STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2017AP1584-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TERRELL ANTWAIN KELLY,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION,
THE HONORABLE DANIEL L. KONKOL, PRESIDING,
AND AN ORDER DENYING POSTCONVICTION RELIEF,
THE HONORABLE M. JOSEPH DONALD, PRESIDING,
BOTH ENTERED IN THE
MILWAUKEE COUNTY CIRCUIT COURT

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Wisconsin Attorney General

SARAH L. BURGUNDY
Assistant Attorney General
State Bar #1071646

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-8118
(608) 266-9594 (Fax)
burgundysl@doj.state.wi.us

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ISSUES PRESENTED

I. Did Terrell Antwain Kelly's attorneys provide ineffective assistance of counsel in either of the two following ways:

A. Was Kelly's first attorney ineffective when he advised Kelly to accept one of the two alternative plea offers from the State, based on counsel's strategic decision that that alternative would give Kelly his best shot at a lower sentence than what the State was recommending?

B. Did Kelly's second attorney, whom Kelly hired after he entered his plea, provide ineffective assistance when he did not seek pre-sentencing plea withdrawal, given that there was no basis for such a motion and Kelly did not ask counsel to seek it?

The circuit court concluded that neither counsel was ineffective.

This Court should affirm.

II. At sentencing, the court was aware that Kelly has a learning disability. Is the fact that Kelly actually has an intellectual disability a new factor justifying sentence modification?

The circuit court held that Kelly's intellectual disability was not a new factor.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither. The parties' briefs should adequately present the facts and law precluding the need for oral argument. Moreover, publication is not warranted because the issues presented can be resolved by applying established law.

Kelly opines that publication may be justified based on how *Lafler v. Cooper*, 566 U.S. 156 (2012), applies to the facts of this case. (Kelly's Br. 1–2.) But because Kelly's counsel was not deficient with respect to his plea-offer advice, this Court will likely not need to address *Lafler* in a significant manner.

INTRODUCTION

This appeal arises from Kelly's conviction for second-degree sexual assault of a child, to which Kelly pleaded guilty. The offense is based on Kelly's relationship with "Laura," whom he had impregnated when he was 25 or 26 and she was 14 years old. In the criminal complaint in this case (the sexual assault case), the State also documented 17 reports of domestic violence Kelly committed against Laura between 2007 and 2013, some of which were the basis for charges in a separate Milwaukee County case (the domestic violence case).

Ultimately, the State made a plea offer to Kelly with two options: (1) he could plead guilty to counts of strangulation and suffocation and recklessly endangering safety in the domestic violence case, and have the other counts in that case and the sexual assault case dismissed and read in, or (2) he could plead guilty to second-degree sexual assault in this case, and have the domestic violence case and its charges dismissed and read in. Regardless which option Kelly chose, the State agreed to recommend five to eight years of initial confinement.

On his counsel's advice, Kelly chose the second option. After the court accepted his plea, Kelly then fired his attorney and hired a new one to handle his sentencing. At sentencing, the State discussed the facts underlying the sexual assault charge as well as the read-in charges and reports of Kelly's ongoing domestic violence against Laura. The parties also made the court aware that Kelly had a

learning disability for which he received Social Security disability benefits. The court considered the sentencing factors and sentenced Kelly to ten years' initial confinement and eight years' extended supervision.

In a postconviction motion, Kelly raised two ineffective assistance claims: (1) he challenged his first attorney for advising him to plead to the sex assault charge instead of the domestic violence charges, and (2) he faulted his second attorney for not filing a pre-sentencing motion for plea withdrawal. In the alternative, Kelly sought new-factor sentence modification based on his having an intellectual—not just a learning—disability.

The circuit court denied the motion after a hearing. This Court should affirm. As for the first ineffective assistance claim, counsel based his advice to Kelly on a strategic decision that, as the court correctly determined, was reasonable under the circumstances. As for the second claim, counsel had no basis to seek plea withdrawal and Kelly never asked him to seek that relief. Finally, Kelly's intellectual disability is not a new factor entitling him to sentence modification.

STATEMENT OF THE CASE

I. The State offered for Kelly to plead either to domestic violence charges or to one count of second-degree sexual assault of a child.

Kelly appeals from his conviction in Milwaukee County case number 14CF1063 (the sexual assault case), in which he pleaded guilty to one count of second-degree sexual assault of a child under 16 years of age. (R. 39:1.) According to the criminal complaint, the count was based on Kelly's having sexual intercourse in 2006 with Laura when she was 14 years old and Kelly was 25 or 26 years old. (R. 1:1.) Kelly

impregnated Laura, who had Kelly's child in December 2006. (R. 1:3.) Laura went on to bear a second child by Kelly in 2008 and a third in 2012 or 2013. (R. 1:2–3.)

The Milwaukee Police Department began investigating this case in August 2006. (R. 1:1.) Soon after that time, in February 2007, the Milwaukee Police Department also began investigating calls of alleged domestic violence and battery by Kelly against Laura. (R. 1:1.) In addition to the February 2007 report, the criminal complaint listed 16 reports Milwaukee police had received alleging Kelly's acts of domestic violence against Laura between June 2008 and November 2013. (R. 1:2–3.) Those acts included Kelly's hitting, striking, slapping, and punching Laura in the head and face, and his choking her, grabbing her neck, and strangling her. (R. 1:2–3.) Specifically, in November 2013, Kelly strangled Laura with a belt, causing her to urinate herself. (R. 1:3.) That report and others resulted in the State's charging Kelly with (1) disorderly conduct, domestic abuse; (2) two counts of strangulation and suffocation, domestic abuse; and (3) second-degree recklessly endangering safety in Milwaukee County case number 2014CF1237 (the domestic violence case). (R. 26:9–12.)[1]

To resolve the charges in both the domestic violence case and the sexual assault case, the State made a plea offer with two options. First, Kelly could plead guilty in the domestic violence case to one count each of strangulation and suffocation and second-degree recklessly endangering

[1] According to the complaint, the State originally charged Kelly in Milwaukee County case number 2013CF5072, which was eventually dismissed without prejudice. *See* Wisconsin Court System Circuit Court Access, *State v. Terrell Antwain Kelly*, Milwaukee County Case No. 2013CF5072. The State refiled the charges in Milwaukee County case number 2014CF1237.

safety, and the State would dismiss and read-in the other counts and the sexual assault case. (R. 72:1.) Taken together, pleas to those charges would have exposed Kelly to 16 years' incarceration, including eight years of initial confinement and eight years of extended supervision, and up to $35,000 in fines. (R. 26:9–10.)[2]

Second, and alternatively, Kelly could plead guilty in the sexual assault case to its one count of second-degree sexual assault of a child, and the State would dismiss and read in the two charges from the domestic violence case. (R. 72:1.) Pleading to that count would expose Kelly to 40 years' incarceration, including up to 25 years' initial confinement and 15 years' extended supervision, and fines up to $100,000. (R. 1.)

In either case, the State agreed to recommend five to eight years' initial confinement. (R. 72:1.) The State also noted that "at sentencing, the State will accurately recite information pertaining to the offense, its impact on victims and the community, and [Kelly's] criminal history and contacts." (R. 72:1.)

II. Kelly chose the second option and pleaded guilty in the sexual assault case.

Kelly and his then-counsel, Scott Anderson, completed a Plea Questionnaire and Waiver of Rights Form, in which Kelly agreed that he reviewed the criminal complaint and elements that the State needed to prove; that he understood that by pleading, he was exposed to 40 years' incarceration (including 25 years' initial confinement and 15 years'

[2] Strangulation and suffocation is a Class H felony with penalties of up to six years' imprisonment and $10,000 in fines; second-degree recklessly endangering safety is a Class G felony with penalties of up to ten years' imprisonment and $25,000 in fines.

extended supervision); that he was subject to sex offender registration; and that he understood that if convicted "of a serious child sex offense" he could not work or volunteer in positions in which he would interact with children under age 16. (R. 21:1–2.)

At the start of the plea hearing on July 16, 2014, the court[3] asked for an explanation why the State was dropping the many domestic violence counts. (R. 93:4–5.) The State explained that Laura had disappeared and was avoiding the State's efforts to find her and obtain her necessary testimony for the domestic violence counts. (R. 93:5.) Accordingly, it was proceeding on the sexual assault count because it could prove that crime without Laura's participation. (R. 93:5.)

After Kelly pleaded guilty to second-degree sexual assault, he stated that he understood it was a Class C felony and that it carried a maximum 40-year sentence, including up to 25 years' confinement and 15 years' extended supervision, and a $100,000 fine. (R. 93:7–9.) The court explained the consequences of Kelly's plea, including, as is relevant to this appeal, his requirement that he register as a sex offender:

> Q: Do you understand that because of this conviction, the second-degree sexual assault, which is a felony, you will be required, I have no discretion, you will be required to register as a sex offender for life? If you live to be 102, you will still be registering as a sex offender with the State of Wisconsin; do you understand?
>
> A: Yes, sir.

(R. 93:9.)

[3] The Honorable David Borowski presided over the plea hearing.

The court also ensured that Kelly understood that his conviction barred him from working or volunteering under circumstances where he would have contact with kids under age 16:

> Q: Do you understand that because this matter is a serious child sex offense, you will not be allowed to engage in any occupation or work or volunteer in a position that requires you to work or interact primarily with children under the age of 16; do you understand?
>
> A: Yes, sir.

(R. 93:10.)

The court also ensured that Kelly understood that it had discretion in sentencing him and did not have to follow the parties' recommendations. (R. 93:11.) It reiterated that it could sentence Kelly up to the maximum of 25 years' initial confinement and 15 years' extended supervision; when asked if he understood that, Kelly said, "Yes, sir." (R. 93:11–12.) The court went on: "I have no obligation, whatsoever, to follow the State's recommendation or your attorneys or yours, sentencing is my decision," and Kelly responded that he understood. (R. 93:11–12.)

Kelly further told the court, when asked, that he reviewed the plea form and elements of the crime with his attorney. (R. 93:12.) Attorney Anderson told the court that he believed Kelly's plea was knowing, intelligent, and voluntary. (R. 93:13.) The court accepted Kelly's guilty plea, and scheduled sentencing for one week later. (R. 93:14–15.)

III. At sentencing, the court sentenced Kelly to ten years' initial confinement and eight years' extended supervision.

At that sentencing hearing, Attorney Anderson, who was still representing Kelly, sought an adjournment because of delays in his receiving some files. (R. 94:4.) Anderson also

requested a PSI. (R. 94:4.) The court ordered the PSI and rescheduled the sentencing for October 3, 2014. (R. 94:4–5.)

At the October 3, 2014, sentencing hearing, the court[4] granted Kelly's request that Attorney Anderson would be substituted by Attorney James Toran, who was prepared to proceed. (R. 95:2–3.) The court heard statements from Laura, her mother, and Kelly's mother, and considered the PSI, the State's arguments and supporting documents, Kelly's statement, and Attorney Toran's arguments. (R. 95:9–42.)

The PSI writer recommended a sentence of ten to 15 years' initial confinement and seven to eight years' extended supervision. (R. 26:32.) The agent based that recommendation on the seriousness of the crime, given that it was the first step in Kelly's long-term victimization of Laura. (R. 26:31–32.) The agent expressed concerns that Kelly did not "appear to take any responsibility for his actions in this offense" and that Kelly chose to continue the illegal relationship with Laura despite learning her true age. (R. 26:31.)

In the PSI, the agent also noted that Kelly reported that he had been diagnosed with a learning disability as an elementary school student. (R. 26:23.) Kelly also told the agent that he had been receiving Social Security benefits for his learning disability, and that before his arrest, he had been approved to continue receiving them. (R. 26:23.) The agent also explained that while she "sensed that Mr. Kelly may have some cognitive difficulties" based on his learning disability, Kelly "knew right from wrong." (R. 26:31.)

The State, consistent with the plea agreement, asked the court to sentence Kelly to five to eight years of

[4] The Honorable Daniel Konkol presided over sentencing.

confinement and for ten years of extended supervision. (R. 95:23, 27–28, 39.) The State argued that the crime involved Kelly, an adult, plunging a 14-year-old girl into an adult relationship by getting her pregnant, and that it was aggravated by the full-blown domestic violence that Kelly perpetrated time and again. (R. 95:7.) The State described the numerous reports of Kelly's violence, including the many times the couple's children witnessed Kelly assaulting Laura. (R. 95:15–21.) The State also summarized and submitted a report from a child protection agency that all three of Laura's and Kelly's children—who were seven years old, five years old, and 15 months old—had serious behavior and developmental issues consistent with witnessing violence. (R. 95:23–25.)

Attorney Toran asked the court to consider giving Kelly five years of probation, including one year of conditional jail time in the House of Corrections, with a stayed sentence of three-and-one-half years of initial confinement. (R. 95:35.) Toran noted that in other cases he had handled involving an older man getting sexually involved and developing a relationship with a girl under sixteen, the defendants had been sentenced to probation with six months to one year of conditional jail time. (R. 95:28–29.) He noted that the circumstances of the sexual assault were not aggravated, given that Laura's mother supported the relationship; that, according to Kelly, Laura had lied about her age and Kelly did not learn that she was a minor until after she was pregnant; and that Kelly accepted responsibility not only by staying involved with the children but also by pleading guilty. (R. 95:29–30.)

Attorney Toran noted that the history of violence in the read-in charges and other reports was an aggravating factor, but explained that the violence in the relationship went both ways with Laura inciting it at times. (R. 95:30.) Counsel also emphasized that the sexual assault for which

the court was sentencing Kelly occurred eight years earlier, and the only reason that the State was pursuing the charge was because it could not secure Laura's cooperation in prosecuting the domestic violence case. (R. 95:35.) Hence, Attorney Toran argued, given the time that had passed and the circumstances, any punishment component of the sentence was unlikely to serve its purpose. (R. 95:35.) Instead, Attorney Toran urged the court to focus on Kelly's taking responsibility for the crime and any rehabilitative component of the sentence. (R. 95:35–36.) Attorney Toran further emphasized that Kelly was trying to support his family through mechanic work and that he "was on disability because he's learning disabled. He was receiving benefits for that." (R. 95:32.)

The court ultimately opined that the PSI writer's recommendation was the most appropriate range under the circumstances; accordingly, it sentenced Kelly to ten years' initial confinement and eight years' extended supervision. (R. 95:59.) In reaching those numbers, the court considered the required factors. As for the seriousness of the crime, the court noted that second-degree child sexual assault was among the most serious felonies, and that this crime was aggravated in two ways: first, because Kelly impregnated a child who went on to have to raise a child, and second, because it spurred what appeared to be Laura's emotional dependence on Kelly and a long-term violent relationship. (R. 95:48–52.) As for Kelly's character, the court reviewed his past drug convictions, and noted positively that Kelly ended that behavior in 2010, yet on the flip side, Kelly was instead engaging in physical violence against Laura. (R. 95:53–54.) The court also noted Kelly's need for therapy. It credited Kelly for accepting some responsibility by pleading guilty, but noted that Kelly nevertheless maintained that Laura had lied about her age when they first met. (R. 95:55.)

Ultimately, the court noted that the need to protect the public, and specifically, the couple's kids, was paramount. (R. 95:56.) In its view, probation would have unduly depreciated the seriousness of Kelly's offense, and correctional treatment was necessary to address Kelly's rehabilitative needs. (R. 95:55–56.)

IV. Kelly sought postconviction relief, alleging ineffective assistance of counsel and seeking new-factor sentence modification.

Through his postconviction counsel, Kelly raised three grounds that are relevant to this appeal. *First*, he claimed that Attorney Anderson was ineffective for advising Kelly to plead to second-degree sexual assault of a child, rather than the two charges in the domestic violence case, because that conviction exposed him to significantly more time and required him to register as a sex offender for life. (R. 59:5–9.) *Second,* he claimed that Attorney Toran provided ineffective assistance when he failed to advise Kelly that he could withdraw his plea before sentencing for any fair and just reason. (R. 59:9–10.) *Third*, he claimed that he was entitled to new-factor sentence modification because he suffered from an intellectual disability, not just a learning disability, which was unknown to the court and unknowingly overlooked by the parties at the time of sentencing. (R. 59:11–13).

The postconviction court[5] held a *Machner* hearing, at which Kelly and Attorneys Anderson and Toran testified. Details of their testimony will appear in the argument section of this brief. But generally, Attorney Anderson testified that he discussed the plea offer with Kelly and recommended that he plead to the second-degree sexual

[5] The Honorable M. Joseph Donald presided over the postconviction proceedings.

assault charge. (R. 96:7–9.) Attorney Anderson explained that Kelly's pleading to that charge—rather than the domestic violence charges—would put Kelly in a better position to argue for a lesser sentence. (R. 96:9, 19–21.) That was so because the circumstances of the sex act were less serious than the charged and uncharged domestic violence acts, given Kelly's assertion that Laura had lied about her age, the initial investigation occurred eight years ago, Laura's mother supported the relationship, the sexual contact was not violent, and it turned into a consensual long-term relationship. (R. 96:21.)

Attorney Toran testified that he came on to represent Kelly after the plea and understood that his focus was on the sentencing. (R. 98:50–51.) Attorney Toran generally had difficulty recalling the specifics of his representation of Kelly. That said, he remembered that Kelly was not happy about his plea, but that Kelly also did not ask Toran about withdrawing his plea "at all." (R. 98:53.) Toran said that if Kelly had asked him to withdraw the plea and there was a legal basis to do it, he would have filed a pre-sentence motion. (R. 98:52.) Toran agreed that a client's dissatisfaction with a plea, without more, was not a sufficient legal basis for pre-sentence plea withdrawal. (R. 98:58.)

Kelly testified that he told both Anderson and Toran that he wanted to withdraw his plea. (R. 98:10–11.) He claimed that Anderson did not respond to his request so he hired Toran. (R. 98:10.) Kelly said that Toran told him it was "too late" to withdraw his plea. (R. 98:11.) Kelly denied being made aware of the maximums he faced with the plea options. (R. 98:6–9.) He claimed that he did not read the maximum penalties despite reviewing the criminal complaints. (R. 98:11–12.) He acknowledged that the court reviewed the maximum penalties and lifetime sex offender registry requirement at the plea hearing, but claimed he

either misunderstood or did not hear everything the court said. (R. 98:8, 38–40.) Kelly claimed that had he known that he faced a greater exposure and sex offender registry for his plea, he would have taken the alternate offer. (R. 98:9.) Later, he stated that had he known he exposed himself to a 40-year maximum sentence and that he would receive an 18-year sentence, he would not have pleaded to the sex assault count. (R. 98:44.)

At the conclusion of the hearing, the court allowed the parties to prepare and submit proposed findings and conclusions, which the parties did. (R. 79; 80; 98:67.) The court then held a hearing at which it allowed the parties to argue their positions. (R. 102:2–11.) After the parties argued, the court denied Kelly's motion. It "adopt[ed] the State's proposed Findings of Fact and Conclusions of Law in this matter." (R. 102:11.) It summarized its reasoning, stating that "Mr. Anderson was not deficient in this matter. He articulated what his strategy was. It is clear the defendant made a choice. In many respects, that was a choice that was made through advice of counsel and defendant." (R. 102:11–12.) Moreover, it found that Toran as successor counsel "indicated his focus primarily was one on trying to at least make an argument with respect to the sentencing of this defendant." (R. 102:12.) Accordingly, it signed the State's proposed order and denied Kelly's motion seeking to withdraw his plea and vacate the conviction. (R. 102:12.)

The court then allowed the parties to argue Kelly's sentence modification motion. (R. 102:12–13.) After hearing argument, it denied the motion because Kelly failed to show a new factor. It stated that "this factor was essentially put forth before the Court at the time of sentencing. The only thing . . . in my opinion that has changed is sort of the extended definition as to what was his disability. But

clearly, it was a factor that was argued before the original sentencing court." (R. 102:15–16.)

Kelly appeals.

STANDARD OF REVIEW

Whether counsel rendered ineffective assistance is a mixed question of law and fact. *State v. Thiel*, 2003 WI 111, ¶ 21, 264 Wis. 2d 571, 665 N.W.2d 305. This Court will uphold the postconviction court's factual findings unless they are clearly erroneous, but reviews its application of those facts to the legal standard de novo. *Id.*

Kelly agrees on the standard of review, but he claims that this court cannot benefit from the analysis of the circuit court because it adopted the State's proposed findings and conclusions. (Kelly's Br. 15.) Because this Court reviews the legal questions of counsel's effectiveness de novo, whether the circuit court provided reasons is "of no consequence in this case." *State v. McDermott*, 2012 WI App 14, ¶ 9 n.2, 339 Wis. 2d 316, 810 N.W.2d 237.

In any event, the court did nothing improper here. This Court is justifiably critical of a circuit court's adoption, without explanation, of a party's ambiguous reasoning and summary conclusion, *see, e.g.*, *Trieschmann v. Trieschmann*, 178 Wis. 2d 538, 541–42, 504 N.W.2d 433 (Ct. App. 1993), or a court's vague adoption of a party's whole brief in denying a motion, *see McDermott*, 339 Wis. 2d 316, ¶ 9 n.2, given that such actions by the circuit court leave its reasoning ambiguous for a reviewing court and risk the appearance of partiality.

That's not what happened here. The court agreed with and adopted the State's proposed findings and conclusions instead of Kelly's proposed findings and conclusions. It reasoned that neither attorney was ineffective; the adopted findings and conclusions provide clear reasoning for those

decisions. (R. 81:10–11; 102:11–12.) In all, this Court is not left to guess at the court's reasoning. Hence, the problems identified in *Trieschmann* and *McDermott* are not present here.

As for Kelly's new-factor sentence modification claim, this Court considers whether a fact or set of facts is a new factor independently, but reviews whether an existing new factor justifies sentence modification for an erroneous exercise of discretion. *State v. Harbor*, 2011 WI 28, ¶ 35, 333 Wis. 2d 53, 797 N.W.2d 828.

ARGUMENT

I. Neither of Kelly's attorneys was ineffective.

Kelly is not entitled to plea withdrawal. Attorney Anderson was not ineffective for advising Kelly to plead guilty to second-degree sexual assault because that advice was based on a reasonable strategic decision under the circumstances. Attorney Toran was not ineffective for not filing a pre-sentence plea withdrawal motion that the circuit court found Kelly never asked for and that otherwise had no legal basis.

A. A defendant alleging ineffective assistance of counsel must demonstrate both deficient performance and prejudice.

To withdraw a plea after sentencing, a defendant must show a manifest injustice justifying such relief. *State v. Taylor*, 2013 WI 34, ¶ 24, 347 Wis. 2d 30, 829 N.W.2d 482 (citation omitted). Ineffective assistance of counsel can satisfy the manifest injustice test. *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996).

Hence, to succeed on his ineffective assistance claim, Kelly must demonstrate: (1) deficient performance, and (2) prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). If the court concludes that the defendant has not

proven one prong of this test, it need not address the other. *Id.* at 697.

To prove deficient performance, the defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." *Id.* at 690. This Court begins with a strong presumption that counsel performed competently. *Id.* Counsel's decisions based on a reasonably sound strategy, without the benefit of hindsight, are "virtually unchallengeable," and do not constitute ineffective assistance. *Id.* at 690–91.

And generally, to prove prejudice, the defendant must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

B. Attorney Anderson was not ineffective when he recommended that Kelly plead to the sex assault count.

1. Attorney Anderson's advice was reasonable and not deficient.

As noted above, the State offered Kelly two pleading options: (1) in the domestic violence case, guilty pleas to strangulation and suffocation and reckless endangerment, or (2) in the sex assault cause, a guilty plea to second-degree sexual assault. In either case, the State agreed to recommend five to eight years' initial confinement.

Each option had pros and cons for Kelly. The first option—pleading guilty in the domestic violence case to two counts—meant that Kelly would be exposed to 16 years of incarceration, including up to eight years of initial confinement and eight years of extended supervision. However, as Anderson articulated (R. 97:9), and the circuit court found (R. 81:4), Kelly's admitting guilt to those violent

acts would supply credence to the numerous other reports of his violence and the read-in charges. Given that, Attorney Anderson concluded that he would unlikely be able to persuade the court to sentence Kelly below the State's recommendation if Kelly entered guilty plea to the domestic violence counts.

The second option allowed Kelly to plead guilty to second-degree child sexual assault, which by its facts, was not a violent crime. While it exposed Kelly to more time than the first option and required compliance with the sex offender registry, it featured mitigating facts that counsel could advance to persuade the court to sentence him to less time: Kelly claimed that Laura lied about her age and he did not learn the truth until she was pregnant. Kelly supported his child (and later, children). Further, Kelly became involved with Laura with her mother's blessing, and the relationship developed into a consensual one with three children. Finally, the offense was an eight-year-old crime that the State appeared to have resurrected due to its inability to prosecute the domestic violence crimes.[6]

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[6] There was a third option that Kelly disregards: Kelly could have rejected both alternatives and gone to trial. Although Kelly asserted postconviction—and essentially asserts now—that he does not want relief that means he would go to trial (R. 102:4–5), consideration of the State's ability to prove these crimes factors into the reasonableness of Anderson's advice regarding the pleas. As Anderson articulated and the court found, the State's evidence was strong in the sex assault case, including DNA evidence that Kelly was the father of Laura's first child. The strength of that case suggests that Kelly had an interest in pleading to that charge and shows that he was taking responsibility for that crime. In contrast, Laura was demonstrably uncooperative with the State in the domestic violence case, which suggests Kelly may not have been willing to plead guilty to charges that the State appeared unlikely to ever be able to try.

As the circuit court found, Anderson recommended that Kelly plead guilty to the sexual assault case as part of a strategy to try to obtain a lessor period of initial confinement than the five-to-eight years recommended by the State. (R. 81:7–8.) That strategy was reasonable: the sexual assault was a non-violent offense involving facts that Anderson could argue merited a sentence below the State's recommendation. Had Kelly pleaded guilty to the domestic violence case, he "would have give[n] more credence to the State's allegations of a history of domestic violence against" Laura, which likely would have resulted in a sentence in line with the high end of the State's recommendation. (R. 81:4.)

Moreover, Kelly's complaint was not that he was exposed to 40 years, but that he was sentenced to 18. (R. 81:6; 98:43.) That the court ultimately sentenced Kelly to two years more than the maximum Kelly would have faced on the domestic violence counts simply means that Anderson's and Kelly's calculated risk did not pay off. It did not render Anderson's advice and strategy unreasonable. To conclude otherwise requires hindsight and second-guessing, which *Strickland* does not allow. *See Strickland*, 466 U.S. at 689 (requiring courts to make "every effort . . . to eliminate the distorting effects of hindsight" and not second-guess counsel's strategy simply because it did not succeed).

And to the extent that Kelly claims that Anderson did not explain his options or the consequences of his plea, the circuit court properly found that Anderson fully advised Kelly on the two alternatives. The court found Anderson's testimony credible generally and found that Anderson adequately "explain[ed] to Mr. Kelly the terms of the offer letter, the two plea options by the State, his maximum exposure on both cases, sex offender registration, and the reasons for pleading guilty to the sexual assault case instead of the domestic violence case." (R. 81:7.)

Those findings have support in the record, given Anderson's testimony that while he did not remember the specifics of his conversations with Kelly, Kelly "would have been aware of the maximum penalties, the terms of initial confinement . . . between the two cases." (R. 96:9.) Moreover, assuming Anderson had a duty to explain the collateral consequence of the sex offender registry requirement to Kelly,[7] Anderson fulfilled that duty. He testified that in every case where a client would be subject to sex offender registration, he would explain the information on the plea form regarding that lifetime registration and the bar on his working with minors. (R. 96:11.)

Kelly does not challenge the court's factual findings. (Kelly's Br. 19–20.) Rather, he argues that the court erred in concluding that Attorney Anderson's strategy was reasonable. (Kelly's Br. 20–21.) To Kelly, Anderson's advice to plead to the sexual assault charge was patently unreasonable in two ways. *First*, there was no upside to pleading to sexual assault: it featured greater exposure and registering as a sex offender, and the sentencing court was going to consider Kelly's violence against Laura regardless whether he admitted to the domestic violence charges. (Kelly's Br. 22–23.) *Second*, according to Kelly, Anderson unreasonably guaranteed Kelly "significantly less time" if he pleaded to the child sexual assault charge. (Kelly's Br. 23.)

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[7] Although it is not necessary for this Court to reach this question, Anderson did not have a duty to inform Kelly of collateral consequences such as the sex offender registry requirement. *See State v. Bollig*, 2000 WI 6, ¶¶ 16–17, 232 Wis. 2d 561, 605 N.W.2d 199. Counsel is not constitutionally deficient for failing to inform a defendant of such consequences. *See State v. LeMere*, 2016 WI 41, ¶ 69, 368 Wis. 2d 624, 879 N.W.2d 580 (failure to advise of possibility of Chapter 980 commitment cannot form basis of ineffective assistance claim).

As explained above, however, Anderson's advice was not unreasonable. Kelly's pleading to the second-degree sexual assault charge focused the sentencing court on that charge, which did not involve violence. Moreover, the charge involved an eight-year-old crime, a situation that began with the consent of Laura's mother and evolved into a consensual relationship in which Kelly supported his and Laura's children. Attorney Anderson never testified that he believed the court would ignore Kelly's violence; his point was that Kelly would not be admitting to the charged violence, which—based on the complaint—was brutal: he strangled Laura with a belt until she urinated herself, after which she escaped and begged a neighbor for help, claiming that Kelly was going to kill her. (R. 1:3.) Kelly's admitting to those acts supported the inference that he also committed the many other reported acts and made it more likely that the court would sentence Kelly to the maximum (or close) of 16 years that he would have faced had he pleaded in the domestic violence case.

In contrast, his plea to a sexual assault under the circumstances created the possibility that the court would start with a relatively low sentence and, even weighing the read ins, impose a sentence lower than the State's recommendation. Attorney Anderson had reason to believe that could happen. He had 32 years' experience, much of it handling criminal defense and, in his experience, the sexual assault charge and its attendant circumstances made it the less serious crime to which Kelly could admit guilt. That belief was not patently unreasonable; indeed, at sentencing Attorney Toran referenced two cases he handled involving older man-teen girl statutory rape that resulted in probation with conditional jail time. (R. 95:28–29.)

Further, Anderson never promised Kelly a shorter sentence than the State's recommendation. What Anderson said was that in recommending the plea to the sex assault,

he believed that Kelly "would have got . . . significantly less time taking [a plea in] that case than the strangulation and [recklessly endangering safety] case" and that he was "certain that [he] could sell a much less sentence to the Court on that charge than [he] could on the other one." (R. 96:9, 20.)[8] On that second remark, Attorney Anderson agreed that what he meant by "sell," was his "strategy of what is the best posture to put the client in before the sentencing court." (R. 96:20.)

Taken together, these statements mean simply that Anderson would not have had room to argue for less time than the high end of what the State was recommending if Kelly had pleaded in the domestic violence case. In contrast, if Kelly pleaded in the sex assault case, counsel had room to advocate for less confinement time. Indeed, Anderson said that he generally does not tell a client, at least when going over the plea, "what I believe the judge may be looking at." (R. 96:17.) Further, Anderson said, "No," when asked whether he recalled "having any concerns about [Kelly's] ability to . . . understand the case and his risks and his exposure and what he was doing?" (R. 97:16.) And that Kelly offered contradictory testimony to those points changes nothing (R. 98:6, 36, 44), since the court found his testimony incredible where it conflicted with Anderson's and Toran's (R. 81:7), and found that Kelly understood the terms of the offer and each alternative's maximum penalties (R. 81:8).

In sum, Attorney Anderson was not deficient. His advice to Kelly to plead to the sex assault charges was a reasonable strategic decision. Accordingly, this Court need not consider prejudice.

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[8] Kelly's citations to Anderson's testimony appear to be off by one page. (Kelly's Br. 23.) The State assumes that Kelly is referring to the lines quoted above.

2. Kelly cannot establish prejudice.

To prove prejudice, "[i]n the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice." *Lafler*, 566 U.S. at 163. Specifically, the defendant must show that but for counsel's advice, he would have accepted the alternative plea offer, the court would have accepted it, and the conviction or sentence or both under the offer's terms would have been less severe. *See id.* at 164.[9]

While the State concedes that Kelly's sentence to the two domestic violence counts would have been less severe, by at least two years, than the 18-year sentence he received, Kelly failed his burden of demonstrating a reasonable probability (1) that he would have taken the State's alternate plea offer and pleaded guilty to the domestic violence counts, and (2) that the circuit court would have accepted his plea to the domestic violence counts.

First, Kelly failed to demonstrate that he would have pleaded to the domestic violence counts but for Attorney Anderson's advice. In his postconviction motion, Kelly asserted that he could meet this burden by testifying "that if his lawyer had informed him of the difference in penalty between the two plea options the State gave him, and if counsel had informed him that pleading to the sexual assault charge would entail mandatory sex offender registration, he would have chosen the more favorable plea

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[9] In *Lafler*, the Supreme Court assessed prejudice where the defendant rejected a plea offer and went to trial; whereas, here, Kelly rejected a plea offer by taking an alternative offer. *Lafler*, 566 U.S. at 163. Still, given that Kelly's primary claim of prejudice was that he lost the opportunity to accept the alternative plea offer, the State assumes that *Lafler*'s articulation of the defendant's requirements for proving prejudice applies.

option." (R. 59:8.) Kelly indeed testified to that effect, claiming that Anderson never told him that the maximum penalties for the domestic violence charges would be much less than the maximum for the sexual assault, that he never told him about the sex offender registry, and that if Anderson had told him those things, he would have pleaded to the two domestic violence counts. (R. 98:6–9.) Kelly said, "Yes," when asked whether he would have understood that pleading guilty in the domestic violence case meant that he was admitting committing those crimes. (R. 98:9.)

But the circuit court found Kelly's testimony incredible where it conflicted with his attorneys', and specifically found that Attorney Anderson adequately explained the maximum exposure on both cases and the sex offender registry. (R. 81:7.) It found incredible Kelly's statements that he nevertheless did not understand the maximums and the sex offender registry despite evidence that the maximums were included in the criminal complaints (which Kelly claimed he read), that he was informed of the maximums at his initial appearance (R. 87:3–4),[10] and that the maximum penalty on the sex assault (as well as the sex offender registry requirement) was in his plea questionnaire and explained by the court at the plea hearing (R. 21:1; 93:9). Kelly does not challenge the legitimacy of those findings, which undercut his explanation why he now claims that he would have pleaded guilty to the domestic violence charges.

Moreover, there was significant evidence that Kelly was not willing to admit guilt to the domestic violence

[10] Kelly's initial appearance transcript in the domestic violence case is not in this record. But given the court's finding that informing a defendant of the maximum penalties is the "primary function and routine practice of the intake court" (R. 81:7), Kelly failed to show that the court abandoned its duty in this respect.

charges, given the difficulties the State was going to have to prove the crimes without Laura's cooperation. At the postconviction hearing, the State presented evidence that Laura had failed to show up for Kelly's original trial date (R. 98:24), and that in at least one phone call between Laura and Kelly shortly after his arrest in November 2013, Laura told Kelly to not plead guilty to the domestic violence charges (R. 98:27). The circuit court made findings consistent with that testimony. (R. 81:5.) The record was also replete with evidence that Laura was not willing to cooperate with the State in a prosecution of the domestic violence counts. In addition to failing to show up for trial (under circumstances where the State could not even locate her), at Kelly's sentencing Laura said that she did not "recall being in a domestic violence relationship" with Kelly. (R. 95:9.)

Second, Kelly failed his burden of showing that the circuit court would have accepted his guilty plea to the domestic violence charges. His statement in his postconviction motion that "there is no reason to suppose that the alternative plea would not have been presented to the Court" does not allege that the court would have accepted his plea. (R. 59:8.)

Even if Kelly could meet his burden without any mention whether the court would have accepted his plea agreement in the domestic violence case, the record suggests that the court's acceptance was not a given. A trial court may, in a sound exercise of its discretion, "reject a plea agreement that it deems not to be in the public interest." *State v. Conger*, 2010 WI 56, ¶ 27, 325 Wis. 2d 664, 797 N.W.2d 341. Here, at the start of the plea hearing, the court expressed concern that the State was dismissing the domestic violence case, given its understanding "that Mr. Kelly has been referred to the DA's office 19 or 20 times for domestic violence." (R. 93:4.) Given the gravity of Kelly's

crimes and how serious the court found Kelly's domestic violence crimes to be, it is at least questionable whether the court would have felt that guilty pleas to single charges of strangulation and suffocation and second-degree recklessly endangering safety would have been in the public interest. In any event, Kelly has not offered anything to support his burden of showing that the court would have accepted the alternate plea agreement.

Finally, Kelly is incorrect that the appropriate remedy under *Lafler* would require this Court to vacate the conviction and order the prosecution to reoffer the plea proposal so Kelly could plead to it. (Kelly's Br. 25.) To start, *Lafler* involved a situation where counsel's deficient advice led Lafler to reject a plea offer and go to trial, at which he was convicted, not the situation here where counsel's advice led to Kelly's accepting one plea offer and necessarily rejecting an alternative offer.

But even if an appropriate remedy here "may be to require the prosecution to reoffer the plea proposal," *Lafler*, 566 U.S. at 171, whether to accept the plea terms and vacate the conviction would be up to the circuit court—not this Court (*see* Kelly's Br. 25)—in its discretion. *Id.*; *see also Conger*, 325 Wis. 2d 664, ¶ 28 (stating that circuit court's decision whether to accept a plea agreement is a discretionary one).

In any event, Kelly is not entitled to that limited relief because, as shown above, Attorney Anderson was not deficient, and Kelly failed to show prejudice. Kelly is not entitled to relief on this claim.

C. Attorney Toran was neither deficient nor was his conduct prejudicial for not seeking pre-sentencing plea withdrawal because he had no basis or instructions to do so.

An attorney can be neither deficient nor prejudicial for declining to file a motion that would have failed. *See State v. Wheat*, 2002 WI App 153, ¶¶ 23, 30, 256 Wis. 2d 270, 647 N.W.2d 441. Accordingly, the law governing standards for pre-sentencing plea withdrawal is relevant.

A defendant may withdraw his plea before sentencing if the court finds that he has a "fair and just" reason for seeking withdrawal, "unless the prosecution would be substantially prejudiced." *State v. Jenkins*, 2007 WI 96, ¶ 28, 303 Wis. 2d 157, 736 N.W.2d 24 (citing *State v. Canedy*, 161 Wis. 2d 565, 582, 469 N.W.2d 163 (1991)). The defendant must show by a preponderance of the evidence his fair and just reason; belated misgivings about the plea are insufficient. *Id.* ¶ 31 (citations omitted). In contrast, a defendant's genuine misunderstanding of the plea or its consequences is a fair and just reason for withdrawal. *Id.* ¶ 34 (citing *State v. Garcia*, 192 Wis. 2d 845, 862, 532 N.W.2d 111 (1995)).

1. Attorney Toran was not deficient because Kelly provided no reason to believe there was a fair and just reason to withdraw his plea.

Here, Kelly cannot demonstrate that Attorney Toran had reason to believe Kelly had a fair and just reason to withdraw his plea or any basis to seek pre-sentencing plea withdrawal, because any dissatisfaction Kelly expressed with his plea was nothing more than belated misgivings.

To start, Kelly's plea was knowing, intelligent, and voluntary, and did not provide a fair and just reason for withdrawal. As the circuit court found, Attorney Anderson discussed both plea options with Kelly, including the maximum penalties and their consequences. (R. 81:7.) Attorney Anderson reviewed the plea questionnaire with Kelly, who gave Anderson no reason to believe he did not understand it. (R. 81:7.) The court engaged in a full colloquy with Kelly, explaining not only the maximum amount of time he faced, but also the sex offender registry requirement and limits to his employment and volunteer opportunities. (R. 93:7–10.) Kelly does not identify anything in the record of the plea suggesting that he misunderstood his plea or its consequences.

Nor does any of the *Machner* hearing testimony suggest that Kelly expressed colorable grounds to withdraw his plea before sentencing. The reasonableness of counsel's actions may be determined by the defendant's own statements or actions. *Strickland*, 466 U.S. at 691. Accordingly, counsel cannot be faulted for failing to pursue plea withdrawal that his client never requested and is under no obligation to inform his client of every possible legal standard that might apply to his case. *See id.*

Here, Kelly told Toran that he was not happy with his decision to plead. (R. 98:52–53.) But Kelly did not express to Toran any reasons beyond mere dissatisfaction. When asked what advice he gave, Toran said, "We didn't decide to withdraw the plea, I mean, I said I would represent him at sentencing and then we opted to proceed." (R. 98:53.) When asked "[h]ow the decision was made to proceed to sentencing," Toran stated that Kelly "said he wasn't happy with his attorney in terms of the advice and which case he pled to. Like I [said], we didn't deal with that. I just dealt with the fact that he had pled guilty to the charge and

represented him at sentencing. We didn't really go into detail about withdrawing the plea at all." (R. 98:53.)

And if Kelly had provided a basis, Toran would have filed a motion. (R. 98:52.) When asked, "If Mr. Kelly had told you about something that you could hang your hat on for a plea withdrawal and he wanted it, would you have filed the motion?" Toran replied, "Absolutely." (R. 98:59.) But there was no such hook for Toran to use. Specifically, Toran did not recall Kelly telling him that he did not know about the sex offender registry. (R. 98:63–64.) And there was no testimony from the *Machner* hearing regarding whether Kelly told Toran he did not know the maximum penalties he faced by pleading to the sex assault charge or how those penalties compared to the alternative plea offer.

Kelly argues that the advice Anderson gave Kelly to plead to the sex assault charge instead of the charges in the domestic violence case would have provided grounds to withdraw his plea. (Kelly's Br. 27–28.) But as argued in Part I.B. above, Attorney Anderson provided reasonable advice to Kelly under the circumstances.

Kelly also highlights an erroneous finding by the court that Attorney Toran said "we decided not to file," and that Kelly's expressed unhappiness with the plea should have at least led Toran to talk to Kelly about the pre-sentencing plea withdrawal standard. (Kelly's Br. 28–29.) To be sure, Toran never stated "we decided not to file," and Toran's testimony reflects that Toran focused on sentencing strategy with Kelly. But again, Kelly points to nothing that would have provided a basis for plea withdrawal, even under the relatively low fair and just standard. Attorney Anderson's advice was reasonable, Kelly entered a knowing, intelligent, and voluntary plea, and his dissatisfaction with his plea at the point he talked to Toran was simply a change of heart. Because Toran cannot have been deficient for filing a baseless motion for plea withdrawal, he was not deficient.

2. Kelly failed to demonstrate prejudice.

As noted above, there was no basis for Kelly to seek pre-sentencing plea withdrawal. Because he cannot show that such a motion would have succeeded, he cannot demonstrate that Toran's representation prejudiced him.

In addition, Kelly cannot show prejudice because if his plea withdrawal motion was successful, he had no guarantee that the State would have re-extended the same offer to him. Indeed, in the original plea letter, the State wrote that its recommendation was contingent upon several factors, including Kelly's "accepting responsibility, at both plea and sentencing, for the criminal conduct attributed to him in the criminal complaint." (R. 72:1.) Given that Kelly's seeking and obtaining plea withdrawal immediately after going through a full plea hearing demonstrates Kelly's failure to take responsibility for his crimes, there is nothing to suggest that the State would have re-offered any plea deal, let alone the same one, to Kelly if he withdrew his plea. The circuit court soundly determined as much. (R. 81:11.)

Kelly does not address the circuit court's findings and conclusions that Kelly's plea was knowing, intelligent, and voluntary. (R. 81:10.) Rather, he summarily asserts that any motion to withdraw his plea pre-sentencing "would surely have been granted." (Kelly's Br. 29–30.) He then focuses on the circuit court's additional determination that Kelly cannot show prejudice because, even if he successfully withdrew his plea, "there is no evidence that the State would have re-extended the same offer to Mr. Kelly." (R. 81:11; Kelly's Br. 30.) He claims that under *Lafler*, the question is whether, at the time of the original plea, "there were any intervening circumstances that would have caused the State to withdraw its original offer." (Kelly's Br. 30.)

The *Lafler* Court's discussion of prejudice was in the context of counsel's deficient advice leading to the rejection of a plea offer, not counsel's failure to file a motion for plea withdrawal. *Lafler*, 566 U.S. at 164. Thus, if Attorney Anderson was deficient *at the time of the plea* in his advice to Kelly, *Lafler*'s prejudice test would seemingly apply based on that advice causing the rejection of the original plea offer. If, on the other hand, Attorney Toran was deficient for not filing a motion for plea withdrawal, the question of prejudice focuses on whether the motion would have succeeded. But Kelly points to no authority (nor is the State aware of any) requiring the State to re-extend a plea offer after a defendant successfully seeks plea withdrawal.[11]

In sum, Kelly cannot show deficient performance or prejudice based on Attorney Toran's representation of him. He is not entitled to relief.

II. Kelly is not entitled to new-factor sentencing modification based on his claim that he has an intellectual disability, not just a learning disability.

Wisconsin circuit courts have inherent authority to modify sentences, with certain constraints. *Harbor*, 333 Wis. 2d 53, ¶ 35 (citation omitted). While a court cannot modify a sentence based on reflection or second thoughts alone, it may modify a sentence based on a new factor. *Id.* (citation omitted).

In seeking new-factor sentence modification, the defendant bears the burden of demonstrating that a new factor exists, and that it justifies sentence modification. *Id.*

[11] Similarly, contrary to Kelly's assertion (Kelly's Br. 30), and as noted above, *Lafler* does not address the remedy for counsel's ineffectiveness in failing to seek pre-sentence plea withdrawal.

¶ 36 (citation omitted). A new factor is "a fact or set of facts highly relevant to the imposition of the sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). "To promote the policy of finality of judgments, strict rules govern the information that can be considered in a request for sentence modification." *State v. Carter*, 208 Wis. 2d 142, 146, 560 N.W.2d 256 (1997), *overruled on other grounds by Harbor*, 333 Wis. 2d 53, ¶¶ 47–48 & n.11 (citing *State v. Franklin*, 148 Wis. 2d 1, 9, 434 N.W.2d 609 (1989)).

If a new factor exists, the circuit court must then determine whether the new factor justifies sentence modification. *Harbor*, 333 Wis. 2d 53, ¶ 38.

Kelly asserts that the sentencing court was unaware that he had an intellectual disability that has qualified him for Social Security disability payments. (Kelly's Br. 31.) Kelly is wrong.

Here, as the postconviction court correctly concluded, Kelly's disability was not a new factor because the sentencing court considered it. Indeed, there was ample evidence before the sentencing court that Kelly suffered a disability that caused him to receive Social Security benefits. That information was in the PSI, where Kelly reported that as an elementary student, "he was diagnosed with a learning disability, and as a result, he was placed in special education programming throughout his remaining school years." (R. 26:21, 23.) He also reported that "he had been receiving Social Security Disability benefits for his learning disability." (R. 26:23.) As of his interview with the PSI writer, Kelly had allowed those benefits to terminate, but "he had recently applied, and had been approved for benefits prior to his arrest." (R. 26:23.) In the agent's summary, the

agent noted Kelly's learning disability and stated that she "sensed that Mr. Kelly may have had some cognitive difficulties," the agent believed he knew right from wrong. (R. 26:31.)

Attorney Toran also alerted the court to Kelly's disability at sentencing. In discussing Kelly's background, Toran noted that Kelly "was on disability because he's learning disabled. He was receiving benefits for that. He does work as a mechanic and he's trying to . . . reinstitute his benefits." (R. 95:32.) The sentencing court also noted the PSI's mention of Kelly's learning disability, the fact that he had previously received Social Security benefits as a result, and that he had recently reapplied and been approved for benefits. (R. 95:54.)

Given that information, the postconviction court correctly determined that Kelly's disability was not a new factor, because it "was essentially put forth before the Court at the time of sentencing. The only thing that . . . has changed is sort of the extended definition as to what was his disability. But clearly, it was a factor that was argued before the original sentencing court." (R. 102:15–16.)

Kelly disagrees, arguing that the court was unaware that Kelly suffered a more serious cognitive disability that "likely contributed to his engaging in impulsive, immature and inappropriate behavior." (Kelly's Br. 33.) He writes that, as applied to the sex assault crime, Kelly's involvement with Laura was based on those features of his disability rather than "any deviance or sexual paraphilia." (*Id.*) He highlights the view of a DOC psychologist who assessed Kelly's treatment needs and opined that Kelly's sex crime was unlike that of a sexual predator or pedophile. (*Id.*) Moreover, as applied to the domestic violence crimes, Kelly writes that his poor impulse control and aggression from his disability "would indicate that Mr. Kelly would benefit from sustained

counseling and training in aggression management." (*Id.* at 34.)

Yet Kelly disregards that the sentencing court considered and weighed those things, and factored in Kelly's treatment needs at sentencing. As for the sexual assault, the court recognized that the gravity of Kelly's offense was that he impregnated Laura at a young age and thrust her—and their children—into an adult relationship with domestic abuse. The court expressed no concerns or view that Kelly was a pedophile or targeting young girls; its concerns were focused on curbing Kelly's long-established pattern of physically abusing Laura.

As for the domestic abuse read ins, the sentencing court also considered Kelly's need for cognitive programming, which the PSI writer indicated could include anger management counseling, cognitive therapy, and classes to improve his social skills. (R. 95:55.) The court agreed that such intervention was required, and it was required in a confined setting. (R. 95:56.) In setting his sentence, the court made conditions that Kelly undergo sex offender and drug and alcohol assessments and follow through with any recommended programming. (R. 95:57.) It also ordered him to "follow through with any cognitive intervention programming or parenting programming that may be recommended by the agent." (R. 95:57.)

In sum, additional details about Kelly's disability were neither new nor highly relevant to the sentence. The sentencing court was aware that Kelly suffered a disability significant enough to qualify him for Social Security benefits; it was aware of the nature of his sex offense; and it was aware that Kelly required cognitive treatment for his anger and impulse control. Hence, Kelly is not entitled to a remand to the circuit court for a determination of whether sentence modification is warranted.

CONCLUSION

This Court should affirm the judgment of conviction and the order denying postconviction relief.

Dated this 3rd day of April, 2018.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

SARAH L. BURGUNDY
Assistant Attorney General
State Bar #1071646

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-8118
(608) 266-9594 (Fax)
burgundysl@doj.state.wi.us

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 9,444 words.

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SARAH L. BURGUNDY
Assistant Attorney General

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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 3rd day of April, 2018.

_____
SARAH L. BURGUNDY
Assistant Attorney General