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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP21-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

ROBERT K. NIETZOLD, SR.,

Defendant-Appellant.

REVIEW OF A DECISION AND ORDER OF THE COURT OF APPEALS, DISTRICT IV, REVERSING A JUDGMENT AND ORDER OF VERNON COUNTY CIRCUIT COURT, THE HONORABLE DARCY JO ROOD, PRESIDING, AND REMANDING FOR RESENTENCING

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

INTRODUCTION

At Robert Nietzold's sentencing hearing, the prosecutor made a mistake. He recommended a specific term of imprisonment, contrary to his promise in the plea agreement not to make such a recommendation. Had this mistake gone unnoticed, Nietzold would be entitled to resentencing.[1] But defense counsel objected, and, in response, the prosecutor withdrew the mistaken recommendation and argued for the promised one, imprisonment with the term left to the court. The mistake having been addressed, counsel raised no further objection, and the court imposed sentence.

Nietzold argues that the parties' efforts at the hearing to remedy the prosecutor's initial mistake were inadequate and beside the point: "Obviously, one cannot unring a bell." (Nietzold's Br. 12.) Nietzold also argues that, even if such an error *could* be remedied without re-sentencing, it wasn't here. Counsel's objection was too late, Nietzold argues, because he allowed the prosecutor to "complete[ ] his presentation" before objecting. (Nietzold's Br. 16.) Nietzold argues that his case is most like *Williams*[2] (Nietzold's Br. 7–12), where the prosecutor appeared to advocate for *both* the PSI writer's recommendation of imprisonment and the State's promised recommendation of only jail time. And Nietzold maintains that *Smith*, *Knox*, and *Bowers*[3] are distinguishable. (Nietzold's Br. 12–14, 16.)

As argued, Wisconsin cases provide that a prosecutor's initial breach of the plea agreement at sentencing *is* the sort

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[1] *State v. Smith*, 207 Wis. 2d 258, 558 N.W.2d 379 (1997).

[2] *State v. Williams*, 2002 WI 1, 249 Wis. 2d 492, 637 N.W.2d 733.

[3] *State v. Knox*, 213 Wis. 2d 318, 570 N.W.2d 599 (Ct. App. 1997); *State v. Bowers*, 2005 WI App 72, ¶ 12, 280 Wis. 2d 534, 696 N.W.2d 255.

of error that typically *can* be remedied at the hearing. And the prosecutor's initial mistake *was* remedied in this case; defense counsel's objection was timely, and the prosecutor promptly withdrew the mistaken recommendation and advocated for the promised one. *Smith*, *Knox*, and *Bowers* are controlling, and *Williams* is readily distinguishable. The court of appeals' decision should be reversed.

ARGUMENT

Nietzold is not entitled to resentencing for the prosecutor's initial breach of the plea agreement because the breach was caught and remedied at the sentencing hearing.

The State renews the arguments made in its opening brief. Unless expressly conceded, the State opposes Nietzold's response brief arguments.

As Nietzold observes, the parties agree that the standard of review is *de novo*, and that a plea breach must deny the defendant of a "substantial and material benefit" to be actionable. (Nietzold's Br. 8.) The dispute is over whether an initial breach like the one here can be remedied at the sentencing hearing, and whether this breach was, in fact, remedied. The answers: Yes, it can, and yes, it was.

As argued (Opening Br. 13–15), cases of this Court and the Wisconsin Court of Appeals establish that a prosecutor's initial breach of the plea agreement may be "remedied" at the sentencing hearing. *State v. Smith*, 207 Wis. 2d 258, 272–73, 558 N.W.2d 379 (1997); *see also State v. Bowers*, 2005 WI App 72, ¶ 12, 280 Wis. 2d 534, 696 N.W.2d 255; *State v. Knox*, 213 Wis. 2d 318, 322–23, 570 N.W.2d 599 (Ct. App. 1997). Upon concluding that the prosecutor's breach in *Smith* was "material and substantial," this Court added: "Further, the breach was not *remedied*, because Smith's counsel failed to object to the breach." *Smith*, 207 Wis. 2d at 272–73 (emphasis

added). Later, the Court observed that "prejudice . . . arose when the prosecutor" breached the plea agreement "and Smith's defense counsel failed to object to that recommendation." *Id.* at 282.

Then, in *Knox* and *Bowers*, the court of appeals confirmed that a prosecutor's initial breach of the plea agreement may be remedied at the sentencing hearing. In *Knox*, the prosecutor's breach—a request for consecutive sentences when the State promised to seek concurrent sentences—was objected to, and the prosecutor withdrew the mistaken recommendation and "earnest[ly]" requested concurrent sentences instead. 213 Wis. 2d at 320–23. The court of appeals said that the breach was "not substantial" because the prosecutor's initial mistake was "quickly acknowledged and rectified." *Id.* at 322–23. Likewise, in *Bowers*, the court held that an initial sentencing recommendation that exceeded the recommendation promised in the plea agreement was not a "material and substantial" breach because defense counsel caught the breach and the prosecutor corrected the recommendation. 280 Wis. 2d 534, ¶¶ 12, 13. The court explained: "*Knox* teaches us that it is sufficient for the State to promptly acknowledge the mistake of fact and to rectify the error without impairing the integrity of the sentencing process." *Id.*

In response, Nietzold argues that an initial breach like the one here cannot be remedied. Citing *State v. Williams*, 2002 WI 1, 249 Wis. 2d 492, 637 N.W.2d 733, Nietzold argues that he is "entitled to relief regardless of whether defense counsel lodged a timely objection to the breach." (Nietzold's Br. 7.) "No one can reasonably argue [I] realized the benefit of [the] plea agreement," he maintains. (Nietzold's Br. 7.) Nietzold is mistaken.

The benefit at issue was the State's not seeking a specific term of imprisonment. Here, as acknowledged, the

prosecutor made an initial, mistaken recommendation of a specific term. (R. 54:16–17, Pet-App. 29–30.) But defense counsel objected, and, in response, the prosecutor promptly withdrew the mistaken recommendation and advocated for the promised one. (R. 54:16–17, Pet-App. 29–30.) Once corrected, the prosecutor made the State's sentencing recommendation plain to the court—imprisonment with the term left to the court's discretion—and advocated for that recommendation. (R. 54:17–18, Pet-App. 30–31.) In fact, when the court imprecisely referred to DOC's sentencing recommendation as "the State's" recommendation, the prosecutor interrupted to remind the court that "the State" was not recommending a specific term of imprisonment. (R. 54:37–38, Pet-App. 50–51.) Under these circumstances, Nietzold cannot reasonably argue that he was denied the benefit of the State's promise not to seek a specific term of imprisonment.

Contrary to Nietzold's view, *Williams* does not stand for the proposition that an initial, mistaken sentencing recommendation like the one here cannot be remedied at sentencing. Rather, *Williams* is an example of a case unlike the present one in which a particular breach was not, and perhaps could not be, remedied.

There, as noted, the State promised to recommend a jail sentence. *Williams*, 249 Wis. 2d 492, ¶ 24. But at sentencing, the prosecutor described at length DOC's recommendation of imprisonment, ostensibly because the PSI writer was unable to attend the hearing. *Id.* ¶ 26. The prosecutor then conveyed the PSI writer's very negative view of Williams, and even indicated that she had come to share this view. *Id.* ¶ 26. When the prosecutor relayed DOC's imprisonment recommendation, defense counsel objected. *Id.* ¶¶ 27, 29. In response, the prosecutor said that, by conveying DOC's views and recommendation, she had not breached the plea

agreement and was merely seeking to provide the court with all the relevant information. *Id.* ¶ 29. The court imposed a sentence of imprisonment. *Id.* ¶ 25.

This Court concluded that the prosecutor's remarks had "undercut the defendant's plea agreement," and the prosecutor's efforts to repair the breach—a breach that she had denied committing—were "too little, too late." *Williams*, 249 Wis. 2d 492, ¶¶ 52, 59. The prosecutor had appeared to subtly advocate for a second, harsher sentencing recommendation by conveying the DOC's recommendation in the PSI writer's stead. *Id.* ¶ 26. The breach was systemic, and the prosecutor denied responsibility for it. Here, the initial breach was a simple (though important) mistake for which the prosecutor immediately took responsibility, withdrawing the mistaken recommendation and advocating for the promised one. (R. 54:17–18, Pet-App. 30–31.) *Williams* is therefore inapt.

Nietzold complains that he did not bargain for the prosecutor to make the wrong recommendation before making the right one upon defense counsel's objection. (Nietzold's Br. 11.) But whether the State perfectly executed its promise from the start isn't the test for relief. A breach must be "material and substantial" to be actionable. *See State v. Bangert*, 131 Wis. 2d 246, 290, 389 N.W.2d 12 (1986). As *Smith*, *Knox*, and *Bowers* establish, an initial, mistaken sentencing recommendation that is promptly caught and remedied at the hearing is not a material and substantial breach of the plea agreement. *See Smith*, 207 Wis. 2d at 272–73; *Bowers*, 280 Wis. 2d 534, ¶ 12; *Knox*, 213 Wis. 2d at 322–23.

Alternatively, Nietzold argues that, even if a breach like this one *could* be remedied, it wasn't here because defense counsel's objection was untimely, which, he adds, contrasts this case from *Knox*. (Nietzold's Br. 12–13, 16–17.) But the record shows that the prosecutor made the mistaken

recommendation at the conclusion of his sentencing remarks, and defense counsel immediately objected when the prosecutor finished speaking. (R. 54:15–17, Pet-App. 28–30.) Nietzold says that the objection was untimely because it allowed the prosecutor to "complete[ ] his presentation." (Nietzold's Br. 16.) The State fails to see the difference between an objection made as soon as the recommendation is uttered and one made moments later when the prosecutor sits down. Either way, it's made before the hearing proceeds to other matters, and in time for the prosecutor to correct the mistake and request the promised recommendation.

A clear premise of Nietzold's argument (and the court of appeals' decision) is that, once a prosecutor makes a mistaken sentencing recommendation, even one that he or she immediately disavows, the sentencing court is unable to disregard that recommendation. "Obviously, one cannot unring a bell," Nietzold argues. But that metaphor rings hollow here. Courts frequently must disregard irrelevant or improper information when imposing sentence. As argued (Opening Br. 16–17), even jurors are presumed to follow cautionary instructions when exposed to inadmissible evidence. *State v. Olson*, 217 Wis. 2d 730, 743, 579 N.W.2d 802 (Ct. App. 1998). Judges are at least as capable of setting aside improper information—as *Smith*, *Knox*, and *Bowers* would indicate.

For the reasons set forth here and in the opening brief, this Court should reverse the court of appeals' decision.

CONCLUSION

The decision of the court of appeals should be reversed and the sentence should be reinstated.

Dated this 8th day of July 2022.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,713 words.

Dated this 8th day of July 2022.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12) (2019-20)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12) (2019-20).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 8th day of July 2022.

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