STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP953-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

HENRY J. BLOEDORN,

Defendant-Appellant.

APPEAL FROM AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE OZAUKEE COUNTY CIRCUIT COURT, THE HONORABLE PAUL V. MALLOY PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2015AP953-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

HENRY J. BLOEDORN,

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APPEAL FROM AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE OZAUKEE COUNTY CIRCUIT COURT, THE HONORABLE PAUL V. MALLOY PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

ISSUE PRESENTED

Did Henry Bloedorn receive effective assistance of trial counsel?

Circuit court answered: Yes. The circuit court first concluded that Bloedorn's trial counsel did not perform

deficiently. Defense counsel's "representation was competent and effective. It was strategic" (88:108). The court next concluded that, although it need not reach the issue of prejudice, defense counsel's performance did not prejudice Bloedorn (88:108-09). The court reasoned that Bloedorn's "sentence was largely driven . . . by the seriousness of the offense" (88:109).

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent, and because resolution of this appeal requires only the application of well-established precedent to the facts of the case.

STATEMENT OF THE CASE[1]

On September 3, 2013, the State filed a criminal complaint charging Henry Bloedorn with one count of repeated sexual assault of a child, a class C felony; one count of incest, a class C felony; and one count of child enticement, a class D felony (1:1). The charges stemmed from Bloedorn's repeated acts of sexual assault of his grandson, N.T.K. (1:1). N.T.K. was between 11 and 14 years of age when the assaults occurred (1:2). According to the complaint, on at least three occasions, Bloedorn put his mouth on N.T.K.'s penis (1:2). Bloedorn had N.T.K. put his penis in Bloedorn's anus on at least two occasions (1:2).

On September 12, 2013, Bloedorn and his wife, Laura Bloedorn (Laura), met Attorney Kenneth Kratz and decided to hire him to represent Bloedorn in this matter (88:84). On September 15, Attorney Kratz sent two letters to Bloedorn, which explained his billing practices and the standard

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[1] As the plaintiff-respondent, the State need not present a statement of the case. Wis. Stat. § (Rule) 809.19(3)(a)2. Nevertheless, the State will provide one because Bloedorn's statement of the case is incomplete. In particular, Bloedorn's statement of the case omits several record citations and does not discuss the circuit court's ruling and reasoning at the postconviction hearing, in violation of § 809.19(1)(d). *See State v. Straehler*, 2008 WI App 14, ¶ 2 n.4, 307 Wis. 2d 360, 745 N.W.2d 431 (citation omitted) ("An appellate court is improperly burdened where briefs fail to consistently and accurately cite to the record."). The State will also provide a supplemental appendix of the postconviction hearing transcript pages that show the circuit court's ruling and reasoning. Bloedorn's failure to include those pages in his appendix is a violation of § 809.19(2)(a). *See State v. Bons*, 2007 WI App 124, ¶ 23, 301 Wis. 2d 227, 731 N.W.2d 367; *see also S.C. Johnson & Son, Inc. v. Morris*, 2010

(continued on next page)

procedures for a felony case (88:40-41). On September 20, Laura met with Attorney Kratz and paid him his retainer fee (88:84-85).

That same day, Attorney Kratz had "a very, very long face-to-face interview" with Bloedorn's daughter, who is N.T.K.'s mother, in an effort to convince her to recommend probation if Bloedorn were convicted (88:55). On September 27, Attorney Kratz met with Bloedorn's sister (88:55-56).

Attorney Kratz subsequently held several lengthy meetings with Bloedorn. On October 14, 2013, Attorney Kratz and Bloedorn had "a very, very extensive long meeting" where they developed their "initial defense strategy," decided whether to have a psychosexual evaluation done, and whether Bloedorn would waive a preliminary examination (88:57).[2] At this meeting, Attorney Kratz advised Bloedorn that he had already secured a promise from the State that if Bloedorn pled guilty, the State would not charge Bloedorn for a related sexual assault of N.T.K. in Washington County (88:59).[3] On October 30, Attorney Kratz met with Bloedorn and discussed possible evidence in this case and whether they should file a Fifth or

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WI App 6, ¶ 5 n.1, 322 Wis. 2d 766, 779 N.W.2d 19 (fining appellate counsel $150 for not including the circuit court's ruling in an appendix).

[2] On October 16, 2013, Bloedorn waived his right to a preliminary examination (74).

Sixth Amendment challenge to Bloedorn's statements to the police (88:60). Bloedorn had confessed to the police in the present case and in Washington County (88:59-60; 80:6). On November 11, Attorney Kratz and Bloedorn "had a very lengthy strategy meeting" (88:60-61). Their "next strategy meeting" was on December 18 (88:61).

Attorney Kratz had "ongoing discussions" with the Ozaukee County District Attorney's Office to try to secure a plea offer (*see* 81:16). On January 17, 2014, Attorney Kratz sent an email to the Ozaukee County District Attorney's Office, arguing that Bloedorn should receive probation if convicted (88:61-62). On January 21, Attorney Kratz met with Bloedorn to discuss the State's plea offer and to decide whether Attorney Kratz should file any motions (88:63). The State memorialized its plea offer in a letter dated January 23, 2014 (81:16). Under the plea offer, if Bloedorn pled guilty to count one (repeated sexual assault of a child), the State would move to have the remaining counts dismissed and read in (81:16). The State would also stand silent with respect to a sentence recommendation (81:16).

On February 12, 2014, Bloedorn pled guilty to count one (77:24). Bloedorn admitted that the acts of sexual assault as alleged in the complaint occurred (77:25). The circuit court revoked Bloedorn's bail and remanded him to

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[3] The possible charge in Washington County stemmed from one or two acts of sexual assault that formed part of the basis for count one (repeated sexual assault of a child) in the present case (80:4, 6).

the custody of the Ozaukee County Sheriff's Department (23; 77:26, 29).

On February 21, 2014, Attorney Kratz met with Laura without Bloedorn present (88:65-66). On February 26, Attorney Kratz met with Bloedorn in jail and advised him not to undergo a psychosexual evaluation or an independent presentence investigation (PSI) because the results would likely be unfavorable (88:65-68).

Bloedorn subsequently sent several letters from jail. He sent letters dated March 4 and 6 to the circuit court (25; 27). In the March 4 letter, Bloedorn denied sexually assaulting N.T.K. and instead suggested that N.T.K. sexually assaulted him (25:1-2). In the March 6 letter, Bloedorn stated that he took "full responsibility" for what happened, but he wanted to change his guilty plea because he did not think that it was "correct" (27:1). In both letters, Bloedorn stated that he had never been shown any evidence against him (25:3; 27:1). In a letter dated March 7, Bloedorn asked Attorney Kratz whether he would be found guilty if he went to trial (88:68).

On March 11, 2014, Attorney Kratz again met with Bloedorn in jail (88:69-70). They discussed the possibility of withdrawing the guilty plea, and Bloedorn decided not to do so (88:69-70). They then made a list of information, including character references, that they could present to the court in an attempt to secure a favorable sentence (88:70).

On April 2, 2014, Attorney Kratz had "a very lengthy interview [with Bloedorn] that began at 8:30 that morning" (88:71). At that meeting Attorney Kratz read the PSI report to Bloedorn "word for word" (88:71).

The next day, Attorney Kratz met with Bloedorn in jail for one and a half hours (88:71). They prepared for sentencing and discussed allocution (88:71). Attorney Kratz met with Laura on the next day, April 4 (88:72).

On April 7, 2014, the circuit court held a sentencing hearing (78). Attorney Kratz explained that Bloedorn continued to deny engaging in oral sex with N.T.K., although Bloedorn still admitted to engaging in at least three acts of anal intercourse with N.T.K. (78:10-11). However, the court adjourned the hearing because Bloedorn asked, "is there a law that says maybe the child takes advantage of a grandparent or of a parent?" (78:14-15). The court determined that, because Bloedorn suggested that he was the victim rather than perpetrator of his sexual intercourse with his grandson, the factual basis for Bloedorn's guilty plea was gone (78:14-15). Bloedorn, however, stated, "I don't want a trial" (78:15).

The circuit court held a hearing the next day, April 8 (79). Attorney Kratz asked the court to continue the case for three or four weeks so Bloedorn could decide whether he wanted to withdraw his guilty plea (79:4-5). At this hearing, Bloedorn admitted to at least two instances of "hand-to-penis" contact and one act of anal intercourse with N.T.K.

(79:6). However, Bloedorn again suggested that he was the victim and N.T.K. was the perpetrator of their sexual interactions (79:7). The court scheduled a status conference for May 2 and a trial for May 6 (79:9). The court stated that the parties could "try to work out some agreement as to the specific conduct and file an Amended Information" (79:8).

On May 1, 2014, the State filed an amended information (38).[4] The next day, Bloedorn entered an *Alford*[5] plea to count one of the amended information, repeated sexual assault of a child (80:29). Counts two and three were dismissed and read in (80:30).

On May 6, 2014, the court held a sentencing hearing (71). Several of N.T.K.'s family members spoke of the seriousness of Bloedorn's sexual assaults against N.T.K. as well as the destructive effect that they had on the family (71:9-14). N.T.K.'s father asked the court to impose "the maximum sentence possible" (71:14). Bloedorn apologized for his behavior and said that he understood "that prison will most likely be the end punishment" (71:33-34).

At the sentencing hearing, the State noted that it was "not making a specific recommendation," but it nevertheless asked the court "to consider the seriousness of this offense. No doubt this is a very serious offense" (71:15). The State

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[4] Attorney Kratz explained that the amended information "removes [the] issue of the commingling of first- and second-degree offenses for the repeated acts, making them all second degree" (80:7).

[5] *See N. Carolina v. Alford*, 400 U.S. 25 (1970).

argued that "the facts of this case make this a particularly serious and aggravated offense" (71:15).

At the sentencing hearing, Attorney Kratz acknowledged that Bloedorn's sexual assaults were "horrific," but he argued that Bloedorn should avoid a prison sentence due to several positive factors, including his lack of any criminal record, his support network, and the fact that he was attending counseling (71:21-31). Attorney Kratz recommended that the court impose and stay a prison sentence consisting of fifteen years of initial confinement and ten years of extended supervision, and place Bloedorn on probation for ten years with one year in the county jail as a condition of probation (71:31-32).

After discussing the relevant sentencing factors—including the seriousness of the offense, the need to protect the community, and the defendant's character—the court sentenced Bloedorn to twenty years of initial confinement and five years of extended supervision (71:35-43). The court stated that "anything . . . short of the maximum would be a serious failure to recognize what's happened here" (71:43). Although it imposed a much different sentence than the one Attorney Kratz recommended, the court stated that "Mr. Kratz has done a great job" (71:41).

Bloedorn filed a motion to withdraw his *Alford* plea on October 21, 2014, and an amended motion on October 30 (52; 57). He argued in both motions that he received ineffective assistance of counsel (52; 57).

On March 12, 2015, the circuit court held a *Machner*[6] hearing on the issue of ineffective assistance (88). Bloedorn did not testify at the hearing (*see* 88:2).[7] The only witnesses were Laura and Attorney Kratz (88:2). Attorney Kratz testified extensively about his representation of Bloedorn, often relying on his notes (*see generally* 88:4-81). Laura testified primarily about the length of the meetings between Bloedorn and Attorney Kratz (88:82-94). Laura admitted that she did not attend several of the meetings and that she was unsure when the meetings occurred and how many there were (88:83, 90, 92). The circuit court believed Attorney Kratz's testimony over Laura's (*see* 88:103-10; R-Ap. 103-10). The court in particular found that the "length of the meetings" was "consistent" with Attorney Kratz's testimony (88:107; R-Ap. 107).

The circuit court concluded at the *Machner* hearing that Attorney Kratz had not rendered ineffective assistance (88:108; R-Ap. 108). The court stated, "I'm finding specifically that Mr. Kratz's representation was competent and effective. It was strategic. There were limited options for him to pursue" (88:108; R-Ap. 108). Bloedorn had put Attorney Kratz "in an impossible position" by stating that he did not want a trial but also refusing to "take responsibility"

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[6] *See State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).
[7] Bloedorn spoke only one sentence at the *Machner* hearing, to state that he, like Laura, did not "remember the dates [of the meetings] either" (88:91).

and plead guilty (88:107; R-Ap. 107). Attorney Kratz's representation of Bloedorn "was much above the standard of just an average practitioner" and he "did a good job" (88:109). Although the court noted that it did not need to reach the issue of prejudice, it concluded that Bloedorn "wasn't prejudiced either" (88:109; R-Ap. 109). The court reasoned that Bloedorn's "sentence was largely driven . . . by the seriousness of the offense" (88:109; R-Ap. 109). The court entered a written order denying Bloedorn's postconviction motion on April 22, 2015 (68).

ARGUMENT

The circuit court correctly denied Henry Bloedorn's motion to withdraw his guilty plea because he received effective assistance of trial counsel.

A. Applicable legal standards.

"In general a circuit court should freely allow a defendant to withdraw his plea *prior to sentencing* for any fair and just reason, unless the prosecution [would] be substantially prejudiced." *State v. Ortiz-Mondragon*, 2015 WI 73, ¶ 28, ___ Wis. 2d ___, 866 N.W.2d 717 (quoted source and quotation marks omitted) (alteration in *Ortiz-Mondragon*). "In contrast, the general rule [is] that a defendant seeking to withdraw a guilty or no contest plea *after sentencing* must prove manifest injustice by clear and convincing evidence." *Id.* (quoted source and quotation marks omitted) (alteration in *Ortiz-Mondragon*). "Ineffective

assistance of counsel is one type of manifest injustice." *Id.* (citation omitted).

"The clear and convincing standard for plea withdrawal after sentencing, which is higher than the 'fair and just' standard before sentencing, 'reflects the State's interest in the finality of convictions, and reflects the fact that the presumption of innocence no longer exists.'" *Id.*, ¶ 29 (quoted source and quotation marks omitted). "The higher burden is a deterrent to defendants testing the waters for possible punishments." *Id.* (quoted source and quotation marks omitted). "Disappointment in the eventual punishment does not rise to the level of a manifest injustice." *Id.* (quoted source and quotation marks omitted).

A defendant who asserts a claim of ineffective assistance of trial counsel must demonstrate: (1) trial counsel rendered deficient performance; and (2) the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* "Counsel need not be perfect, indeed not even very good, to be constitutionally adequate." *State v.*

Thiel, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d 305 (quoted source and quotation marks omitted).

To prove prejudice, "the defendant must show that [counsel's deficient performance] actually had an adverse effect on the defense." *Strickland*, 466 U.S. at 693. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* "The 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. "In the context of guilty pleas," "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985). To prove that counsel's deficient performance during a sentencing hearing was prejudicial, a defendant must show that there is a reasonable probability that the court would have imposed a lesser sentence absent the deficient performance. *See State v. Pote*, 2003 WI App 31, ¶ 16, 260 Wis. 2d 426, 659 N.W.2d 82; *State v. Voss*, 205 Wis. 2d 586, 597-98, 556 N.W.2d 433 (Ct. App. 1996); *State v. Giebel*, 198 Wis. 2d 207, 219, 541 N.W.2d 815 (Ct. App. 1995); *see also Glover v. United States*, 531 U.S. 198, 202-04 (2001).

"The defendant has the burden of proof on both components" of the *Strickland* test, that is, deficient performance and prejudice. *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997) (citing *Strickland*, 466 U.S. at 688). If a defendant fails to prove one prong of the *Strickland* test, a court need not consider the other prong. *Strickland*, 466 U.S. at 697.

"A claim of ineffective assistance of counsel is a mixed question of fact and law." *State v. Carter*, 2010 WI 40, ¶ 19, 324 Wis. 2d 640, 782 N.W.2d 695 (citations omitted). A reviewing court "will uphold the circuit court's findings of fact unless they are clearly erroneous." *Id.* (citation omitted). "Findings of fact include the circumstances of the case and the counsel's conduct and strategy." *Id.* (quoted source and quotation marks omitted). Further, a reviewing "court will not exclude the circuit court's articulated assessments of credibility and demeanor, unless they are clearly erroneous." *Id.* (citation omitted). "However, the ultimate determination of whether counsel's assistance was ineffective is a question of law, which [a court] review[s] de novo." *Id.* (citation omitted).

B. Attorney Kratz did not perform deficiently.

Bloedorn first argues that Attorney Kratz failed to adequately advise him regarding the evidence and potential evidence in this case, defense strategy, and possible prison sentences (Bloedorn's Br. at 12-16). He next argues that Attorney Kratz performed deficiently by allowing a

presentence investigation (PSI) to continue while Bloedorn was considering whether to withdraw his guilty plea (Bloedorn's Br. at 17-19). Finally, Bloedorn argues that Attorney Kratz failed to properly argue for a reasonable prison sentence (Bloedorn's Br. at 20-23). Bloedorn is wrong on all fronts.

1. Attorney Kratz adequately advised Bloedorn regarding evidence, defense strategy, and possible sentences.

First, with respect to advising Bloedorn about evidence, Attorney Kratz obtained discovery from the State and reviewed all of it (88:43). He also reviewed all of it with Bloedorn (88:43). Attorney Kratz did not provide the discovery materials to Bloedorn because Bloedorn never asked for them (88:43). However, Attorney Kratz and Bloedorn "spent many, many hours going over the evidence and the potential gaps in the evidence" (88:43). The meeting that Attorney Kratz had with Bloedorn on October 14, 2013, "was almost specifically directed towards the evidence and directed towards whether [Attorney Kratz] was going to file a Fifth or Sixth Amendment challenge to Mr. Bloedorn's statements" to the police (88:60). Bloedorn offered no evidence at the *Machner* hearing to directly contradict Attorney Kratz's testimony that he extensively reviewed the evidence with Bloedorn.

Second, Attorney Kratz thoroughly explained defense strategy to Bloedorn throughout the pendency of this case. As Attorney Kratz explained at the *Machner* hearing:

> [E]arly on in this case I told Mr. Bloedorn that there are two different ways to attack a case like this. Number one is an eye towards litigation, that is an eye towards a jury trial; and number two is an eye towards a negotiated resolution. I told him back in September [2013] when we first met that although we did not have to set on a strategy at that time, . . . I at least wanted his initial opinion whether he thought that the matter should go to trial or whether he wanted the matter resolved.

(88:44.)

Attorney Kratz further testified that "Bloedorn and [Attorney Kratz] decided that the initial strategy, or at least until [they] changed [their] mind[s], was going to have an eye towards resolution, that is to a negotiated resolution of this case rather than a jury trial" (88:44). Attorney Kratz had told Bloedorn, however, that he would "continue to keep all of [Bloedorn's] options open and . . . review all the evidence and review whether there were any suppression or other motions available that would be of benefit" (88:44-45).

On October 14, 2013, Attorney Kratz, Bloedorn, and Laura met for an initial "strategy meeting" (88:57). Attorney Kratz testified that it "was a very, very extensive long meeting where [they] developed [their] initial defense strategy, where [they] decided whether [they] were going to have a psychosexual eval[uation] done, [and] whether or not [Bloedorn] was going to waive the prelim[inary examination]" (88:57). After Attorney Kratz discussed "some

of the evidence and likely evidence that was going to be presented against [Bloedorn]," they discussed "what [they] were going to do" (88:57). At that meeting, Attorney Kratz told Bloedorn that, at that time, the district attorney was going to recommend a prison sentence (88:57). They had "talked already about the possibility of electronic monitoring, what some of the other dispositional alternatives might be, and some other concerns that [Bloedorn] had" (88:57).

Attorney Kratz and Bloedorn held more strategy meetings in subsequent months. On November 11, 2013, about a month after their initial strategy meeting, Attorney Kratz and Bloedorn "had a very lengthy strategy meeting" (88:60-61). About another month later, they met for their "next strategy meeting" (88:61). They met again on January 21, 2014, to discuss the possibility of pleading guilty (88:62-63). At this meeting, Attorney Kratz discussed the possibility of filing "*Miranda*, *Shiffra*, or *Allen* motions" (88:63).[8] Bloedorn decided not to pursue any of those motions after consulting with Attorney Kratz regarding the advantages and disadvantages of each of those motions (88:63-64). In particular, Attorney Kratz advised Bloedorn that an *Allen* motion could "re-victimize" N.T.K. and therefore could hurt Bloedorn's chances of receiving

[8] *See Miranda v. Arizona*, 384 U.S. 436 (1966); *State v. Shiffra*, 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993); *State v. Allen*, 2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433.

probation (88:63-64). Bloedorn offered no evidence at the *Machner* hearing to directly contradict Attorney Kratz's testimony that he extensively discussed defense strategy with Bloedorn.[9]

Third and finally, Attorney Kratz adequately explained to Bloedorn the possible prison sentences that he faced. Attorney Kratz testified at the *Machner* hearing that he twice went over the plea questionnaire form with Bloedorn (88:73). He further testified that he told Bloedorn that the circuit court was not bound by any plea agreement or recommendation, Bloedorn was aware of the maximum possible penalties, and Bloedorn was aware that the State was not going to make a specific sentence recommendation (88:73-74).

At the *Machner* hearing, Attorney Kratz specifically recalled that before Bloedorn first pled guilty on February 12, 2014, Attorney Kratz had "told him that the judge could sentence him up to the maximum potential penalty for the offense for which he was entering a plea" (88:12-13). Attorney Kratz had told Bloedorn that "this was a prison case" (88:13). Attorney Kratz had reminded him that their strategy since September 2013, when Bloedorn

[9] Laura testified at the *Machner* hearing that Attorney Kratz did not discuss motions in her presence (88:90-91). However, Laura did *not* testify that Attorney Kratz never discussed defense strategy with Bloedorn (*see* 88:82-94). Laura had no firsthand knowledge of whether any defense strategy discussions occurred at all because she was absent from many of Bloedorn's meetings with Attorney Kratz (88:85, 90).

hired Attorney Kratz, was for Bloedorn to plead guilty and "ask for an imposed and stayed prison sentence with probation and up to a year in the county jail" (88:13). Bloedorn offered no evidence at the *Machner* hearing to directly contradict Attorney Kratz's testimony that he advised Bloedorn regarding potential sentences.[10]

Bloedorn relies primarily on Laura's *Machner* hearing testimony that Attorney Kratz's meetings with Bloedorn were short (Bloedorn's Br. at 12-16). However, at the conclusion of the *Machner* hearing, the circuit court accepted Attorney Kratz's testimony and rejected Laura's testimony (*see* 88:103-110; R-Ap. 103-10). It was not clearly erroneous for the circuit court to accept Attorney Kratz's testimony over Laura's. Indeed, Bloedorn does not even argue that the circuit court made any clearly erroneous findings.

In particular, the circuit court wisely accepted Attorney Kratz's testimony regarding the length of his meetings with Bloedorn (*see* 88:107; R-Ap. 107). Attorney Kratz's *Machner* hearing testimony was largely based on his "very detailed notes" (88:52-54; *see also* 88:103, 107; R-Ap.

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[10] Laura testified at the *Machner* hearing that Attorney Kratz did not tell her that he was going to recommend an imposed and stayed sentence of fifteen years of initial confinement (88:90). Laura also offered vague testimony that she thought Bloedorn was facing nine years in prison, but she probably meant that she knew the PSI report recommended nine years (*see* 88:88). In any event, Laura did *not* testify that Attorney Kratz never advised Bloedorn regarding potential sentences (*see* 88:82-94). Laura had no firsthand knowledge of whether Bloedorn was advised at all about potential sentences because she was

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103, 107). Laura, on the other hand, testified that she was unsure of how many meetings Attorney Kratz had with Bloedorn, when the meetings took place, and how many of them she attended (88:83, 92). She initially stated that she attended every meeting between Bloedorn and Attorney Kratz except for a meeting on October 30, 2013 (88:85). However, she later admitted that she was also absent from all of the meetings at the jail, which took place in February, March, and April of 2014 (88:66, 69, 70-71, 90). She also admitted that she did not know how long the jail meetings lasted (88:88). She gave several different answers when asked how long the longest meeting was that she attended (88:86, 87, 90).[11]

The foregoing discussion shows that Attorney Kratz adequately advised Bloedorn regarding the evidence and potential evidence in this case, defense strategy, and potential sentences. Bloedorn has not offered any evidence to directly contradict those conclusions.

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absent from many of Bloedorn's meetings with Attorney Kratz (88:85, 90).

[11] When asked how long the longest meeting with Attorney Kratz was, Laura said fifteen or twenty minutes at the most; ten to fifteen minutes at the most; "[l]ike I said, five or ten minutes at the most"; and, "[l]ike I said, five minutes at the most" (88:86, 87, 90).

2. Attorney Kratz properly allowed the presentence investigation to continue, adequately advised Bloedorn about it, and properly declined to seek an alternative presentence investigation.

Bloedorn next argues that Attorney Kratz performed deficiently by "continuing to move forward with the P.S.I. after the receipt of the letters from [Bloedorn] indicating his confusion and reluctance with regard to his plea" (Bloedorn's Br. at 18). Bloedorn is wrong. He never says what Attorney Kratz could have done to stop the PSI from moving forward.[12] Bloedorn recognizes that "the court ordered a pre-sentence investigation" (Bloedorn's Br. at 17; *see also* 24:1). Attorney Kratz did not have the legal authority to stop a court-ordered PSI from moving forward. Although "no law in Wisconsin requires a defendant to cooperate with the PSI writer, . . . a PSI can be written without the defendant's cooperation." *State v. Hess*, 2009 WI App 105, ¶ 12, 320 Wis. 2d 600, 770 N.W.2d 769, *aff'd*, 2010 WI 82, 327 Wis. 2d 524, 785 N.W.2d 568.

Perhaps the PSI would have stopped if Bloedorn withdrew his plea, but that was not Attorney Kratz's decision to make. Bloedorn decided not to withdraw his plea. He stated at the April 7, 2014 hearing, "I don't want a trial"

[12] One term of the State's plea offer was that the State "will ask for a pre-sentence investigation" (81:16).

(78:15). He reaffirmed his plea by entering an *Alford* plea on May 2, 2014 (80:29).

Bloedorn next argues that Attorney Kratz performed deficiently because he "allowed [Bloedorn] to complete a presentence investigation without proper guidance" (Bloedorn's Br. at 19). Bloedorn is wrong. He acknowledges that Attorney Kratz testified at the *Machner* hearing that he "discussed the P.S.I. process throughout his representation" (Bloedorn's Br. at 18).

Indeed, Attorney Kratz advised Bloedorn in detail about the PSI process. On February 26, 2014, Attorney Kratz met with Bloedorn at the jail and "discussed the PSI process" with him (88:16). Attorney Kratz testified at the *Machner* hearing that

> [b]efore Mr. Bloedorn talked to the presentence writer, [he and Attorney Kratz] went over in detail what it is that he would say to that presentence writer and [Attorney Kratz's] admonition to him on specifically what he should not say to the presentence writer, specifically in the areas of victim blaming[.]

(88:19).

Bloedorn did not offer any evidence at the *Machner* hearing to contradict Attorney Kratz's testimony that he advised Bloedorn in detail about the PSI process. Instead, he relies on Laura's testimony that she never saw the PSI report (Bloedorn's Br. at 18-19). However, Laura's testimony does not contradict Attorney Kratz's testimony that he advised Bloedorn "in detail" about the PSI process (88:19). Bloedorn provides no case law, and the State is unaware of

any, which holds that an attorney performs deficiently by failing to show a PSI report to a defendant's spouse. Further, Laura did not testify that she ever asked Attorney Kratz to show the PSI report to her (*see* 88:82-94). Attorney Kratz, nonetheless, discussed the PSI process with Laura (88:66). Bloedorn's contention that Attorney Kratz did not adequately advise him about the PSI process is without any factual basis in the record.

Finally, Bloedorn argues that Attorney Kratz performed deficiently "by not requesting a supplemental presentence [investigation]" (Bloedorn's Br. at 19). Bloedorn is wrong again. Attorney Kratz told Bloedorn about the possibility of having an independent PSI and discussed the cost involved (88:24). Similarly, Attorney Kratz advised Bloedorn about the possibility of undergoing an independent psychosexual evaluation (88:23). Attorney Kratz advised Bloedorn that any independent evaluation of him would likely conclude that he "was a danger to the community" and at "high risk of recidivism" due to his failure to take responsibility for his criminal behavior (88:67-68). Because such a conclusion "would be incredibly harmful to Mr. Bloedorn," Attorney Kratz recommended that they not have an independent evaluation done (88:67-68). Accordingly, "as a matter of sentencing strategy," they both agreed not to seek such an evaluation (88:23). Nothing is deficient about Attorney Kratz's representation of Bloedorn regarding the PSI.

3. Attorney Kratz properly argued for a reasonable sentence.

At the sentencing hearing, Attorney Kratz correctly stated that "the Court has to consider the three primary factors when deciding the sentence: The seriousness of the offense, the character of the offender, and the need to protect the public" (71:21). *See also State v. Ziegler*, 2006 WI App 49, ¶ 23, 289 Wis. 2d 594, 712 N.W.2d 76. Attorney Kratz acknowledged that Bloedorn's crime—repeated sexual assault of his adolescent grandson—was "horrific" and serious (71:21). However, Attorney Kratz argued that the court should refrain from sentencing Bloedorn to prison due to his character and the absence of a need to protect the public from him (71:23-28).

In particular, Attorney Kratz said that the PSI report concluded that Bloedorn had "no risk or very, very little risk of recidivism" (71:23). Attorney Kratz said three different times during the sentencing hearing that Bloedorn had no prior criminal record (71:23, 26, 32). He also said that Bloedorn

> "[h]as over 30 years of employment history, has a support system which includes not only a wife but a family and his church and those other support individuals around; has a stable lifestyle and relationship, has gone through individual therapy, has gone through group counseling; involves himself in 12-step support groups and has developed a safety plan"

(71:23-24). Attorney Kratz argued that Bloedorn "took responsibility from day one" and gave a confession when interviewed by the police (71:25). Attorney Kratz further

stated that Bloedorn entered into individual counseling before entering a plea in this case (71:26).

Attorney Kratz described the nine-year prison sentence recommended by the PSI report as a "very lengthy prison term" and a "very, very harsh recommendation" (71:23, 24). He argued that the report failed to acknowledge the "positive factors" that, he contended, justified sentencing Bloedorn to probation (71:27-28).

Attorney Kratz correctly noted that the circuit court was required to "first consider probation" (71:27). *See also State v. Gallion*, 2004 WI 42, ¶ 25, 270 Wis. 2d 535, 678 N.W.2d 197. He argued that "somebody has to be given probation" for a crime like Bloedorn's (71:30). Attorney Kratz argued that "[i]f everybody went to prison, there'd be no incentive to plead. There would be no incentive to accept responsibility. There would be no incentive for presentence treatment. There'd be no incentive to point out all of those factors that [the Department of Corrections] usually points to" (71:29). He argued that probation was appropriate in this case, in light of all of the factors that he laid out (71:31-33).

Finally, Attorney Kratz recommended that the circuit court impose and stay a prison sentence consisting of fifteen years of initial confinement and ten years of extended supervision (71:31). Attorney Kratz recommended that the court place Bloedorn on probation for ten years and impose one year in the county jail as a condition of probation (71:31-32). He explained that this recommended sentence would

deter Bloedorn from engaging in similar crimes because he would "understand[] what's hanging over his head" (71:31).

At the *Machner* hearing, Attorney Kratz again explained his sentence recommendation. He first discussed the PSI report's recommendation of a nine-year prison sentence (88:28). He then explained that he

> intentionally strategically asked for a higher sentence to allow the Court to move from the presentence recommendation and provide a bigger—we'll call it a hammer over the client's head should he violate the terms of his probation. It was a strategic position for an imposed and stayed recommendation[.]

(88:28-29).

The circuit court, at the *Machner* hearing, correctly stated that Attorney Kratz's sentence recommendation "was a gamble," "but it certainly was a valid way to proceed" (88:106; R-Ap. 106). The court reiterated Attorney Kratz's rationale that an imposed and stayed prison sentence serves as "a hammer over the person's head" to deter the person from reoffending (88:107; R-Ap. 107). Imposing and staying a prison sentence, the court explained, "is an option. I've seen it done. . . . I wouldn't find somebody ineffective for [recommending an imposed and stayed prison sentence]" (88:107; R-Ap. 107).

It is not entirely clear why Bloedorn thinks that Attorney Kratz performed deficiently by recommending the sentence that he did. Bloedorn seems to argue that Attorney Kratz never explained to him that he would recommend an

imposed and stayed prison sentence consisting of fifteen years of initial confinement and ten years of extended supervision (Bloedorn's Br. at 22). However, Bloedorn readily acknowledges that Attorney Kratz testified at the *Machner* hearing that he did advise Bloedorn precisely what sentence he would recommend (Bloedorn's Br. at 21; 88:13). Bloedorn offers no contrary evidence.[13]

Bloedorn seems to argue that Attorney Kratz's sentence recommendation was "incredible" and "ridiculous" in light of the nine-year prison sentence that the PSI report recommended (Bloedorn's Br. at 22). Bloedorn contends that Attorney Kratz recommended "more rather than the same or less" time in prison than the PSI report recommended (Bloedorn's Br. at 22). Bloedorn is wrong. Attorney Kratz recommended probation and one year in jail, with an *imposed and stayed prison sentence* (71:31-32). Indeed, at the sentencing hearing, Attorney Kratz explained that his

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[13] Bloedorn also suggests that Attorney Kratz performed deficiently because, according to Laura's testimony at the *Machner* hearing, Attorney Kratz did not tell either one of them that Bloedorn "would ever receive more than three years in prison" (Bloedorn's Br. at 21). First of all, Attorney Kratz was required to advise Bloedorn about the *potential* sentences that he was facing, rather than to advise Bloedorn that he *would* receive any particular sentence. *See State v. Frey*, 2012 WI 99, ¶ 87, 343 Wis. 2d 358, 817 N.W.2d 436 (stating that "defense counsel should assure that defendants entering a plea understand the potential consequences"). The State has explained above that Attorney Kratz adequately advised Bloedorn regarding the potential sentences he was facing. Further, any contrary testimony by Laura about *potential sentences* does not directly contradict Attorney Kratz's testimony that he informed Bloedorn about the sentence that he was

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sentence recommendation was much more lenient than the PSI report's "very, very harsh recommendation" (71:24). Bloedorn seems to recognize as much (Bloedorn's Br. at 22-23). Nevertheless, Bloedorn apparently asserts that Attorney Kratz recommended that the court sentence Bloedorn to fifteen years of initial confinement (*see* Bloedorn's Br. at 23). That assertion is disingenuous, and Bloedorn made the same disingenuous contention at the *Machner* hearing (*see* 88:28-29).

C. Bloedorn was not prejudiced as a result of any allegedly deficient performance.

Bloedorn does not appear to argue that Attorney Kratz's allegedly deficient performance prejudiced him (*see* Bloedorn's Br. at 12-23). In the lengthy "conclusion" section of his brief, Bloedorn mentions in passing how to establish prejudice in the guilty-plea context, but he never actually argues that he suffered prejudice (*see* Bloedorn's Br. at 24).[14] This Court should reject Bloedorn's undeveloped argument that he suffered prejudice. *See State v. Padley*, 2014 WI App 65, ¶ 58, 354 Wis. 2d 545, 849 N.W.2d 867 (citation omitted) (noting that this Court may reject an argument as undeveloped although the legal standard was mentioned).

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going to *recommend*. Thus, Attorney Kratz's testimony that he advised Bloedorn about his sentence recommendation is uncontested.

[14] The "conclusion" section of Bloedorn's brief spans four pages (*see* Bloedorn's Br. at 23-26), which appears to be contrary to the rule requiring "[a] short conclusion stating the precise relief sought." Wis. Stat. § (Rule) 809.19(1)(f).

Likewise, if Bloedorn develops an argument regarding prejudice in his reply brief, this Court should refuse to consider it. *See A.O. Smith Corp. v. Allstate Ins. Companies*, 222 Wis. 2d 475, 492-93, 588 N.W.2d 285 (Ct. App. 1998) (holding that this Court may consider an argument abandoned if raised for the first time in a reply brief). Because Bloedorn cannot establish prejudice, his ineffective-assistance argument must fail. *See Strickland*, 466 U.S. at 697. This Court may dispose of this appeal on this basis without reaching the issue of deficient performance. *See id.*

If this Court reaches the issue of prejudice, it should conclude that Bloedorn suffered no prejudice.

1. Assuming arguendo that Attorney Kratz performed deficiently during the plea stage, Bloedorn was not prejudiced as a result because he would have pled no contest absent any deficient performance.

In order to prove that Attorney Kratz's allegedly deficient performance during the plea stage prejudiced him, Bloedorn must show a reasonable probability that he would have insisted on going to trial absent the deficient performance. *See Hill*, 474 U.S. at 59. In other words, Bloedorn must show a reasonable probability that he would have gone to trial if Attorney Kratz had adequately advised him about evidence, defense strategy, and possible sentences and had blocked the PSI from going forward. *See id.*

The circuit court correctly concluded that Bloedorn suffered no prejudice (88:109-10; R-Ap. 109-10). As the circuit court noted, Bloedorn's plea agreement resulted in the dismissal of "two significant charges" in this case and "a forbearance to prosecute [Bloedorn] in Washington County" for sexual assault (88:109; R-Ap. 109; *see also* 80:4-6). The present case and the possible Washington County case against Bloedorn were strong because he confessed to the police in both counties (88:59-60; 80:4-6). Even Attorney Kratz stated that, absent the plea agreement, Bloedorn "would face a prosecution [in Washington County] with a[n] almost certain guilty outcome" (80:6). Another favorable provision in the plea agreement required the State to stand silent regarding a sentence recommendation (81:16; *see also* 71:15, 19; 88:47). In light of Bloedorn's confessions and the advantageous plea offer, he would have pled no contest even absent Attorney Kratz's allegedly deficient performance. Thus, Bloedorn suffered no prejudice. *See Hill*, 474 U.S. at 59.

2. Assuming arguendo that Attorney Kratz's sentence recommendation constituted deficient performance, Bloedorn was not prejudiced as a result because he would have received the same sentence absent any deficient performance.

To prove that Bloedorn suffered prejudice due to Attorney Kratz's allegedly unreasonable sentence recommendation, Bloedorn must prove that there is a

reasonable probability that he would have received a lesser sentence had Attorney Kratz made a reasonable sentence recommendation. *See Pote*, 260 Wis. 2d 426, ¶ 16; *Voss*, 205 Wis. 2d at 597-98; *Giebel*, 198 Wis. 2d at 219.

The circuit court correctly concluded that Bloedorn suffered no prejudice (88:109-11; R-Ap. 10-11). His sentence would have been the same even if Attorney Kratz made a different sentence recommendation. The circuit court explained at the *Machner* hearing that "the sentence was largely driven . . . by the seriousness of the offense" (88:109; R-Ap. 109). Indeed, at the sentencing hearing, the circuit court relied heavily on the seriousness of the offense when sentencing Bloedorn (71:35-37, 40-41, 43). The court stated that the "gravity of the offense [is] huge" and that Bloedorn's criminal conduct was "serious on every level" (71:36-37). Right before sentencing Bloedorn, the court stated that "anything . . . short of the maximum would be a serious failure to recognize what's happened here" (71:43). Given that the sentence was largely driven by the seriousness of the offense, Bloedorn did not suffer prejudice as a result of Attorney Kratz's allegedly unreasonable sentence recommendation. *See Voss*, 205 Wis. 2d at 598; *Giebel*, 198 Wis. 2d at 219.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the judgment of conviction

and the circuit court's order denying Bloedorn's postconviction motion to withdraw his no-contest plea.

Dated this 24th day of September, 2015.

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 6844 words.

_____
Scott E. Rosenow
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 24th day of September, 2015.

_____
Scott E. Rosenow
Assistant Attorney General