STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2017AP967-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GITAN MBUGUA,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JANET PROTASIEWICZ AND THE HONORABLE MICHAEL J. HANRAHAN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statute

ISSUES PRESENTED

1. Was defendant-appellant Gitan Mbugua's first attorney ineffective for erroneously advising him that he might be subject to sex offender registration if he pled guilty to the false imprisonment count?

The circuit court held that Mbugua was not prejudiced because the sentence that he received on the aggravated battery count to which he ultimately pled guilty was the same as the maximum sentence he would have faced had he pled guilty to the false imprisonment count.

This Court should affirm the circuit court's ruling.

2. Was Mbugua's second lawyer ineffective for failing to inform him that the aggravated battery count to which he pled exposed him to a greater sentence than the false imprisonment count he previously rejected?

The circuit court held that Mbugua's argument "makes little sense" because successor counsel did not represent Mbugua when Mbugua rejected the first plea offer; that the record "shows unequivocally that the [first] offer was revoked" after Mbugua rejected it; and that even if successor counsel performed deficiently Mbugua was not prejudiced because the sentence he received on the battery count did not exceed the maximum sentence that could have been imposed on the false imprisonment count under the initial plea offer.

This Court should affirm the circuit court's ruling.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication.

INTRODUCTION

Mbugua brutally beat his former girlfriend. She suffered facial fractures and multiple cuts and bruises over her entire body. By the time she was able to get to the hospital, she was in critical condition from acute kidney failure.

Mbugua was charged with first-degree recklessly endangering safety and false imprisonment, with both counts charged as acts of domestic abuse with a repeater enhancer. The State offered a plea agreement with two options, the second of which was that if Mbugua pled guilty to both counts, the State would drop the repeater allegations and the parties would be free to argue at sentencing. Mbugua, who was represented by Attorney Cheryl Ward, rejected the offer and the State withdrew it. Four months later, represented by Attorney Matt Ricci, Mbugua pled guilty to amended charges of first-degree recklessly endangering safety and aggravated battery as a repeater.

Mbugua filed a postconviction motion seeking to withdraw his plea and allow him to plead guilty to option two of the original plea offer. Mbugua alleged that both of his lawyers were ineffective: Attorney Ward because she erroneously advised him that he might be subject to sex offender registration if he were convicted of false imprisonment, leading him to reject the original plea offer; and Attorney Ricci for failing to explain that option two of the original plea offer provided for less exposure than the new offer that Mbugua accepted. The circuit court denied the motion without an evidentiary hearing.

This Court should affirm. Mbugua was not prejudiced by Attorney Ward's advice because both the aggravated battery count to which he ultimately pled guilty and the false imprisonment charge that he originally faced are Class

H felonies and the sentence he received on the aggravated battery charge, which was the maximum unenhanced sentence he could have received, was the same as the maximum sentence he would have faced had he pled guilty to the false imprisonment count without a repeater enhancer. Attorney Ricci was not ineffective for failing to explain to Mbugua that he faced less exposure under the original plea offer because the State withdrew that offer before Ricci became Mbugua's lawyer and because Mbugua's conviction and sentence under the offer he accepted were not more severe than what he faced had he accepted the original offer. Accordingly, this Court should conclude that the circuit court properly denied Mbugua's postconviction motion without an evidentiary hearing.

STATEMENT OF THE CASE

Facts. According to the criminal complaint, C.S. told police that she and Mbugua used to live together but that she recently had ended the relationship because it was "not safe to be together." (R. 1:2.)[1] On October 18, 2015, C.S. went to Mbugua's residence. (*Id.*) When she told him that the residence no longer felt like her home, he responded by grabbing her arms and pushing her into his bedroom. (*Id.*)

Mbugua pushed C.S. onto the bed and began punching her all over her body. (*Id.*) C.S. told Mbugua to "stop before you hurt me" as she covered her face, but he continued to punch her all over her body. (*Id.*) He then struck C.S. on the neck, arms, back, and legs with a cord. (*Id.*) C.S. tried to cover her face, but Mbugua moved her hands away and

[1] The State's record citations use the document numbers and pagination in the electronically filed record.

continued to strike her. (*Id.*) C.S. begged Mbugua to stop but he continued to hit her with the cord. (*Id.*)

C.S. told police that because Mbugua overpowered her she could not do anything but "let it happen." (*Id.*) She asked Mbugua to take her to the hospital but he said that he would not because he did not want to go to jail. (*Id.*)

C.S. then asked Mbugua to help her with an ice bath, so he gave her a couple of ice cubes. (*Id.*) C.S. said that she could not sleep because she was in so much pain and that the mere touch of a pillow on her skin caused her pain. (*Id.*) She tried again to sleep the next day, October 19, but Mbugua would not let her and tried to touch her. (*Id.*) C.S. told him to stop because she was in pain. (*Id.*) C.S. asked for more ice but Mbugua refused. (*Id.*)

C.S. told Mbugua that she was worried that she was not getting better. (R. 1:2–3.) Mbugua replied that he was worried that she wasn't eating, but C.S. could not eat because her lips and mouth were too sore. (R. 1:3.) C.S. also reported that she would fall asleep and wake up in excruciating pain. (*Id.*) Mbugua told C.S. that he wanted to lie next to her so that she would not leave him. (*Id.*)

The following day, October 20, Mbugua asked C.S. if she was better; she again told him that she needed to go to the hospital. (*Id.*) He responded that she needed to eat something. (*Id.*)

C.S. knew that she needed to leave and get help. (*Id.*) When Mbugua left the home the next day, October 21, she was able to get out of bed and leave. (*Id.*)

C.S. was hospitalized in critical condition. (*Id.*) She was diagnosed with potentially fatal acute renal failure,

rhabdomyolysis, a subconjunctival hemorrhage in one eye, and leukocytosis.[2] (*Id.*) C.S. sustained facial fractures, numerous lacerations to her body, and significant bruising, including bruising on the bottoms of her feet and bruising and swelling of her eyes. (*Id.*)

Charges, plea, and sentencing.[3] Mbugua was charged with first-degree recklessly endangering safety, a Class F felony, and false imprisonment, a Class H felony. (R. 1:1–2.) Both counts were charged as acts of domestic abuse with a repeater enhancer. (*Id.*)

On January 14, 2016, the circuit court held a final pretrial conference at which Mbugua appeared with Attorney Cheryl Ward. (R. 34:2.) The court asked the prosecutor to describe the final plea offer that the State had extended to Mbugua. (*Id.*) The prosecutor told the court that there were two options presented to Mbugua. (*Id.*) The first was that in exchange for pleas to both offenses as charged, the State would agree to leave the sentence within the discretion of the trial court. (R. 34:2–3.) The second offer was that if Mbugua pled guilty plea to both counts, the State would move to strike the repeater allegation from both

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[2] Rhabdomyolysis "is a serious syndrome due to a direct or indirect muscle injury" that "results from the death of muscle fibers and release of their contents into the bloodstream" which can "lead to serious complications such as renal (kidney) failure." *See* WebMD, Rhabdomyolysis, https://www.webmd.com/a-to-z-guides/rhabdomyolysis-symptoms-causes-treatments#1 (last visited Oct. 31, 2017). Leukocytosis refers to an increase in the total number of white blood cells (leukocytes). *See* Medscape, Leukocytosis, https://emedicine.medscape.com/article/956278-overview (last visited Oct. 31, 2017).

[3] The Honorable Janet Protasiewicz presided at Mbugua's plea hearing and sentencing. The Honorable Michael J. Hanrahan entered the order denying Mbugua's postconviction motion.

counts and both parties would be free to argue at sentencing. (R. 34:3.)

The State's offers were memorialized in a December 14, 2015, letter from the prosecutor to defense counsel. (R. 18:14–15.) That letter explained that the offers required Mbugua to "take full responsibility in this matter by pleading 'Guilty'" to the charges. (R. 18:14.)

The court asked Mbugua whether he wanted to accept the offer or wanted more time to talk to his lawyer about it. (R. 34:7.) Mbugua said that he did not want to accept the plea offer. (*Id.*) The court then asked the prosecution, "So those offers are revoked. Is that correct?" (*Id.*) The prosecutor answered, "Yes." (*Id.*)

The court then asked Mbugua whether he had spent enough time talking to his lawyer about the offers. (*Id.*) When Mbugua said that he had not, the court passed the case to give him time to do so. (*Id.*) When the case was recalled, Attorney Ward said that she had gone over the offers again with Mbugua and that Mbugua did not want to accept either of them. (R. 34:8.) Mbugua confirmed that he did not wish to accept the plea offer. (*Id.*)

On February 22, 2016, the circuit court granted Attorney Ward's motion to withdraw as counsel. (R. 36:2–3.)

On May 12, 2016, Mbugua, represented by Attorney Matt Ricci, entered guilty pleas to amended counts of first-degree recklessly endangering safety and aggravated battery, with the repeater enhancement applied only to the aggravated battery count. (R. 38:3–4, 9–10.) In his plea colloquy, Mbugua confirmed that he understood that on count one he faced "up to twelve-and-a-half years of incarceration or a $25,000 fine or both" and that on count

two he faced "possibly ten years of incarceration or a $10,000 fine or both." (R. 38:5–6.)[4]

During the discussion of the factual basis for the pleas, Mbugua acknowledged that he hit C.S. with his hands and with a cord. (R. 38:16–17.) But when the court asked Mbugua whether C.S. had asked him to take her to the hospital, Mbugua said that she had not. (R. 38:17.) Attorney Ricci then told the court that at Mbugua's revocation hearing, C.S. "acknowledge[d] . . . that [Mbugua] had left many times while she was at the house, and that . . . if she would have physically been able, she could have left on several occasions" and that "[s]he was left with the telephone while she was in the house [and] Mr. Mbugua was not present." (R. 38:17–18.) Counsel said that he believed that that was the reason "the State amended Count 2 from false imprisonment." (R. 38:17.)

At the sentencing hearing, the circuit court said that in its many years of experience with domestic violence and battery cases, "I don't think I have ever seen anything like this where the person actually survived. Never seen pictures like this with the kind of injuries that she sustained." (R. 39:25.) The court sentenced Mbugua on count one to the maximum sentence of seven-and-a-half years of initial confinement and five years of extended supervision. (R. 39:29.) On count two, the court sentenced him to the maximum unenhanced sentence of six years' imprisonment, consisting of three years of initial confinement and three years of extended supervision. (*Id.*) The court ordered that

[4] Of that ten years of possible imprisonment, six years was the maximum sentence for a Class H felony and four years were for the repeater enhancement. (R. 11:2.)

the sentences run consecutive to each other and to Mbugua's revocation sentence. (*Id*.)

Postconviction motion to withdraw plea. Mbugua filed a postconviction motion seeking "an order vacating his conviction and allowing him to accept option two of the State's initial pretrial offer to allow him to plea to count one, first-degree recklessly endangering safety, domestic abuse assessment, striking the repeater, and count two, false imprisonment, domestic abuse assessment, striking the repeater, with both sides free to argue at sentencing." (R. 18:1.) Mbugua argued that he should be allowed to withdraw his plea because he received ineffective assistance of counsel during the plea bargaining process from both Attorney Ward and Attorney Ricci. (R. 18:6.)

Mbugua alleged that Attorney Ward was ineffective "because she provided incorrect information that a conviction for false imprisonment could lead to the requirement that Mr. Mbugua register as a sex offender." (R. 18:7.) He further alleged that "his belief that the false imprisonment charge brought with it sex offender registration played a substantial role in his decision to refuse the initial offers of the State" and that "if Attorney Ward had not incorrectly informed him of the reporting requirement, that he would have chosen the more favorable plea option, option two of the original plea offer." (R. 18:9.)

Mbugua alleged that Attorney Ricci was ineffective because Ricci "did not explain to Mr. Mbugua that option two of the original plea offer provided for significantly less exposure than the new offer he negotiated for his client." (R. 18:10.) He also alleged that Attorney Ricci "provided incorrect information about the maximum possible exposure that Mr. Mbugua faced under the new plea agreement"

because Ricci erroneously informed him that aggravated battery was a Class I felony, which "led Mr. Mbugua to believe that he was receiving a concession from the State in the felony class level when in fact he was not." (R. 18:10–11.)

Mbugua further alleged that he was "prejudiced by Attorney Ricci's deficient performance because he received a more serious conviction than he would have had he accepted option two of the original offer." (R. 18:11.) He asserted that "there is no reason to believe that this offer had been rescinded by the State despite the representations made at the January 14, 2016 hearing" because "[t]he language of the State's note outlining the new offer mentions the already extended 'plea offer' and adjustments to it, stating, 'As far as a plea offer is concerned, I am willing to make some adjustments.'" (R. 18:11–12.)

In a written decision and order, the circuit court denied the motion without a hearing. (R. 26:1–8, A-App. 101–08.) The court said that "[e]ven assuming that Attorney Ward incorrectly advised the defendant about possible sex offender reporting with a false imprisonment conviction, the defendant has not demonstrated that he was prejudiced." (R. 26:6, A-App. 106.) First, the court noted, "the plea offer the defendant accepted did not carry a sex offender reporting requirement—something he was adamantly opposed to when discussing the initial plea offer with Attorney Ward." (*Id.*) The court observed that "[a]lthough the defendant now states that he would have entered a guilty plea to a false imprisonment charge, the defendant, through his attorney, questioned the factual basis for that charge in light of the victim's statements at the revocation hearing." (*Id.*) The court noted that Mbugua "has made no admission to facts that would have supported a conviction for false imprisonment." (*Id.*)

"But more importantly," the circuit court wrote, "even though a conviction for false imprisonment without the enhancer would have carried four years less maximum incarceration exposure than the defendant faced for the aggravated battery conviction due to the penalty enhancer, the court did not use any of the penalty enhancer time in sentencing the defendant for the battery." (*Id.*) "In other words, the sentence the court imposed for first-degree recklessly endangering safety and for aggravated battery as repeater is the maximum sentence the defendant would have faced if he had accepted 'option two' of the State's initial plea offer." (R. 26:6–7, A-App. 106–07.) "While a lesser sentence was possible," the court ruled, "the defendant cannot base his ineffective assistance of counsel claim upon speculation about the sentence he would have received." (R. 26:7, A-App. 107.) Because the sentence Mbugua "did receive for the offenses he was convicted of is exactly the maximum sentence he could have received under option two of the initial plea offer," Mbugua "has not demonstrated that he was prejudiced by Attorney's Ward's advice regarding the initial plea offer." (*Id.*)

The circuit court also rejected Mbugua's allegation that Attorney Ricci "was ineffective for negotiating a plea offer that was less favorable than the one initially offered by the State." (*Id.*) The court said that "[t]his argument makes little sense, since Attorney Ricci did not represent the defendant at the time the initial offer was made and cannot be held responsible for the defendant's decision to reject it on January 14, 2016." (*Id.*) "While the defendant states that there is no reason to believe that the initial plea offer had been rescinded following the January 14, 2016 hearing," the court wrote, "the record of the hearing shows unequivocally that the offer was revoked at that time." (*Id.*) And, the court

added, "even if Attorney Ricci could somehow be deemed deficient for failing to explain to the defendant that option two of the original offer provided for four years less maximum exposure than the new plea offer he negotiated, the defendant was not prejudiced because the sentence he received did not exceed the maximum sentence that could have been imposed under option two of the initial plea offer." (*Id.*)

The court further rejected Mbugua's claim that his plea was not knowingly and intelligently entered because Attorney Ricci erroneously advised him about the maximum penalties he faced for aggravated battery as a repeater. (*Id.*) The court held that "[t]he record of the plea hearing conclusively demonstrates that the court went over the maximum penalties for each offense with the defendant and that he understood them." (*Id.*)

STANDARD OF REVIEW

Whether a lawyer rendered ineffective assistance is a mixed question of law and fact. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The circuit court's findings of fact will be upheld unless they are clearly erroneous. *Id.* Whether the defendant's proof satisfies either the deficient performance or the prejudice prong is a question of law that an appellate court reviews without deference to the circuit court's conclusions. *Id.* at 128.

Whether a postconviction motion sufficiently alleges facts which, if true, would entitle the defendant to relief is a question of law that this Court reviews independently. *See State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). If the circuit court refuses to hold a hearing based on its findings that the record conclusively demonstrates that the

defendant is not entitled to relief, this Court's review is limited to whether the circuit court erroneously exercised its discretion. *See id.* at 318.

ARGUMENT

I. Legal standards governing motions for plea withdrawal based on alleged ineffective assistance of counsel.

A defendant is entitled to withdraw a guilty plea after sentencing only if he establishes, by clear and convincing evidence, a "manifest injustice." *Bentley*, 201 Wis. 2d at 311. The manifest injustice test is satisfied by a showing that the defendant received ineffective assistance of counsel. *See id.*

A defendant claiming ineffective assistance of counsel must prove both that his lawyer's representation was deficient and that he suffered prejudice as a result of that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." *Id.* at 690. To demonstrate prejudice, the defendant must affirmatively prove that the alleged defect in counsel's performance actually had an adverse effect on the defense. *Id*. at 693.

If a court concludes that the defendant has not proven one prong of this test, it need not address the other. *Id.* at 697. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id*.

II. Mbugua was not prejudiced by Attorney Ward's alleged advice that he might be subject to sex offender registration if he pled guilty to false imprisonment.

Mbugua contends that he received ineffective assistance from Attorney Ward regarding the State's initial plea offers because she "inaccurately advised him that a conviction for false imprisonment exposed him to sex offender registration." (Mbugua's Br. 12.) As the circuit court did, the State assumes that Ward performed deficiently in that respect. But, as the circuit court correctly determined, Mbugua was not prejudiced by that alleged inaccurate advice.[5]

"To establish *Strickland* 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.'" *Lafler v. Cooper*, 566 U.S. 156, 163 (2012) (quoting *Strickland*, 466 U.S. at 694). "In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice." *Id*. When "the ineffective advice led not to an offer's acceptance but to its rejection," the showing of prejudice requires "a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that

[5] The State agrees with Mbugua that, under the facts of this case, he would not have been subject to sex offender registration. (*See* Mbugua's brief 14.) And because the circuit court denied the postconviction motion without a hearing, the State assumes for the purposes of this brief that Attorney Ward inaccurately advised Mbugua that a conviction for false imprisonment exposed him to potential sex offender registration.

the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Id*. at 163–64.

The allegations of Mbugua's postconviction motion fall short of demonstrating prejudice under that standard. There are three reasons for that.

First, to establish prejudice, Mbugua must show that but for counsel's erroneous advice, he would have accepted the plea. *Id*. at 164. Mbugua's postconviction motion alleged that he did not accept the original plea offer because he was "adamantly opposed to any plea that would expose him to the possibility of being on the sex offender registry." (R. 18:3.) But the motion did not adequately explain why he would have accepted that offer had he known that the false imprisonment charge did not expose him to that possibility.

To be entitled to a hearing on a motion to withdraw a plea, "the facts supporting plea withdrawal must be alleged in the petition and the defendant cannot rely on conclusory allegations, hoping to supplement them at a hearing." *Bentley*, 201 Wis. 2d at 313. "A defendant must do more than merely allege that he would have pled differently; such an allegation must be supported by objective factual assertions." *Id*.

The following two sentences are the entirety of the allegations in Mbugua's postconviction motion regarding why he would have accepted the original plea offer had he not been misinformed about the potential for sex offender registration.

> Mr. Mbugua will testify that if Attorney Ward had not incorrectly informed him of the reporting requirement, that he would have chosen the more favorable plea option, option two of the original plea offer. This is facially logical as he ultimately choose to enter a plea and did not take the case to trial once the charge of false imprisonment was amended to a new charge that was also a Class H felony.

(R. 18:9.)

The first sentence is insufficient because it is simply a conclusory allegation that Mbugua would have pled differently. *See Bentley*, 201 Wis. 2d at 313. The second sentence does include an objective fact—that Mbugua ultimately pled to a different Class H felony. But that fact does not explain why he would have been willing to plead guilty to false imprisonment four months earlier had he known that it did not carry the possibility of sex offender registration. Mbugua asserts that it is "facially logical" that he would have pled guilty to the Class H felony of false imprisonment in January 2016 because he later pled guilty to the Class H felony of aggravated battery in May 2016. But that is an argument, not an objective factual allegation.

Second, to establish prejudice, a defendant also must show "that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Lafler*, 566 U.S. at 164. Mbugua has not shown that either his conviction or sentence would have been less severe had he accepted the original offer.

Mbugua "acknowledges it is unknown whether the trial court would have imposed a less severe sentence had he accepted the original plea offer." (Mbugua's Br. 20.) But, he argues, "his conviction and maximum exposure was indisputably more severe under the plea deal he accepted." (*Id.*) That is so, he contends, because "[w]hile both the false

imprisonment and aggravated battery charges were Class H felonies, under the plea offer, Mr. Mbugua entered a plea to the aggravated battery Class H felony with a repeater enhancer, which added four additional years of confinement exposure, while the original plea offer would have dismissed the repeater enhancer." (*Id*. at 20–21.) For that reason, he argues, the "terms of the conviction" were less severe under the original offer. (*Id*. at 23.)

That argument reflects a misunderstanding of the nature of a repeater enhancer under Wisconsin law. "Wisconsin courts do not view repeater status, under § 939.62, as part of the underlying crime for which the defendant was convicted." *State v. Bush*, 185 Wis. 2d 716, 725, 519 N.W.2d 645 (Ct. App. 1994). "[B]eing a repeater is not a crime—it is a status." *State v. Harris*, 119 Wis. 2d 612, 618, 350 N.W.2d 633 (1984).

That status "may enhance the punishment for the crime of which the person is convicted—the substantive offense." *Id*. "A charge of repeater, if proved, 'only renders the defendant eligible for an increase in penalty for the crime of which he is convicted.'" *Id*. (citation omitted). "Thus, . . . sec. 939.62 is applicable to a sentence if an increase in the penalty prescribed by law for the crime of which the defendant is convicted is determined to be warranted by the trial court." *Id*.

"A sentence imposed which is within the term authorized by law for the prescribed crime does not invoke the repeater statute." *Id*. at 619. "Sec. 939.62(1), Stats., is invoked when the maximum term of imprisonment prescribed by law, in the trial court's discretion, is not sufficient and needs be enhanced." *Id*. Accordingly, "[t]he repeater statute, sec. 939.62, Stats., is not applicable to the sentence of a defendant unless the trial court seeks to

impose a sentence in excess of that prescribed by law for the crime for which the defendant is convicted." *Id.* "Only when greater than the maximum sentence prescribed by law is imposed upon the defendant can the repeater statute be applicable, and only then is the issue of whether the defendant is a 'repeater,' as defined by sec. 939.62(2), relevant." *Id.* at 620; *see also State v. Kourtidias*, 206 Wis. 2d 574, 590, 557 N.W.2d 858 (Ct. App. 1996) ("When a sentence is within the term prescribed by the statute for the substantive crime, the repeater statute is not invoked.").

In this case, both the aggravated battery count to which Mbugua pled guilty and the false imprisonment count to which he did not enter a plea are Class H felonies with a maximum sentence of six years' imprisonment and a $10,000 fine. (R. 3:1–2; 11:1–2.) When the court sentenced Mbugua on the aggravated battery count, it imposed the maximum unenhanced sentence of six years' imprisonment. (R. 39:29.)

Because Mbugua's sentence was within the maximum six-year term prescribed for aggravated battery, the repeater statute was not part of his conviction. *See Harris*, 119 Wis. 2d at 620. Accordingly, Mbugua cannot show "that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Lafler*, 566 U.S. at 164.

Third, to establish prejudice, a defendant also must show "that the court would have accepted [the plea agreement's] terms." *Lafler*, 566 U.S. at 164. On that point, the postconviction motion alleged only that "[t]here is no reason to believe the court would not have accepted the offer." (R. 18:6.) An allegation that there is no reason to believe the court would not have accepted the plea does not satisfy Mbugua's burden of showing that the court would have accepted it.

More importantly, the record provides a reason why the court may not have accepted Mbugua's plea to false imprisonment. A trial court accepting a guilty or no contest plea must satisfy itself that "the defendant in fact committed the crime charged." Wis. Stat. § 971.08(1)(b); *see State v. Tourville*, 2016 WI 17, ¶ 40, 367 Wis. 2d 285, 876 N.W.2d 735. "A sufficient factual basis for the guilty plea requires a showing that 'the conduct which the defendant admits constitutes the offense charged.'" *Tourville*, 367 Wis. 2d 285, ¶ 40 (citation omitted).

As the circuit court noted in its order denying the postconviction motion, "[a]lthough the defendant now states that he would have entered a guilty plea to a false imprisonment charge, the defendant, through his attorney, questioned [at the plea hearing] the factual basis for that charge in light of the victim's statements at the revocation hearing." (R. 26:6, A-App. 106.) At the plea hearing, after Mbugua denied that C.S. had asked him to take her to the hospital, his lawyer told the court that at Mbugua's revocation hearing, C.S. "acknowledge[d] . . . that [Mbugua] had left many times while she was at the house, and that . . . if she would have physically been able, she could have left on several occasions"; that "[s]he was left with the telephone while she was in the house [and] Mr. Mbugua was not present"; and that "she didn't choose to take advantage of obvious opportunities to leave." (R. 38:17–18; 39:19.) Counsel said that he believed that was the reason that "the State amended Count 2 from false imprisonment." (R. 38:17.)

The circuit court also noted in its postconviction decision that Mbugua "has made no admission to facts that would have supported a conviction for false imprisonment." (R. 26:6.) Mbugua does not argue otherwise in his appellate brief. Because Mbugua has not admitted to conduct that

would provide a factual basis for a conviction for false imprisonment, he has not shown that the circuit court would have accepted a plea to that charge.

In his circuit court reply brief, Mbugua argued that his unwillingness to admit to the factual basis of the false imprisonment charge was "not dispositive, as Mr. Mbugua could have entered either a 'no contest' or 'Alford guilty plea' to the charge without admitting to the underlying factual basis." (R. 25:4.) But the State's plea offer required that Mbugua "take full responsibility in this matter by pleading 'Guilty.'" (R. 18:14.) A no-contest or *Alford* plea was not an option under the State's plea offer.[6] Moreover, there no basis in the record to believe that the circuit court would have accepted an *Alford* plea.

To establish prejudice based on Attorney Ward's alleged advice that the false imprisonment charge carried a possible sex offender registration requirement, Mbugua must show that "but for the ineffective advice of counsel there is a reasonable probability . . . that [he] would have accepted the plea . . ., that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Lafler*, 566 U.S. at 163–64. Because Mbugua has not made an adequate showing on any of those requirements, he has failed to carry his burden of demonstrating that he was

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[6] An *Alford* plea is a conditional guilty plea in which the defendant maintains his or her innocence of the charge while at the same time pleading guilty or no contest to it. *See North Carolina v. Alford*, 400 U.S. 25, 37 (1970). A defendant has no constitutional right to have a court accept an *Alford* plea. *See id.* at 39 n.12.

prejudiced by counsel's alleged deficient performance. He is not entitled, therefore, to an evidentiary hearing on his claim that Attorney Ward was ineffective.

III. Mbugua's second attorney was not ineffective with respect to the plea agreement that Mbugua ultimately accepted.

Mbugua argues that his second attorney, Matt Ricci, performed deficiently because "he did not explain that option two of the original plea offer provided for significantly less exposure than the new offer he negotiated for his client." (Mbugua's Br. 15.) He alleges that he was prejudiced because he "would have been permitted to enter a plea under option two of the original plea agreement" (*id*. at 17) and the circuit court "could well have determined sentence differently had it been presented with a different offense (false imprisonment) rather than the aggravated battery as a repeater to which Mr. Mbugua pled and which carried greater exposure" (*id*. at 24). This Court should reject that claim because Mbugua has not shown that the original plea offer was still available when he entered his guilty plea and because he was not prejudiced by accepting the new plea offer.[7]

[7] In his motion for postconviction relief, Mbugua also alleged that Attorney Ricci was ineffective because Ricci erroneously informed him that aggravated battery was a Class I felony, which "led Mr. Mbugua to believe that he was receiving a concession from the State in the felony class level when in fact he was not" (R. 18:10–11). He does not mention that claim in his brief to this Court. (*See* Mbugua's Br. 1–2, 8–25.) He has, therefore, abandoned the claim. *See A.O. Smith Corp. v. Allstate Ins. Co.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) ("an issue raised in the trial court, but not raised on appeal, is deemed abandoned").

A. Mbugua has not alleged sufficient facts to warrant a hearing on his allegation that the original plea offer was still available.

Mbugua's allegation that he received ineffective assistance from Attorney Ricci is predicated on his assertion that the plea offer that he rejected in January 2016 was still on the table when he pled guilty pursuant to a different offer in May 2016. (*See* Mbugua's Br. 18–20.) The circuit court rejected that assertion because the record "shows unequivocally that the offer was revoked at that time." (R. 26:7, A-App. 107.) The circuit court was correct.

Mbugua's argument to the contrary rests in part on "his written assertion in the [postconviction] motion." (Mbugua's Br. 19.) Mbugua does not provide a pinpoint cite for that assertion—he cites to the entire motion—but the State assumes he is referring to his assertion in the motion that "there is no reason to believe that this offer had been rescinded by the State despite the representations made at the January 14, 2016 hearing." (R. 18:11.) But the prosecutor could not have been more clear at that hearing that the offer was revoked.

> THE COURT: All right. Do you want to accept the offer or do you want more time to talk to your lawyer about it before you formally reject it?
>
> THE DEFENDANT: I do not want to accept the plea offer.
>
> THE COURT: You do not want to accept the offers?
>
> THE DEFENDANT: No.
>
> THE COURT: All right. So those offers are revoked. Is that correct?

[THE PROSECUTOR]: Yes.

(R:34:7.) The court then gave Mbugua additional time to confer with his lawyer, after which Mbugua confirmed he did not want to accept the offer. (R. 34:8.)

The other basis for Mbugua's contention that the original offer remained available after the January 14 hearing is an undated note "apparently from the district attorney's office" in Attorney Ricci's file that discussed a new plea offer. (R. 18:4.) That note states:

> As far as a plea offer is concerned, I am willing to make some adjustments. In exchange for a plea to 1st Degree RES § 941.30(1) and Aggravated Battery § 940.19(4), 1 would strike the habitual repeater only on the 1st Degree RES charge (leaving the habitual repeater with the Aggravated Battery charge). Both parties would be free to argue with respect to sentencing.
>
> I also want to confirm that you received all discovery materials from prior counsel. This would include my offer letter that outlines the additional charges I would intend to try should this matter proceed on that route. Not only am I working through my file and will notify you should I locate additional materials to turn over, but I will also have an amended information ready to be filed on Thursday.

(R. 18:16.)

Mbugua argues that this note demonstrates that the original offer was still available. That is so, he contends, because the first sentence says, "As far as a plea offer is concerned, I am willing to make some adjustments." (Mbugua's Br. 19.) "If one is willing to make 'adjustments,'" he argues, "it stands for the proposition that there is something that is already in existence." (*Id.*) "If there was no

other offer that was being referenced by the State, that line would make no sense." (*Id*.)

The State agrees that the note appears to be an offer to "make some adjustments" to the original plea offer that the State withdrew after Mbugua rejected it. But a reference to the withdrawn offer does not mean that the withdrawn offer remained available to Mbugua. There is nothing in that note that suggests that the State had rescinded its withdrawal of the original offer.

Mbugua argues that it is "[n]otabl[e]" that "the State never asserted in its response to the postconviction motion that the plea offer had not been reinstated, nor did the State assert that it would not have accepted a plea under the terms of the original agreement." (Mbugua's Br. 19.) "Instead," he argues, "the State argued simply that Mr. Mbugua had '"not established that either of those options were (sic) still viable after they had been affirmatively revoked."' (*Id*.)

That argument places the burden on the wrong party. It was Mbugua's burden to allege sufficient objective facts in his postconviction motion to warrant an evidentiary hearing. *See Bentley*, 201 Wis. 2d at 313. Because he has not alleged sufficient facts to establish that the withdrawn plea offer still was an available option when Mbugua pled guilty to the new offer, his claim that Attorney Ricci was ineffective for not explaining that option two of the original plea offer provided less exposure than the offer Mbugua accepted is without merit.

B. Mbugua was not prejudiced because he offers nothing but speculation that he would have received a lesser sentence on count two had he pled guilty to false imprisonment rather than substantial battery.

As previously noted, Mbugua "acknowledges it is unknown whether the trial court would have imposed a less severe sentence had he accepted the original plea offer." (Mbugua's Br. 20.) But, he argues, the "terms of the conviction" were less severe under the original offer. (*Id*. at 23.) The State has explained why that is not correct. *See supra*, pp. 15–17.

Notwithstanding his concession that "it is unknown whether the trial court would have imposed a less severe sentence had he accepted the original plea offer" (Mbugua's Br. 20), Mbugua argues that "[t]he differences in the actual conviction charge very well could have changed the sentencing court's assessment of appropriate sentence" (Mbugua's Br. 24). That is so, he contends, because by pleading guilty to the battery charge, he admitted "to not only acting recklessly and exposing C.S.S. to great bodily harm, but also intentionally inflicting great bodily harm." (*Id*.)

There are two problems with that argument. First, Mbugua's assertion that the differences in the charges "very well could have" changed the sentence does not satisfy the *Strickland* prejudice standard. Under *Strickland*, "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

Second, Mbugua's suggestion—that absent his admission to having intentionally inflicted great bodily harm, the circuit court would have sentenced him only based

on his admission that he acted recklessly—ignores the facts of this case. In its sentencing remarks, the court said that in its many years of experience with domestic violence and battery cases, "I don't think I have ever seen anything like this where the person actually survived. Never seen pictures like this with the kind of injuries that she sustained." (R. 39:25.) C.S., the court said, "was only hours from death but for the fact that she was able to get medical treatment." (*Id*.) The court observed that C.S. was "covered head-to-toe in the most serious lacerations," that Mbugua struck her "over and over with that cord," that she suffered bruising on the bottoms of her feet, swelling of her eyes, facial fractures, and "[o]ver 100 linear cuts and abrasions," and that she was "[p]unched, hit, [and] whipped on a continual basis." (R. 39:26–27.) There is no reasonable way the court could have construed Mbugua's conduct as anything other than the intentional infliction of great bodily harm.

Mbugua also contends that the fact that the substantial battery charge exposed him to the repeater enhancement "would . . . have influenced sentencing." (Mbugua's Br. 24.) That is sheer speculation. "A showing of prejudice requires more than speculation." *State v. Wirts*, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993).

Moreover, there is no arguable basis in the record on which to base that speculation. The circuit court noted at the outset of the sentencing hearing that "[t]he habitual criminality repeater enhancer was dismissed as to count one, otherwise he pled guilty to the two counts in that amended information." (R. 39:4.) But that was the only mention of the repeater enhancement at the sentencing hearing. (R. 39:3–31.) The court never mentioned the repeater enhancement during its sentencing remarks. (R. 39:24–31.)

Mbugua's postconviction motion did not allege sufficient facts to demonstrate that Attorney Ricci performed deficiently or that Mbugua was prejudiced by Ricci's representation. The circuit court properly exercised its discretion when it denied Mbugua's postconviction motion without an evidentiary hearing.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of conviction and the order denying postconviction relief.

Dated this 17th day of November, 2017.

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 6,929 words.

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Dated this 17th day of November, 2017.

_____
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