STATE OF WISCONSIN

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

DISTRICT I

Case No. 2017AP001584-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TERRELL ANTWAIN KELLY,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

PAMELA MOORSHEAD
Assistant State Public Defender
State Bar No. 1017490

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
moorsheadp@opd.wi.gov

Attorney for Defendant-Appellant

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ARGUMENT

I. Mr. Kelly's Attorneys Provided Ineffective Assistance In Advising Him Regarding His Plea Options.

A. Attorney Anderson provided ineffective assistance.

1. Deficient performance.

At the postconviction motion hearing, the prosecutor offered Anderson a theory to support his decision to advise Mr. Kelly to plead guilty to a child sexual assault rather than domestic violence offenses. The prosecutor asked whether by pleading guilty to domestic violence offenses against L.J., Mr. Kelly would have "given more credence by his admission to the history of domestic violence that the State would be alleging at sentencing." (R.97: 9: App. 146). Anderson ratified this theory. The circuit court signed on. (R.81: 4; App. 104). For lack of a better argument, the State continues to run with this notion that pleading guilty to the sexual assault was preferable because pleading guilty to the domestic violence charges would have lent "credence" to the State's narrative — that there was a long history of domestic violence by Mr. Kelly against L.J.. (Response Brief at 17).

To accept this as a reasonable basis for Anderson's plea advice requires indulgence in the most superficial sort of fiction. It requires one to swallow the idea that without Mr. Kelly's admission, the State's narrative about the violence in the relationship somehow *lacked* "credence." Competent counsel should have known better.

The complaint that charged the domestic violence offenses alleged that in addition to the charged offenses, Mr.

Kelly had been referred for domestic violence charges involving L.J. approximately 20 times since 2007. The complaint recited a long list of specific domestic violence allegations. (R.26: 11-12). The complaint described a number of occasions on which police officers observed injuries to L.J. consistent with her domestic violence allegations, including "redness," and "bruises" to her neck. (R.26: 10).

The complaint described in excruciating detail L.J.'s account of the strangulation offense that was read in. (R.26: 10-11). The complaint also related the corroborating statement of the neighbor, who said L.J. ran to her house after midnight, clothed only in her underwear, screaming "he is trying to kill me!" The neighbor described Mr. Kelly attempting to pull L.J. off the porch as L.J. screamed. (R.26: 11). The complaint described photographs of injuries to L.J.'s face and neck and a photograph of the chair with a wet stain consistent with her account of urinating while sitting there as Mr. Kelly strangled her with a belt. (R.26: 11). The notion that these allegations lacked "credence" as long as Mr. Kelly did not admit to any of them is absurd.

The prosecution of Mr. Kelly was always all about the domestic violence. The sexual assault charge was leverage to prevent Mr. Kelly from escaping punishment for the abuse. Anderson knew that. (R.96: 14; App. 125). Anderson knew from the outset that the State was focused on the domestic violence allegations in this prosecution. (R.96: 14; R.97: 16; App. 125, 153). In his words "They [the State] could care less that he was having sex with this young lady. It had been ignored." (R.96: 14; App. 125). Anderson was so convinced that the sexual assault charge was being used as leverage to ensure that Mr. Kelly was punished for the domestic abuse that he filed a motion to dismiss arguing vindictive prosecution. (R.15; R.16).

Against this back-drop, reasonably competent counsel would have foreseen what would happen at sentencing. Competent counsel would have known that regardless of which plea option Mr. Kelly chose, the State's focus at sentencing would be the history of domestic violence, including the read in charges. Competent counsel would have anticipated extensive discussion about the charged and uncharged allegations of domestic violence and would have expected the State to present the sentencing court with photographic evidence of the injuries to L.J. A reasonable attorney would have understood that regardless of what plea option Mr. Kelly chose there would be no chance of side-stepping or minimizing the only thing the State really cared about — the long history of domestic violence. Reasonable counsel would have known what Toran knew — that positioning Mr. Kelly as non-violent at sentencing was "impossible." (R.98:65; App.174).

The State opines that Anderson's "calculated risk did not pay off," and this is only evident now in "hindsight." (Response Brief at 18). But there was nothing surprising about what happened at the sentencing. There was never any chance that the sentencing judge would discount or deemphasize the lengthy, detailed domestic violence narrative, accompanied by photographs, including offenses Mr. Kelly had agreed to have read in, simply because Mr. Kelly was not admitting to it. Hindsight is unnecessary. This should have been obvious to Anderson when he advised Mr. Kelly. The State argues that Anderson's advice was not unreasonable because "Kelly's pleading to the second-degree sexual assault charge focused the sentencing court on that charge, which did not involve violence." (Response Brief at 20). Actually, it didn't have that effect at all. (R.95: 52-53, 54). More to the point, there was never any reason to believe that it would. Any advantage Mr. Kelly could gain by

pleading guilty to the child sexual assault was always illusory.

The State submits as support for Anderson's plea advice that the State's case was stronger on the sexual assault than the domestic violence. (Response Brief at 17, n. 6). That is true but entirely beside the point. Anderson was called upon to advise Mr. Kelly as he elected between the two plea options available to him to resolve all of the charges against him. Mr. Kelly was not deciding between pleading to the child sexual assault and going to trial. He was given an offer that required him to plead to one case and allow the other to be read in. Under no circumstances would he be testing the strength of *either* of the State's cases with a trial. The relative strength of the State's cases had nothing to do with anything.

The State insists that Anderson did not promise Mr. Kelly that he would receive a shorter sentence if he pled guilty to the sexual assault charge. (Response Brief at 20-21). To make this argument, the State must assign a meaning to Anderson's testimony that is contrary to his words. Anderson said that he believed Mr. Kelly would get "significantly less time taking that [sexual assault] case than the strangulation and RES [recklessly endangering safety] case." (R.96: 9). Further, he testified "The bottom line is I was *certain* that I *could sell* a much less sentence to the Court on that [sexual assault] charge than I could on the other one. (R.96: 20) (emphasis added). The prosecutor next asked Anderson "And when you're talking about sell, you're essentially talking about strategy of what is the best posture to put the client in before the sentencing court?" Anderson responded "Yes." (R.96: 20). Yet the State argues that these remarks taken together somehow mean something other than that Anderson was certain of a better result if Mr. Kelly pled to the sexual assault. (Response Brief at 21).

Anderson's testimony was clear. One cannot be certain one can "*sell"* something without being certain that the customer will "*buy"* it. In other words, Anderson could not be certain he could "sell" a lesser sentence to the court without being certain that the court would impose a lesser sentence. The State's argument also ignores Mr. Kelly's testimony. He testified that that Anderson told him that by pleading to the child sexual assault, he *would* — not *could* — get a lighter sentence. (R.98: 6, 36, 44). This testimony was consistent with Anderson's, and the circuit court did not find it incredible. Anderson performed deficiently when he led Mr. Kelly to believe that less time was a certain outcome of choosing the plea option that was otherwise much less attractive.

2. Prejudice.

The State argues that Mr. Kelly has not shown prejudice. First, the State argues that he has not proved that he would have pled guilty to the domestic violence allegations absent Anderson's advice. (Response Brief at 22). Anderson testified that he "strongly recommended" that Mr. Kelly plead to the sexual assault and that he was certain that he could sell a lesser sentence to the Court upon a plea to that charge. (R.96: 9, 20; App. 120, 131). Mr. Kelly said he pled to the sexual assault because he believed his lawyer when he said he would get less time that way. (R.98: 43). He said absent that advice he would not have pled to the sexual assault absent that advice, but would have pled to the domestic violence charges. (R.98: 8, 43). Mr. Kelly's testimony is consistent with Anderson's in this regard, is uncontroverted in the record, and was not found to be incredible by the circuit court. And this testimony is consistent with common sense. Pleading guilty to the sexual charge meant a much higher penalty exposure, lifetime sex offender registration, and all of

the associated stigma. If not for Anderson's assurances that he would get less time, why on earth would he have chosen that option rather than the other?

The State also suggests that there was "significant evidence" that Mr. Kelly "was not willing to admit guilt to the domestic violence charges, given the difficulties the State was going to have to prove the crimes without [L.J.'s] cooperation." (Response Brief at 24). The State then fails to point to any actual evidence of this. The State relies on L.J.'s uncooperativeness. That is a factor that Mr. Kelly undoubtedly would have considered if he were simply trying to decide whether to plead guilty to the domestic violence offenses or go to trial. Those were not Mr. Kelly's options. The State had charged him with the sexual assault, thereby gaining leverage against him — if he refused to plead to the domestic violence, then he would face an iron-clad sexual assault prosecution. The sexual assault charge made trying his cases an option with risk, but no reward beyond what he could gain through accepting one of the State's plea alternatives. Thus, Anderson was advising him about which plea option to accept, not whether he could beat the domestic violence charges at trial. Again, the strength of the State's domestic violence case had no bearing on anything in this context.

The prosecutor did expend significant energy at the ***Machner*** hearing attempting to elicit testimony to support his theory that the real reason Mr. Kelly pled guilty to the child sexual assault was that he was unwilling to plead to the domestic violence. These efforts were unavailing. Mr. Kelly specifically denied the prosecutor's theory that he chose the option he did because he did not want to admit to "being a violent person." (R.98: 42). Anderson also rebuffed the State's attempts to elicit testimony that a defendant might

make a plea decision because he does not want to admit to a certain kind of charge, saying "I don't think that was the case here, but not in general, no." (R.98: 42). While the record contains a great deal of the prosecutor's intimation that Mr. Kelly made his plea decision based on something other than his lawyer's advice, there is absolutely no evidence to support that.

The State next argues that Mr. Kelly has not established prejudice because he has not shown that the court would have accepted alternative plea agreement. (Response Brief at 24, 25). This overstates Mr. Kelly's burden. It is not incumbent upon Mr. Kelly to conclusively prove that the court would have accepted the alternative plea proposal, which is a burden no one could ever meet. He must only show a reasonable probability that the court would have accepted it**.** ***Lafler***, 566 U.S. at 164; ***Missouri v. Frye***, 566 U.S. 134, 147, 132 S. Ct. 1399, 1409 (2012).

Here, there is no reason to suppose that the court would have rejected the alternative plea agreement. The State suggests that the circuit court may not have accepted it because the court was concerned about the dismissal of the domestic violence case in light of the number of domestic violence referrals. But the State does not explain how that concern would have led the court to reject a plea agreement that called for a plea to some of the domestic violence charges when it was willing to accept a proposal that allowed the dismissal of all of those charges. Citing ***State v. Conger***, 2010 WI 56, ¶27, 325 Wis. 2d 664, 797 N.W.2d 341, the State notes that a trial court has the discretion to "reject a plea agreement that it deems not to be in the public interest." (Response Brief at 24). But the State should not be heard to argue that its own plea offer was so plainly contrary to the

public interest that there is no reasonable probability that the circuit court would have accepted it.

The State next argues that the remedy Mr. Kelly has proposed is not appropriate. The State points out that the defendant in ***Lafler*** rejected a plea offer and went to trial while Mr. Kelly rejected one plea offer in favor of another. (Response Brief at 25). However, the State fails to offer any reason why this distinction is legally significant. In ***Frye***, the Supreme Court addressed the situation where, as here, a plea offer has lapsed or been rejected due to counsel's ineffective assistance, and the defendant accepts a less favorable plea offer. The Court specifically referred to ***Lafler*** for a discussion of the appropriate remedy in this situation. ***Frye***, 566 U.S. at 138. There is no question that the remedy outlined in ***Lafler*** applies here.

B. Attorney Toran provided ineffective assistance.

1. Deficient performance.

The State insists that Toran Did not provide ineffective assistance when he failed to discuss pre-sentencing plea withdrawal with Mr. Kelly. The State relies entirely on its claim that Anderson's plea advice was reasonable, and therefore, Mr. Kelly's stated dissatisfaction with that advice was no more than "belated misgivings." (Response Brief at 26). As discussed above, Anderson's advice was not reasonable. Mr. Kelly's dissatisfaction with the advice he had received and the plea decision he had made was certainly a fair and just reason to withdraw his plea in order to take the more favorable plea option.

Toran knew that Mr. Kelly had pled guilty to a child sexual assault with a greater penalty exposure and all of the attendant consequences. He knew that positioning Mr. Kelly

as non-violent at sentencing was "impossible." Therefore, he should have known that pleading to the sexual assault conferred no possible benefit upon Mr. Kelly. He knew that Mr. Kelly was unhappy with his choice regarding "which case he pled to." (R.98: 52; App. 51). Yet Toran did not even discuss the possibility of pre-sentencing plea withdrawal with Mr. Kelly. Toran's testimony reflects that he simply did not see that as his job. He "didn't deal with that." (R.98: 52; App. 51). Toran performed deficiently.

2. Prejudice.

The State argues that if Mr. Kelly had withdrawn his plea, there is no guarantee that the State would have extended the same alternative plea offer. The State posits that the prosecutor may have withdrawn the offer because a pre-sentencing plea withdrawal would have evidenced a failure of Mr. Kelly to accept responsibility for his crimes. (Response Brief at 29). Again, the State overstates Mr. Kelly's burden. He does not need to conclusively prove that the result would have been different absent counsel's deficient performance. He must show only that there is a reasonable probability that it would have. ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984).

Furthermore, the State's argument ignores the nature of the plea withdrawal motion that Toran should have filed. Toran knew that Mr. Kelly's dissatisfaction was with "which case he pled to." There was never any suggestion that Mr. Kelly wanted to withdraw his plea and go to trial or even try to renegotiate. There was no question of his trying to evade responsibility. Toran should have filed a plea withdrawal motion pursuant to ***Lafler*** asking that Mr. Kelly be permitted to withdraw his plea on the condition that he accept the alternative offer. There would have been no possible basis for

the State to withdraw that offer under those circumstances. It is worth noting that Mr. Kelly asks for nothing more than a plea agreement that the State proposed in the first place and presumably believed was perfectly acceptable.

There is no reason to suppose that the court would not have permitted Mr. Kelly to exchange one plea offer proposed by the State for another prior to sentencing under the circumstances of this case. The State certainly cannot argue that there is not a reasonable probability that the court would have allowed it.

II. Mr. Kelly Presented a New Sentencing Factor.

Mr. Kelly stands on the argument presented in his initial brief.

CONCLUSION

Mr. Kelly requests that this Court enter an order vacating his conviction and allowing him to accept the State's original offer to dismiss the other charges in exchange for his plea of guilty to one count of suffocation and strangulation and one count of second-degree reckless injury. Resentencing will then be required. In the event that request is denied, Mr. Kelly requests remand to the circuit court for a decision as to whether the new factor of his intellectual disability warrants a modification of his sentence.

Dated this 18th day of April, 2018.

Respectfully submitted,

PAMELA MOORSHEAD
Assistant State Public Defender
State Bar No. 1017490

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
moorsheadp@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,887 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 18th day of April, 2018.

Signed:

PAMELA MOORSHEAD
Assistant State Public Defender
State Bar No. 1017490

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
moorsheadp@opd.wi.gov

Attorney for Defendant-Appellant