supreme court.

Under *Sprang*, if this court determines that the prosecutor's sentencing argument breached the plea agreement, Bokenyi's lawyer performed deficiently. That is so, regardless of whether his failure to object itself was deficient performance, because counsel did not consult with Bokenyi

about the possibility of objecting (65:15). (Although, it bears repeating, that given the fact that counsel did not object because he saw no legal basis for objecting (65:15), it is unclear what the nature of that consultation should have been.) Accordingly, even though this case comes before the court as a claim of ineffective assistance of counsel, the dispositive issue is whether the prosecutor's sentencing argument constituted a breach of the plea agreement.

I. APPLICABLE LEGAL STANDARDS.

An accused has a constitutional right to the enforcement of a negotiated plea agreement. *State v. Williams,* 2002 WI 1, ¶37, 249 Wis. 2d 492, 637 N.W.2d 733. An agreement by the State to recommend a particular sentence may induce an accused to give up the constitutional right to a jury trial. *Id*. Consequently, once an accused agrees to plead guilty in reliance upon a prosecutor's promise to perform a future act, the accused's due process rights require fulfillment of the bargain. *Id*.

"End runs" around a plea agreement are prohibited. *Id*., ¶42. "The State may not accomplish by 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." *Id*. (source omitted).

An actionable breach must not be merely a technical breach; it must be a material and substantial breach. *Id*., ¶38. A material and substantial breach is a violation of the terms of the plea agreement that defeats the benefit for

which the accused bargained. *Id*. When the breach is material and substantial, a plea agreement may be vacated or an accused may be entitled to resentencing. *Id*.

An appellate court reviews the circuit court's determination of historical facts, such as the terms of the plea agreement and the State's conduct that allegedly constitutes a breach, under the clearly erroneous standard of review. *Id*., ¶20. Whether the State's conduct constitutes a substantial and material breach of the plea agreement is a question of law that is reviewed de novo. *Id*.

II. THE PROSECUTOR'S SENTENCING ARGUMENT DID NOT BREACH THE PLEA AGREEMENT.

Under the plea agreement, the State agreed to cap its sentencing recommendation "at the high end range of the PSI" (61:3). At the sentencing hearing, the State requested that the court sentence Bokenyi to four years of initial confinement and four years of extended supervision on the reckless endangerment count and asked the court to withhold sentence and place Bokenyi on probation on the other two counts (60:14-15).

Bokenyi does not argue that the prosecutor's request for that sentence violated the plea agreement. *See* Bokenyi's brief at 3 (describing the PSI's sentencing recommendation). Rather, he argues that the prosecutor made an "end run" around the agreed-upon recommendation by making comments during his sentencing argument that "impl[ied] that the court should impose more than the four years' confinement he

was bound to recommend given the PSI's recommendation." *Id*. at 9.

To understand why Bokenyi's argument lacks merit, it is necessary to view the prosecutor's remarks in context. The charges in this case arose from an incident in which Bokenyi repeatedly threatened to kill his wife and eleven-year-old son, who barricaded themselves in a bedroom and called 911 (1:2-4). Bokenyi's wife reported that as Bokenyi tried to break down the door, he repeatedly said to them, "which one of you should die first" (1:3-4).

When the first responding officer arrived, he identified himself and told Bokenyi to open the door (1:3). Bokenyi responded, "Fuck you, you will have to come in and kill me" (*id*.). Bokenyi then opened the door, holding two knives in his hand (*id*.). The officer ordered Bokenyi to drop the knives and get on the floor; Bokenyi responded with another obscenity and slammed the door (*id*.). The officer heard Bokenyi yell, "Fuck you, I'm going to kill you woman" (*id*.).

Two other officers arrived and police kicked in the door (*id*.). Bokenyi approached them with two knives in his hands (*id*.). After Bokenyi ignored the officers' command to drop the knives, one of the officers fired his Taser (*id*.). Although the Taser's probes struck Bokenyi in the chest and the Taser activated, it appeared to have no effect on him (*id*.). After Bokenyi took a step towards the officers, one of them shot Bokenyi with his service weapon (*id*.).

Bokenyi was charged with ten criminal counts as a result of this incident: first-degree reckless endangerment; two counts of felony

intimidation of a victim; failure to comply with an officer's attempt to take a person into custody; three counts of attempted battery of a peace officer; disorderly conduct as an act of domestic abuse; resisting an officer; and negligent handling of a weapon (1:1-2; 7:1-2). Under the plea agreement, Bokenyi pled guilty to first-degree recklessly endangering safety, felony intimidation of a victim, and failure to comply with an officer's attempt to take him into custody, and the other counts were dismissed and read in (34:3; 61:17). As previously noted, the State agreed that its sentencing recommendation "would be capped . . . at the high end range of the PSI" (61:3).

As he recounts in his brief, Bokenyi has a long history of serious mental illness. *See* Bokenyi's brief at 2-3. The prosecutor explained at the postconviction hearing that based on numerous discussions with defense counsel prior to sentencing, he knew that defense counsel's sentencing recommendation "was going to be for a very short period of further incarceration, taking into account the time that Mr. Bokenyi had served up to that point and he was basically asking for mental health treatment and for a release[] therefrom a short time later" (65:32). He said that he had "no inkling" whether the court would agree with defense counsel's position that Bokenyi "needed mental health counseling and then was free to be released, or if the court was going to agree with the PSI and the state that a long term incarceration, and I do consider 4 years to be a long term incarceration, which was the recommendation[,] was appropriate" (*id.*). The prosecutor explained that because the parties held "totally opposite" views of whether further incarceration was necessary, and because he had prosecuted "numerous reckless endangerments

where persons have been placed on probation and given jail time," "the state had no choice but to argue vociferously in terms of the position on the PSI" (65:35).

The prosecutor's expectation about defense counsel's sentencing argument proved to be correct. Defense counsel began his argument with a lengthy discussion of Bokenyi's mental health problems and his current mental state (60:15-20). Counsel asked the court to impose an initial confinement term of eighteen months, which he acknowledged was "pretty close" to the time Bokenyi already had spent in pretrial confinement, and requested that Bokenyi's extended supervision include mandatory mental health treatment (60:22-23).

The State recognizes that whether the prosecutor intended to breach the plea agreement is irrelevant. *See Williams*, 249 Wis. 2d 492, ¶52. The reason the State has provided this background is not to excuse an unintended breach of the agreement but to explain why there was no breach at all because the prosecutor's comments did not convey an implicit suggestion that the trial court should exceed the recommended sentence but instead supported the State's recommendation of a four-year term of initial confinement. *See id*., ¶46 (when determining whether a prosecutor's remarks breached a plea agreement, the court must examine the entire sentencing proceeding).

The prosecutor's sentencing argument runs for more than ten pages of transcript (60:5-15). From that argument, Bokenyi has plucked three statements that, he contends, "amount[ed] to a material and substantial breach of the plea agreement." Bokenyi's brief at 7. Because those

comments did not imply that the prosecutor was asking the court to impose a sentence longer than the sentence recommended by the PSI, which the prosecutor explicitly asked the circuit court to impose (60:14-15; A-Ap. 112-13), this court should reject Bokenyi's claim.

"The maximum penalties don't do justice to the seriousness of the crimes." The prosecutor began his sentencing argument with a discussion of relevant sentencing factors, starting with the seriousness of the case (60:5-7). The prosecutor described those facts in detail (60:6-7). Bokenyi does not take issue with that discussion. *See* Bokenyi's brief at 10 ("The state was free to discuss in detail and in strong language the facts of the offense as it did."). Rather, Bokenyi claims that the ensuing comment by the prosecutor on the seriousness of the offenses violated the plea agreement.

> The three convictions that he is being sentenced on today is 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.

(60:8; A-Ap. 106.)

In its oral decision denying Bokenyi's postconviction motion, the court explained why the prosecutor's comments did not imply that it should impose a more severe sentence than the recommended sentence.

> I then went back and read multiple times the actual transcript regarding the first incident that counsel for Mr. Bokenyi highlights, which is about [assistant district attorney] Mr. Steffen, as part of his discussion of the first Gallion factor, recites the maximum penalties, which total 26 years. This is what he said . . ., "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," close quote. He's not talking about the 26 years not doing justice to the crimes. He's talking about the classification system, the A, B, C, D, E, F, G, H, I. So I think that when you look at it in the context which it is -- was uttered, he's specifically talking about the A through I classification system not doing justice to how serious the conduct was in this particular case. And again, you know, could we be more artful? Could all of us be more artful in our arguments? Yes, we could. But I don't think that says what you think it says, [postconviction counsel] Miss Hagopian. I don't think he's saying oh, good Lord, Judge, the total potential penalty is 26 years and even that doesn't do justice to Mr. Bokenyi's conduct. That's not what he's saying.

(65:48-49; A-Ap. 117-18.) The State agrees with the postconviction court's reading of the prosecutor's comment.

Bokenyi argues that the court's analysis was incorrect because "the prosecutor referred not just to the classification but specifically recited the maximum term of imprisonment for each of the three crimes." Bokenyi's brief at 11. However, the court's statements at the time of sentencing

confirm that it understood the prosecutor to have been referring to the classification system:

> I agree with the state that this is a very serious crime. It's a Class F felony but that doesn't do it justice. You instilled trauma into a child's brain and he will never forget it, and I hope at some point will be able to make some sense of it. But this is an incredibly serious offense. It argues for a prison sentence.

(60:26.)[1]

Bokenyi compares the prosecutor's comments in this case to those in *Liukonen*. *See* Bokenyi's brief at 12. In *Liukonen*, the prosecutor argued that "the more I argue today, I realize that Mr. Liukonen I think got an extreme break by the system here," and that "the defendant, even if the Court goes along with the proposed sentence recommendation, I think will be getting a tremendous break from the system, but it has been agreed to and the State will make the recommendation as agreed to by myself and the two assistant D.A.'s." *Liukonen*, 276 Wis. 2d 64, ¶15. The court of appeals concluded – and the State conceded – that those comments "communicated to the circuit court that the prosecutor was making the plea agreement recommendation because he was bound to do so, not because he thought it constituted an appropriate prison term." *Id.*

[1]The State cites the sentencing court's contemporaneous comments not for the purpose of demonstrating that the prosecutor's remarks had no effect on the sentencing court but to demonstrate that the postconviction court's understanding of the meaning of the prosecutor's argument was correct.

The postconviction court correctly found in this case, however, that the prosecutor's comments about the offense classification not doing justice to the seriousness of the offenses did not suggest that the prosecutor was reluctantly making the agreed-upon recommendation only because he was bound to do so. This court should conclude, therefore, that the prosecutor's comment did not represent a material and substantial breach of the plea agreement.

"The victims should be able to live without fear of Bokenyi getting out of custody until his 11-year-old son is grown and out of school." At the outset of the sentencing hearing, the prosecutor, with the court's permission, read a letter that Bokenyi's wife had written in which she stated:

> It has been a long wait for this day, yet I'm still nervous and scared. I want Bill 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 parentheses MB close parentheses, are afraid for the day Bill 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 MB only 11 is growing and in school. Thank you.

(60:5; A-Ap. 103.)

Bokenyi does not contend that the prosecutor breached the plea agreement by reading that letter. *See* Bokenyi's brief at 13. Rather, he contends that the following remarks by the prosecutor that refer to that letter breached the agreement:

> Finally, there's the need to protect the public or the public's interest in rehabilitation of the defendant and I think this overwhelmingly comes down to the

> protection of the public interest. The protection of the public, being Sherry Bokenyi and their son. 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.

(60:13; A-Ap. 111.)

Bokenyi argues that because his son was eleven years old, the prosecutor's reference to Ms. Bokenyi's desire to "live fearlessly" while their son was in school implied that a confinement period of more than four years was necessary. *See* Bokenyi's brief at 14-16. The postconviction court explained why it did not agree with that assessment:

> I think [the prosecutor is] allowed to repeat the victim's wish. Wisconsin has a tradition, at least in the ten years I've been on the bench, of putting great emphasis on victim's rights. . . . I don't think restating what the victim's rights are without augmenting them in some fashion, without increasing them in some way, like I absolutely agree with Mrs. Bokenyi that this sentence needs to provide her and her son with a peace of mind that he won't be out until their son is an adult, he didn't do that. It's a relatively short amount of the total sentencing argument and I just don't think it gets to the level of material and substantial.

(65:50-51; A-Ap. 119-20.) Again, the State agrees with the postconviction court's analysis.

Bokenyi compares the prosecutor's comment to those in *Williams*. *See* Bokenyi's brief at 15. However, the supreme court's opinion in *Williams* highlighted repeated comments by the prosecutor that suggested that the prosecutor was giving only

lip service to the plea agreement. *See Williams*, 249 Wis. 2d 492, ¶26-29, 47-50. In this case, in contrast, the circuit court was correct that the prosecutor's passing reference to the victim's wishes did not rise to the level of a material and substantial breach of the plea agreement.

"'Most frightening' is Mr. Bokenyi's threat to shoot up some cops when he's released." Near the conclusion of his sentencing argument, the prosecutor made the following remarks:

> 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 Fandrena, 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 quote "shoot up some cops" end quote. 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 then [sic] 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. There is an absolute necessity to protect the public from William Bokenyi.

(60:14; A-Ap. 112.)

Bokenyi does not contend that the prosecutor breached the plea agreement by conveying to the court information about the threats Bokenyi made while in jail. He acknowledges that the plea agreement did not and could not prevent the prosecutor from providing

relevant information to the sentencing court. *See* Bokenyi's brief at 18. Rather, he complains that the prosecutor suggested that the recommended sentence was inadequate by "editorializing about how frightening he viewed Mr. Bokenyi's threats." *Id.*

"[N]othing prevents a prosecutor from characterizing a defendant's conduct in harsh terms, even when such characterizations, *viewed in isolation*, might appear inconsistent with the agree-on sentencing recommendation." *Liukonen*, 276 Wis. 2d 64, ¶10. The *Liukonen* court noted that in *State v. Ferguson*, 166 Wis. 2d 317, 479 N.W.2d 241 (Ct. App. 1991), "where the prosecutor agreed to recommend probation with an imposed and stayed sentence, there was no plea breach even though the prosecutor characterized the offenses as 'the most perverted of all perverted sex acts' and stated, 'this 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.'" *Liukonen*, 276 Wis. 2d 64, ¶10 (quoting *Ferguson*, 166 Wis. 2d at 319-20, 325). The prosecutor's description of Bokenyi's threats as "frightening" pales in comparison to the "editorializing" in *Ferguson* that this court found not to have breached the plea agreement.

The prosecutor's remarks, viewed in context, did not convey a "covert message to the circuit court that a more severe sentence was warranted than that which had been recommended." *Williams*, 249 Wis. 2d 492, ¶51. Rather, the prosecutor's sentencing argument was aimed at persuading the court that what would in effect be a time-served disposition that Bokenyi was seeking was inappropriate and that a period of additional incarceration – that is, a four-year term

of initial confinement – was necessary. Accordingly, the court should conclude that the prosecutor's sentencing remarks did not represent a material and substantial breach of the plea agreement.

CONCLUSION

For the reasons stated above, the court should affirm the judgment of conviction and the order denying postconviction relief.

Dated this 6th day of March, 2013.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,304 words.

_____
Jeffrey J. Kassel
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 6th day of March, 2013.

_____
Jeffrey J. Kassel
Assistant Attorney General