STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2013AP2559-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID M. CARLSON,

DEFENDANT-APPELLANT.

APPEAL OF A JUDGMENT OF CONVICTION AND AN ORDER DENYING POST-CONVICTION RELIEF ENTERED IN OZAUKEE COUNTY CIRCUIT COURT, THE HONORABLE SANDY A. WILLIAMS, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request either 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

The State charged David M. Carlson with second-degree sexual assault of a child pursuant to Wis. Stat. § 948.02(2) in Ozaukee County (1; 14). The criminal complaint alleged that Carlson had repeated sexual contact and intercourse with the victim from the year she attended fifth grade until the year she attended ninth grade (1:1). All but one act occurred in the Village of Grafton, Washington County (1:1). The last act occurred in the Town of Cedarburg, Ozaukee County (1:1). A relative of the victim recorded Carlson's admissions to the acts (1:2-3). Carlson also confessed to police (1:3).

On March 8, 2012, Carlson applied to the Ozaukee County District Attorney to consolidate the Ozaukee County charge with a charge of repeated sexual assaults of the same child under the age of sixteen, then pending in Washington County (25; 33). Carlson requested the consolidation on the basis of an "agreement" to enter pleas to both crimes (25:1-2; 33:1-2). Under the agreement, both parties could freely argue the sentence (25:2; 33:2). The Ozaukee County District Attorney filed an amended information charging both crimes (30).

On March 22, 2012, Carlson entered guilty pleas to both counts of the second amended information (86:20). At the State's request, the circuit court ordered a pre-sentence investigation report (PSI) (86:21). The court sentenced Carlson to a fourteen-year sentence on the conviction for repeated sexual assault of the same under-age-sixteen child (the Washington County conviction); the sentence consisted of ten years of initial confinement and four years of extended supervision

(39; 74:83). The court sentenced Carlson to a nine-year sentence on the conviction for sexual assault of a child under age sixteen (the Ozaukee County conviction); the sentence consisted of five years of initial confinement and four years of extended supervision (39; 74:83-84). The court ordered the sentences to run consecutively (39; 74:84).

Carlson filed a post-conviction motion (62). He first sought to withdraw his guilty pleas based on an allegation that his trial attorney rendered ineffective assistance of counsel (62:2-15) and an allegation that his trial attorney had a conflict of interest (62:15-18).[1] He also sought resentencing based on alleged inaccurate information that the circuit court relied on at sentencing (62:18-20); he claimed the circuit court denied him due process by not allowing him to rebut the inaccurate information (62:20-21), and that his trial attorney rendered ineffective assistance of counsel when he failed to object to the inaccurate information (62:21-23). Finally, he sought modification of the sentence arguing it was unduly harsh or unconscionable (62:23-25).

The circuit court heard argument on the post-conviction motion (87:4-16). The court denied the motion without an evidentiary hearing (69; 87:23, 30-32).

Carlson appeals his judgment of conviction and the circuit court order denying his post-conviction motion without a hearing (70).

[1] Carlson does not advance the conflict of interest claim on appeal.

ARGUMENT

The State will address Carlson's claim in an order different from the order he presents in his brief. The State will first address Carlson's claims that the sentence is unduly harsh or unconscionable and the circuit court relied on inaccurate information because if the Court finds merit in either argument, a re-sentencing must be ordered which will moot Carlson's claim that the circuit court should have held an evidentiary hearing on his post-conviction motion. Carlson will have to file a new post-conviction motion after his re-sentencing. *See State v. Walker*, 2006 WI 82, 292 Wis. 2d 326, 716 N.W.2d 498.

I. THE CIRCUIT COURT DID NOT IMPOSE AN UNDULY HARSH OR UNCONSCIONABLE SENTENCE.

Carlson requested the circuit court to modify his sentence because it had, in his view, imposed an unduly harsh or unconscionable sentence (62:23-25). He renews that claim in this Court. Carlson's brief at 26-29. Carlson bases his argument on "a number of compelling factors." Carlson's brief at 27. Since this argument equates to a claim that the circuit court erroneously exercised its sentencing discretion, the State will first address the circuit court's exercise of sentencing discretion.

A. THE CIRCUIT COURT DID NOT ERRONEOUSLY EXERCISE ITS SENTENCING DISCRETION IN SENTENCING CARLSON TO A TOTAL OF TWENTY-THREE YEARS.

The trial court must consider a variety of factors in imposing sentence. These factors include "the gravity of the offense, the character of the defendant, and the need to protect the public." *State v. Mursal*, 2013 WI App 125, ¶23, 351 Wis. 2d 180, 839 N.W.2d 173 (internal quotation marks omitted). The circuit court is best suited to consider the relevant factors and demeanor of the convicted defendant. *State v. Frey*, 2012 WI 99, ¶38, 343 Wis. 2d 358, 817 N.W.2d 436. "'An [erroneous exercise] of discretion may be found where the trial court relied upon factors which are totally irrelevant or immaterial to the type of decision to be made.'" *Id.* (quoting *Elias v. State*, 93 Wis. 2d 278, 282, 286 N.W.2d 559 (1980)).

Appellate courts start with the presumption that the trial court acted reasonably in choosing a sentence. *Frey*, 343 Wis. 2d 358, ¶38. A strong public policy exists against any interference with the circuit court's exercise of its sentencing discretion. *State v. Mata*, 2001 WI App 184, ¶13, 247 Wis. 2d 1, 632 N.W.2d 872. An appellate court reviews sentencing decisions under the erroneous exercise of discretion standard. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. This court is not limited to the transcript of the sentencing, but can consider any remarks the circuit court made during post-conviction proceedings that explain the sentence imposed. *See State*

v. Santana, 220 Wis. 2d 674, 683, 584 N.W.2d 151 (Ct. App. 1998).

The circuit court first considered and rejected probation based on the nature of Carlson's conduct (74:75). It then addressed the three primary factors. The court first considered the seriousness of the offense, pointing out that Carlson occupied a position of trust with the victim and violated that trust (74:75-76, 79-80).

At the post-conviction hearing the court noted:

> Then I went on as to the factors I was considering. And the two that really struck out, came to being, is the relationship he had with the victim and the long lasting effects his actions had on the victim. His behavior, I think I used the word repulsive, towards a person that trusted him, that looked to him as a father.
>
> . . . .
>
> . . . I had heard how the effect of the numerous assaults he had on the victim and the effect it has had on the victim.

(87:30-31). The court's consideration of Carlson's "misconduct, the effect it had on the victim, [and] the seriousness of the offenses" addressed the gravity of the offense (87:31-32).

As to Carlson's character, the court correctly considered him to be "100 per cent culpable" (74:78). The court noted Carlson groomed the victim (74:76, 78). The court also pointed to several of Carlson's statements to the PSI author which minimized and rationalized his conduct (74:76, 81). In particular Carlson used a note the victim wrote,

which the court referred to as "I got blackmail on [the victim]" (74:81). The court also considered the positives in Carlson's life (74:77, 80).

As to the need to protect the public, the court placed some emphasis on segregation and deterrence (74:82-83). The court characterized Carlson as a predator because of his opportunistic exploitation of his position of trust and his grooming of the victim (74:76-77). The Court recognized the need to segregate Carlson from the community (74:82). The court also recognized the need to set an example for the community, of harsh punishment for this serious behavior (74:83-84).

Carlson points to his pleading guilty and accepting responsibility for his conduct. Carlson's brief at 27. The court did acknowledge Carlson's pleas and gave him credit for them (74:77). But the court also got a mixed message from Carlson (74:77). The court noted his minimization of his offense and rationalization for it to the PSI author (74:76, 81).

Carlson also points to his lack of a prior criminal record. Carlson's brief at 27. The court acknowledged that fact (74:75).

Carlson next points to the fact he stopped the assaults without law enforcement intervention and in spite of his continuing access to the victim. Carlson's brief at 27. But, as the court noted, Carlson continued his victimization by holding a note she wrote over her head "till the day [Carlson] got caught and arrested" (74:82).

Carlson points out the two offenses amounted to one course of action. Carlson's brief at 27. While this is true, that course of action spanned

three to four years (74:77). And the assaultive behavior escalated over that time (74:78). Carlson began with touching (74:77-78). Then he moved to digital penetration; then having her touch him; then cunnilingus and fellatio (74:81; 1:1-2). Although the court did not mention it, the court was surely aware the behavior ultimately involved Carlson rubbing his penis on the victim's vagina without penetration (1:2).

Carlson points to his participation in sex offender treatment. Carlson's brief at 27-28. But he did not begin treatment until after his arrest. The court concluded he was fearful of "los[ing] everything" and so did not seek help because he "didn't want this to come out, people to know" (74:80-81).

Carlson points to the fact he scored low on sex offender re-offense actuarials. Carlson brief at 28. But as the court pointed out, the community concern and the deterrent aspect overrides his low probability to re-offend (74:83-84).

Carlson points to the lower recommendation of the PSI author. Carlson's brief at 28. The PSI author recommended an initial confinement of nine to ten years and term of extended supervision of three to four years on both crimes, to be served concurrently (35:18). Carlson characterizes the court's twenty-three year sentence as "significantly larger" than the PSI author's twelve to fourteen-year sentence. Carlson's brief at 28. But the court's extended supervision term of four years matched the PSI author's three to four-year recommendation on both counts (35:18). Likewise, the court's ten-year term of initial confinement on count two matched the PSI author's nine to ten-year recommendation on count two (35:18). The court's five-year initial confinement term on count

one halved the PSI author's nine to ten-year recommendation on count one (35:18). The principle difference between the court's sentence and the PSI author's recommendation comes down to the consecutive nature of the court's sentence compared to concurrent nature of the PSI author's nine to ten-year recommendation.

At bottom, the PSI author only recommends a sentence to the court. It is the court's responsibility, in the exercise of its discretion, to chose an appropriate sentence. *See State v. Ninham,* 2011 WI 33, ¶85, 333 Wis. 2d 335, 797 N.W.2d 451 ("[W]hat constitutes adequate punishment is ordinarily left to the discretion of the trial judge." (internal quotation marks and citation omitted)).

Carlson also points to his chart showing that his initial confinement is longer than other similar offenders. Carlson's brief at 28-29. There is no requirement that defendants convicted of committing similar crimes receive equal or similar sentences. On the contrary, individualized sentencing is a cornerstone to Wisconsin's system of indeterminate sentencing. *State v. Lechner*, 217 Wis. 2d 392, 427, 576 N.W.2d 912 (1998). "[N]o two convicted felons stand before the sentencing court on identical footing. The sentencing court must assess the crime, the criminal, and the community, and no two cases will present identical factors." *Matter of Judicial Admin. Felony Sentencing Guidelines,* 120 Wis. 2d 198, 201, 353 N.W.2d 793 (1984). Imposing a requirement of similar sentences would ignore the particular mitigating and aggravating factors in each case. *Lechner*, 217 Wis. 2d at 427.

Carlson also claims that the victim "did not think prison would help [him]. Instead, she want-

ed Carlson to continue with therapy." Carlson's brief at 29. Carlson's argument presents a selective and disingenuous reading of the victim's comments to the PSI writer. Without setting forth the detail of the victim's interview, it is fair to say the victim had conflicting feelings about the ultimate outcome. On the one hand she felt prison was appropriate for the damage Carlson had done to her and addressed her concerns for the effect his continued presence in the family home would have on her siblings. On the other hand, she did not have much faith in the prison system to affect any positive change on Carlson's negative behavior or character; a sentiment she also expressed about treatment (35:6-7).

Carlson's "compelling factors" ultimately amount to no more than an invitation for this Court to substitute its weighing of the sentencing factors for the circuit court's. To obtain resentencing Carlson "must establish, under the 'clear and convincing' burden of proof, that it is 'highly probable or reasonably certain' that the circuit court relied on an irrelevant or improper factor.'" *State v. Betters*, 2013 WI App 85, ¶7, 349 Wis. 2d 428, 835 N.W.2d 249 (quoting *State v. Harris*, 2010 WI 79, ¶¶34-35, 326 Wis. 2d 685, 786 N.W.2d 409). The record in this case does not established an erroneous exercise of discretion.

B. THE CIRCUIT COURT'S SENTENCE IS NOT UNDULY HARSH OR UNCONSCIONABLE.

A court may modify a sentence if it concludes the original sentence was "'unduly harsh or unconscionable'" *State v. Grindemann*, 2002 WI App 106, ¶21, 255 Wis. 2d 632, 648 N.W.2d 507

(quoting *Cresci v. State*, 89 Wis. 2d 495, 504, 278 N.W.2d 850 (1979). A sentence is unduly harsh if it is so excessive, unusual and so disproportionate to the offenses committed that it shocks public sentiment and violates the judgment of reasonable people as to what is right and proper under the circumstances. *Grindemann*, 255 Wis. 2d 632, ¶31; *Ocanas v. State,* 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). This court reviews a circuit court's conclusion that a sentence it imposed was not unduly harsh or unconscionable for an erroneous exercise of discretion. *Grindemann*, 255 Wis. 2d 632, ¶30; *State v. Ralph*, 156 Wis. 2d 433, 438-39, 456 N.W.2d 657 (Ct. App. 1990).

Carlson plead to two Class C felonies. At the time of his offenses, Class C felonies carried a maximum forty-year sentence (30). Wis. Stat. § 939.50(3)(c) (2003-04). So Carlson's maximum exposure on the two crime totaled eighty years. The circuit court sentenced Carlson to consecutive sentences of fifteen years and nine years, a total of twenty-three years. This is just over one-fourth of his total maximum exposure.

The sentencing statutes impose a limitation on the length of initial confinement. For a Class C felony in 2003-04, the maximum initial confinement was twenty-five years. Wis. Stat. § 973.01(2)(b)3 (2003-04). So the maximum length of exposure Carlson faced on initial confinement was fifty years. The court's fifteen-year initial confinement represented thirty per cent of his maximum exposure on initial confinement.

"A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable

people concerning what is right and proper under the circumstances" *State v. Daniels*, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983); *see also Gallion*, 270 Wis. 2d 535, ¶74 (citing *Daniels*). That is especially true here, given Carlson's lengthy and extensive sexual abuse of the victim.

II. THE CIRCUIT COURT DID NOT SENTENCE CARLSON BASED ON INACCURATE INFORMATION.

Carlson argues he is entitled to re-sentencing because he was sentenced on inaccurate information. To establish this claim, Carlson must establish two things: that some of the information presented at his sentencing was inaccurate, and that the sentencing court actually relied on that inaccurate information in reaching its determination in regard to the sentence imposed. *State v. Tiepelman*, 2006 WI 66, ¶28, 291 Wis. 2d 179, 717 N.W.2d 1.

A. CARLSON DID NOT ESTABLISH THE COURT'S ASSAULT CALCULATION TO BE INACCURATE.

Carlson claims that the circuit court relied on inaccurate information at his sentencing: that he assaulted the victim 300-400 times. The court did state during sentencing "You abused her more than 300 times, anywhere from 300 to 400 times" (74:77).

Carlson argues, both in conjunction with this direct claim and with his tie-in claim of ineffective assistance of counsel, that he only admitted to five or six assaults. Carlson's brief at 19. He al-

so claims that evidence existed to demonstrate the inaccuracy of the court's statement. Carlson's brief at 20-21.

Carlson fails to establish the circuit court's calculation of "more than 300" sexual assaults to be inaccurate. The court arrived at the figure of 300 by taking the victim's statements that the assaults occurred regularly twice a week, during the time from when she was in fourth grade until she was in ninth grade (1:2; 30:2). The time frame for the assaults began in spring 2000 (30:2) and continued until January 15, 2004 (1:1). There were thirty-five weeks from May 1, 2000 to December 31, 2000. Add fifty-two weeks for the years 2001, 2002, 2003 and two weeks for January 1, 2004 to January 15, 2004. The total number of weeks in the charging period is 193. So according to the victims testimony, the total number of assaults could be at least 386. The court discounted the total to three years and subtracted two weeks (74:77) Thus according to the court's calculation, 308 assault occurred.[2] The court gave Carlson the benefit of some doubt because it believed the assaults actually occurred over four years as the two criminal complaints alleged (74:77).

Carlson's brief relies on four primary sources of "evidence" which he claims refute the court's calculation of "more than 300 times" (74:77). While his evidence could lead the court to conclude that Carlson assaulted the victim less than the 308 the court calculated, it does not establish, by clear and convincing evidence, the court's calculation to be erroneous. Three of Carl-

[2] 52 weeks x 3 years = 156 - 2 = 154 weeks x 2 assaults = 308 assaults.

son's four sources rely on the presence of the victim's mother. But the criminal complaint recites that the assaults occurred in the basement family room (1:2), at nighttime (1:2), and "when every one [sic] else in the house was sleeping" (30:3). Thus the victims mother's general presence at "home all day, on maternity leave" or working "only three days a week" would not have precluded the basement, nighttime assaults. Carlson's brief at 20.

More importantly, each time Carlson assaulted the victim in a different way or separated by some small amount of time, constituted a separate assault. The twice a week to which the court referred constituted a period of time over which the assaults occurred. Carlson completely ignores the fact that on one night if he touched the victim, the victim touched him, he performed cunnilingus and she performed fellatio, that activity comprised not one but four assaults.

While there was no evidentiary hearing and thus no actual factual determination, there certainly was a factual basis for the circuit court's attribution of "over 300" assaults. Carlson bears the burden of demonstrating by clear and convincing evidence that the "300 times" amounted to inaccurate information. *Tiepelman*, 291 Wis. 2d 179, ¶19. Even taking his evidence as true, that the assaults could have happened only on 685 days, or approximately 98 weeks,[3] that still equates to 196 periods when multiple assaults may have (and probably did) occur. His evidence is not clear or convincing that he assaulted the victim less than 300 times.

[3] 1385-700 = 685/7 = 97.88 weeks.

B. CARLSON ESTABLISHED THE COURT ACTUALLY RELIED ON THE INFORMATION.

The court did state that it believed Carlson assaulted the victim "more than 300 times, anywhere from 300 to 400 times" (74:77). The sentencing transcript also makes clear that "the sentencing court specifically considered" the "more than 300 times" in its decision. *Tiepelman*, 291 Wis. 2d 179, ¶29. The court's consideration establishes actual reliance.

C. ANY ERROR THE CIRCUIT COURT MADE BY REFERENCE TO "MORE THAN 300" ASSAULTS WAS HARMLESS.

Even if Carlson established both inaccurate information at sentencing and the circuit court actually relied on the information, that error must be analyzed for whether in was harmless. *Tiepelman*, 291 Wis. 2d 179, ¶26.

An error is harmless when it is clear "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967); *State v. Harvey,* 2002 WI 93, ¶44, 254 Wis. 2d 442, 647 N.W.2d 189; *State v. Eison*, 2011 WI App 52, ¶11, 332 Wis. 2d 331, 797 N.W.2d 890. For constitutional errors at sentencing, the State must prove beyond a reasonable doubt that there is no reasonable probability that the error contributed to the defendant's sentence. *State v. Lindsey,* 203 Wis. 2d 423, 448, 554 N.W.2d 215 (Ct. App. 1996). In order to find a court's reliance on inaccurate information harmless, the reviewing court must be "confident" that the inaccuracy did not

"contribute to" the sentence the defendant received. *State v. Anderson*, 222 Wis. 2d 403, 411, 588 N.W.2d 75 (Ct. App. 1998).

The context of the court's statement is important here. The court was merely estimating the magnitude of Carlson's repeated assaultive conduct over an extended period of time. The court first recited the length of the contact (74:77). Then it estimated, based on its calculation from the victim's perspective, the extent of the assaultive conduct (74:76-77). The number 300 merely illustrated the extent to which Carlson subjected the victim to his advances. It was the length of the period over which the assaults took place, the frequency and regularity of the repeated contacts rather than the actual number of assaults upon which the court based its sentence (74:76-77).

Three hundred eight assaults is indistinguishable from the 196 assaults Carlson's "evidence" postulates or even a "mere" 98 assaults (only one per period). The sentence he received did not depend on the circuit court's exact (or inexact) calculation. The point was that Carlson had subjected the victim to a high number of assaults which compelled the court's rejection of probation, opting instead for a long period of initial confinement.

D. CARLSON'S TRIAL ATTORNEY DID NOT PERFORM DEFICIENTLY AT SENTENCING.

Carlson includes a tie-in claim that his attorney performed deficiently by not objecting to or offering rebuttal evidence when the circuit court made its calculation of "more than 300" sexual assaults. Carlson's brief at 18-26.

To establish attorney Mastantuono provided ineffective assistance of counsel, Carlson must demonstrate both that trial counsel's performance was deficient and that this performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Ziebart*, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

As noted above, the sentencing court did not rely on "inaccurate" information when it used the victim's statement contained in criminal complaint in its estimate of the magnitude of Carlson's offenses. Failing to raise an argument that does not have merit does not constitute ineffective assistance of counsel. *See State v. Harvey*, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987).

In addition, since the court's calculation was harmless error, Carlson cannot demonstrate prejudice. The essential difference between a "reasonable probability that the error contributed to the defendant's sentence," *Lindsey,* 203 Wis. 2d at 448, and *Strickland* prejudice, "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *State v. Domke*, 2011 WI 95, ¶54, 337 Wis. 2d 268, 805 N.W.2d 364; *Strickland*, 466 U.S. at 694, is that the State has the burden to establish harmless error while Carlson has the burden to establish prejudice. *Compare In re Commitment of Jones*, 2013 WI App 151, ¶14, 352 Wis. 2d 87, 841 N.W.2d 306, *with Strickland*, 466 U.S. at 687. Since the error here was harmless, Carlson cannot demonstrate prejudice.

III. THE CIRCUIT COURT DID NOT ERR IN DENYING CARLSON'S POST-CONVICTION MOTION TO WITHDRAW HIS PLEA AFTER SENTENCING.

Carlson argues the circuit court erred when it denied without a hearing, his post-conviction motion seeking to withdraw his guilty pleas based on his trial attorney's advice to plead guilty. He claims his motion plead sufficient facts which, if true, entitled him to relief. He requests this Court vacate the order and remand for an evidentiary hearing.

A defendant who seeks to withdraw a guilty or no-contest plea after sentencing bears the heavy burden of establishing by clear and convincing evidence that withdrawal of the plea is necessary to correct a "manifest injustice." *State v. Milanes*, 2006 WI App 259, ¶12, 297 Wis. 2d 684, 727 N.W.2d 94; *State v. Black*, 2001 WI 31, ¶9, 242 Wis. 2d 126, 624 N.W.2d 363. The decision to allow a plea withdrawal rests in the circuit court's discretion, and this Court will reverse only where the circuit court fails to exercise that discretion properly. *Milanes*, 297 Wis. 2d 684, ¶12.

Where a defendant claims a manifest injustice entitles him or her to withdraw a plea, the motion to withdraw the plea can have two different bases. First, a defendant may claim he or she did not knowingly, intelligently and voluntarily enter the plea because the circuit court failed to perform one of the duties required by *State v. Bangert*, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986), and its progeny during the plea colloquy. Second, a defendant may claim, based on *Nelson v.*

State, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), and *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), something extrinsic to the plea colloquy renders the plea not knowingly, intelligently and voluntarily entered. *See generally State v. Howell*, 2007 WI 75, ¶¶2-6, 301 Wis. 2d. 350, 734 N.W.2d 48. Carlson's claim that attorney Mastantuono incorrectly advised him that he had a good chance for a community-based sentence thereby inducing him to plead, presents a *Nelson/Bentley* claim.

To entitle a defendant to an evidentiary hearing under *Nelson/Bentley*, a defendant's motion must allege facts which, if true, would entitle the defendant to relief. If the record conclusively demonstrates that the defendant is not entitled to relief, the trial court may in the exercise of its legal discretion deny the motion without a hearing. *Id.*, ¶75. The circuit court denied Carlson's motion to withdraw his plea on this basis.

To establish attorney Mastantuono provided ineffective assistance of counsel, Carlson must demonstrate both that trial counsel's performance was deficient and that this performance prejudiced his defense. *Strickland*, 466 U.S. at 687; *State v. Ziebart*, 2003 WI App 258, ¶15, 268 Wis. 2d 468, 673 N.W.2d 369.

To prove deficient performance, a defendant must establish that his or her counsel "'made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.' The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms." *State v. Swinson*, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12 (citations omitted). An attorney must have made serious mistakes which could not

be justified as objectively reasonable professional judgment, considered deferentially, under all the circumstances, and from counsel's contemporary perspective to eliminate the distortion of hindsight. *See Strickland*, 466 U.S. at 689-91.

To establish prejudice, a "'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.'" *Domke*, 337 Wis. 2d 268, ¶54; *Strickland*, 466 U.S. at 694. *See also State v. McDougle*, 2013 WI App 43, ¶13, 347 Wis. 2d 302, 830 N.W.2d 243. A reasonable probability is a probability sufficient to undermine a court's confidence in the outcome of the trial. *Strickland,* 466 U.S. at 694; *Domke*, 337 Wis. 2d 268, ¶54; *State v. Prineas*, 2012 WI App 2, ¶21, 338 Wis. 2d 362, 809 N.W.2d 68. In the context of a plea, "the defendant seeking to withdraw his or her plea must . . . show 'that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Bentley,* 201 Wis. 2d at 312 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

A. ATTORNEY MASTANTUONO DID NOT PERFORM DEFICIENTLY.

Carlson's motion claims that attorney Mastantuono performed deficiently by advising him to plead guilty to the two pending charges without a plea agreement. (Carlson's application for consolidation recites an "agreement" to plead guilty with both sides free to argue the sentence but that is precisely the situation when a defendant pleads guilty without any agreement.) More particularly he claims attorney Mastantuono's as-

sessment that he had a realistic possibility of a community-based sentence (probation with or without jail time) fell below reasonable professional standards.

Because the court did not hold an evidentiary hearing, we do not know attorney Mastantuono's actual advice but since the circuit court decided the motion without taking evidence, this Court must assume the allegations in the motion to be true. *Howell*, 301 Wis. 2d. 350, ¶¶75-77. That is the necessary conclusion from the requirement that the allegations entitle a defendant to an evidentiary hearing if true.

Carlson claims that the possibility of a community-based sentence was not realistic because the State would not agree to probation. But a trial court is not bound by the State's sentence recommendation. *State v. Hampton*, 2004 WI 107, ¶37, 274 Wis. 2d 379, 398, 683 N.W.2d 14. So the State's opposition is not dispositive.

Carlson also argues the serious nature of the crimes comprising hundreds of assaults (contrary to his above argument questioning the circuit court's attribution of 300 assaults). But his own data show that since the inception of truth-in-sentencing, 28% of those convicted of repeated sexual assaults of the same child and 50% of those convicted of second-degree sexual assault of a child did receive a community-based sentence. Carlson's brief at 14.

As noted above, a defense attorney satisfies that standard for effective performance if "the challenged action "*might* be considered sound trial strategy." *Strickland,* 466 U.S. at 689 (emphasis added). Since the test is an objective one, an at-

torney's actual reasoning for performing a given act or giving certain advice is not dispositive. If the court can envision a reasonable attorney performing the same act or giving the same advice under the circumstances, the questioned act or advice is objectively reasonable. Thus, "if defense counsel [in *State v. Kimbrough*, 2001 WI App 138, 246 Wis. 2d 648, 630 N.W.2d 752] had chosen for strategic purposes to avoid the lesser-included defense instruction [questioned there], the decision would have been imminently reasonable under the circumstances." *Id.*, ¶32. The fact that the attorney "intended to request that the jury be given the option of convicting Kimbrough of the lesser-included offense, but he inadvertently failed to do so," *id.*, ¶24, did not preclude a finding of no deficient performance because "a reasonable attorney could have chosen an all-or-nothing approach as an objectively reasonable defense strategy." *Id.*, ¶1. *See also State v. Koller*, 2001 WI App 253, 248 Wis. 2d 259, 635 N.W.2d 838.

Carlson did have factors in favor of a positive result of probation. First, he had no prior criminal record (74:75). Second, he had terminated the assaults without law enforcement intervention. Third, he had been consistently employed (74:80). Fourth, he had a supportive relationship to his daughter from a previous marriage (74:80). Fifth, he had supported and been active in dealing with his son's mental problems (35:22-23). Sixth, he had the support of his current wife who was also the victim's mother (35:24-25).

Here, Carlson's overriding objective was to avoid prison (62:5). He correctly points out that the State steadfastly refused to agree to a probation recommendation of any kind. Short of agree-

ing to a prison sentence recommendation, then, his choices in view of these facts were to go to trial or to plead guilty without an agreement.

Pleading guilty without an agreement added the factors in favor of probation: not subjecting the victim to further trauma (74:77), and accepting responsibility for his offenses (35:26-27). Pleading also enabled Carlson to begin sex offender treatment (35:5-10, 19-20), and enabled Dr. Woody to perform a psychological evaluation (35:5-10), and risk assessment. Actuarials showed him as a low risk to re-offend (35:28).

On the other hand, going to trial presented an almost certain result: conviction. Assuming the victim, now an adult, would have testified consistent with her statement to law enforcement, she provided graphic evidence of sexual abuse over an extended time period of time. Carlson had admitted the assaults to a relative of the victim (1:2-3). He had also confessed to police (1:3). Moreover, a trial would have removed the advantage of not subjecting the victim to further trauma, accepting responsibility and being in sex offender treatment prior to conviction.

It is apparent that Carlson stood a better chance of receiving probation after guilty pleas than he did by insisting on a trial. No matter how low Mastantuono (or Carlson or even this Court) put his chances of probation after his pleas without an agreement, those chances were better than his chances of probation after trial and conviction. Under the circumstances, a reasonable attorney could well have advised Carlson to plead without an agreement and take his chances with the judge rather than face sentencing after trial and conviction.

Attorney Mastantuono's advice to plead guilty without an agreement was objectively reasonable. He did not perform deficiently.

B. PREJUDICE

As noted above, the circuit court must hold an evidentiary hearing on a *Nelson/Bentley* plea withdrawal claim if the post-conviction motion to withdraw the plea alleges facts which, if true, would entitle the defendant to relief. *Howell*, 301 Wis. 2d. 350, ¶75.

The circuit court here concluded that Carlson would not have insisted on going to trial despite his allegation to the contrary. This is a credibility determination. But assuming the allegation to be true, as the circuit court must under *Howell* and *Nelson/Bentley*, is inconsistent with credibility determinations at the pleading stage.

If this Court reaches this claim and believes that the circuit court erred in determining on Carlson's pleadings that attorney Mastantuono performed deficiently, it should vacate the order denying his post-conviction motion and remand the case to the circuit court for a evidentiary hearing.

CONCLUSION

For the reasons given above, this Court should affirm Carlson's judgment of conviction and the order denying his post-conviction motion. If the Court believes the record does not establish that the circuit court correctly denied Carlson motion to withdraw his pleas, it should vacate the order denying his post-conviction motion and remand the case for an evidentiary hearing.

Dated at this 6th day of June, 2014.

Respectfully submitted,

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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 5,739 words.

Dated at this 6th day of June, 2014.

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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 at this 6th day of June, 2014.

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