STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2021AP1792-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMIE LEE WEIGEL,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN LAFAYETTE COUNTY CIRCUIT COURT, THE HONORABLE DUANE M. JORGENSON, PRESIDING

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

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) 294-2907 (Fax)
burgundysl@doj.state.wi.us

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ISSUE PRESENTED

At Jamie Lee Weigel's sentencing hearing for child abuse and neglect convictions, Weigel asked the court to sentence her to 20 years' imprisonment and five years' probation. That sentence would have matched the sentence that the same judge gave Weigel's less-culpable partner for the same charges. Weigel's requested sentence was also effectively the same as the 20-year maximum imprisonment that the State had agreed to recommend at the time of the plea agreement.

Against that background, was Weigel's counsel ineffective for not objecting when the prosecutor referenced Weigel's request for "25 years in total" and stated that the parties agreed that that length was appropriate?

The circuit court said no.

This Court should affirm. The prosecutor's remark was not a breach. If it was, it was not material and substantial under the circumstances here, and counsel was not deficient for not objecting.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither is warranted. The parties' briefs should adequately set forth the facts, and the issue presented can be resolved by applying well-established legal standards.

STATEMENT OF THE CASE

Weigel and her partner, Dalton Hopper, had two children together. CAH was born in January 2018, and DMH was born in November 2018. (R. 1:2.) Hopper worked during the day while Weigel stayed home with the babies. (R. 1:3.)

Weigel and Hopper did not take the babies to the doctor for check-ups or other issues beyond when CAH was two months old or when DMH was two days old. (R. 1:12.) In late

March 2019, Weigel and Hopper brought then-four-month-old DMH to a medical center claiming that she was excessively vomiting. (R. 1:2.) But her condition—she was emaciated and weighed under six pounds—reflected serious abuse and led the facility to contact the police, who also checked in on CAH. (R. 1:2–4.)

Both DMH and CAH had suffered from severe starvation and neglect. (R. 1:5, 7.) A physician assistant opined that DMH had probable brain damage from not receiving enough nutrients at important developmental stages. The nurse estimated that without medical intervention, DMH could have died from malnutrition within a week. (R. 1:5.) CAH, who was then 14 months old, weighed just under 15 pounds and showed significant developmental delays and other signs of malnourishment and neglect. (R. 1:7.) Both babies also had severe rashes and lesions consistent with prolonged exposure to urine and feces and with lying in place "without being picked up for hours on end." (R. 1:4–5, 7.)

The State charged Weigel and Hopper each with four criminal counts: physical abuse of a child and chronic neglect of a child, both causing great bodily harm (counts 1 and 2, as to DMH) and chronic neglect of a child and physical abuse of a child, both causing bodily harm (counts 3 and 4, as to CAH). (R. 1:1–2.) The cases against Hopper and Weigel proceeded separately.[1]

Weigel and the State entered a plea agreement by which Weigel pleaded guilty to count 1 (physical abuse of a child, intentionally causing great bodily harm, as to DMH)

[1] Information regarding *State of Wisconsin v. Dalton Hopper* was obtained through Wisconsin Circuit Court Access. *See State of Wisconsin v. Dalton Allen Hopper*, Lafayette Co. Case No. 2019CF48, https://wcca.wicourts.gov/caseDetail.html?caseNo=2019CF000048&countyNo=33&index=0.

and count 3 (chronic neglect of a child causing bodily harm, as to CAH). (R. 72:2–3; 91:1.) The State agreed to dismiss and read in the other counts and to cap its sentencing recommendation "at a 20 year sentence, including initial incarceration and extended supervision." (R. 72:3; 91.) In October 2019, the court accepted Weigel's guilty pleas, ordered a presentence investigation (PSI), and scheduled a sentencing hearing. (R. 72:16–18.)

Weigel requested and was granted several adjournments of the sentencing hearing due to illness and delays in obtaining an alternative PSI. (R. 76:3; 74:2.) In the meantime, Hopper's criminal case proceeded before the same judge. There, Hopper pleaded guilty to the same two counts that Weigel did, and he was sentenced before Weigel was. *See* Wisconsin Circuit Court Access *supra* note 1. At that hearing, the State capped its recommendation for Hopper at 20 years. (R. 94:30.) The court sentenced Hopper on February 4, 2020, to 20 years' imprisonment (15 years' initial confinement and five years' extended supervision). It also ordered five years' probation to run consecutively to that sentence. *See* Wisconsin Circuit Court Access *supra* note 1. Weigel's sentencing was scheduled to occur ten days later. (R. 62; 74:6.)

After hearing Hopper's sentence, the parties expected that Hopper's sentence was the minimum that Weigel, who was to be sentenced by the same judge, would receive. (R. 94:13–14.) That was so because Weigel was considered more culpable for the crimes than Hopper: she was the babies' primary caregiver and she had two older children whom she similarly neglected. (R. 94:30.) Moreover, there did not appear to be any significant mitigating circumstances that would have offset her greater culpability. While Weigel had a history of anxiety and depression, those conditions did not prevent her from being a fit parent or explain her extreme deprivations of her children. (R. 62:26–27.)

Accordingly, Weigel, by her attorney, filed a memorandum recommending that the judge sentence her to 20 years, bifurcated between ten years' initial confinement and ten years' extended supervision, and like with Hopper, order five years' probation to start after she completed her sentence. (R. 48:1.) The PSI writers made similar recommendations. The Department of Corrections' (DOC) PSI writer recommended a 20-year sentence, with consecutive sentences totaling 14 years' initial confinement and six years' extended supervision. (R. 28:39.) Likewise, in the alternative PSI submitted by Weigel, its writer recommended a 20-year sentence, with 10 to 12 years' initial incarceration, 8 to 10 years' extended supervision (combining for 20 years' total), along with 5 years' probation. (R. 62:32.)

At Weigel's sentencing, the prosecutor stated that she agreed with the DOC PSI writer's recommendation of "a 20 year sentence." (R. 62:32.) She also noted that the alternative PSI writer and Weigel each proposed sentence structures totaling 25 years: "So, there's not a lot that we're arguing about today. Both parties agree that 25 years in total is appropriate. The only issue . . . is the amount of initial" confinement. (R. 62:32.) Accordingly, the prosecutor recommended 16 years of initial confinement. (R. 62:32–33.)

The court noted that it reviewed the facts alleged in the criminal complaint, both PSIs, and the psychological evaluation. (R. 62:34.) It stated that "the gravity of the offense is just overwhelming." (R. 62:34.) It referenced information provided about the shocking condition of both babies by the time Weigel and Hopper took DMH to the hospital. (R. 62:35–36.) It noted that while Weigel had mental health problems with anxiety and depression, those conditions did not explain her extreme and pervasive neglect of the children for so long. (R. 62:37.) It noted that a psychologist found that none of Weigel's mental health issues should have prevented her from effectively caring for the children. (R. 62:36–37.) It stated that

while Hopper shared blame for the harm caused to the children, Weigel was somewhat more culpable because she was with the children daily, she had two other children whom she similarly neglected, and she knew that she was harming the babies and tried to hide it. (R. 62:37–38.)

The court then announced its sentence totaling 30 years' imprisonment. On the first count, it sentenced Weigel to a 20-year sentence totaling 15 years' initial confinement and five years' extended supervision; on the second count, it sentenced her to a consecutive 10-year sentence totaling five years' initial confinement and five years' extended supervision. (R. 62:38–39.)

Weigel sought postconviction relief, alleging that her counsel was ineffective for failing to object to the prosecutor's remark that the parties agreed that "25 years in total" was appropriate as a breach of the plea-agreement term that the prosecutor would cap her recommendation for initial confinement and extended supervision at 20 years. (R. 83:3–6.)[2] At a hearing on the motion, the postconviction court denied relief. (R. 93; 94:37.) Weigel appeals.

Additional facts will be addressed in the argument section below.

[2] Postconviction counsel argued that the agreement was for the State to limit its recommendation to ten years' initial confinement and ten years' extended supervision. (R. 83:2–6.) Postconviction counsel could not support that particular claim after presenting testimony from trial counsel making clear that the State never promised any particular bifurcation recommendation and that information to the contrary in the plea agreement was a mistake. (R. 94:9.) On appeal, Weigel limits her argument to the prosecutor's agreement to cap her recommendation at 20 years total.

STANDARD OF REVIEW

The issue raised alleges ineffective assistance of counsel for failing to object to the State's alleged breach of the plea agreement. Thus, the standard of review implicates the law governing both ineffective-assistance claims and plea agreements.

Whether counsel was ineffective is a mixed question of law and fact; this Court defers to the circuit court's factual findings but considers whether counsel's conduct was deficient or prejudicial de novo. *State v. Howard*, 2001 WI App 137, ¶ 23, 246 Wis. 2d 475, 630 N.W.2d 244.

Likewise, "[t]he terms of the plea agreement and the historical facts of the State's conduct that allegedly constitute a breach of a plea agreement are questions of fact" and are reviewed under the clearly erroneous standard of review. *State v. Williams*, 2002 WI 1, ¶ 5, 249 Wis. 2d 492, 637 N.W.2d 733. "Whether the State's conduct constitutes a breach of a plea agreement is a question of law." *Id.*

ARGUMENT

Counsel was not deficient for not objecting to the prosecutor's remark because it was not, under the circumstances, a substantial and material breach, and any objection would have been inconsistent with Weigel's strategy at sentencing.

Because there was an agreement by the State to limit its sentencing recommendation at 20 years of total initial confinement and extended supervision, the State does not advance the postconviction court's reasoning as a basis for affirmance. However, this Court may nevertheless affirm because the State did not breach the agreement. And even if its remarks were a breach, under the unusual circumstances in this case—including the fact that Hopper's sentence operated as a preview of the minimum sentence Weigel could

expect—it was not substantial and material, and counsel was not deficient for not objecting.

A. The threshold question is whether the alleged breach was material and substantial.

Counsel's failure to object to the State's alleged breach of the plea agreement waives the right to directly challenge the alleged breach of the plea; in such a case, the claim can be raised only as ineffective assistance of counsel. *Howard*, 246 Wis. 2d 475, ¶ 12. This Court analyzes the claim by "first address[ing] whether there was, in fact, a material and substantial breach of the plea agreement." *State v. Sprang*, 2004 WI App 121, ¶ 13, 274 Wis. 2d 784, 683 N.W.2d 522. A determination that there was not a material and substantial breach is dispositive of an ineffective assistance claim. *Id.*

"When examining a defendant's allegation that the State breached a plea agreement, such as by making a different recommendation at sentencing, it is irrelevant whether the trial court was influenced by the State's alleged breach or chose to ignore the State's recommendation." *State v. Bowers*, 2005 WI App 72, ¶ 8, 280 Wis. 2d 534, 696 N.W.2d 255. Yet, "[n]ot all breaches of a plea agreement require a remedy." *Id.* ¶ 9 (citing *State v. Bangert,* 131 Wis. 2d 246, 289, 389 N.W.2d 12 (1986)). "A defendant is not entitled to relief when the breach is merely . . . technical . . . rather than . . . substantial and material." *Id.* (citing *Bangert*, 131 Wis. 2d at 289–90).

"A material and substantial breach of a plea agreement is one that violates the terms of the agreement and deprives the defendant of a material and substantial benefit for which he or she bargained." *Id.* (citing *State v. Deilke,* 2004 WI 104, ¶ 14, 274 Wis. 2d 595, 682 N.W.2d 945). Plea agreements are analogous to contracts; therefore, contract principles can aid the determination whether there has been a breach that is

material and substantial. *Id.* (citing *Deilke,* 274 Wis. 2d 595, ¶ 12).

If a court concludes that the breach was material and substantial, the defendant has satisfied the prejudice prong of the *Strickland* analysis. *Howard*, 246 Wis. 2d 475, ¶ 26.

B. The State agreed to cap its recommendation for a total sentence at 20 years, but it had no obligation to abstain from recommending probation.

As an initial matter, the terms of the plea agreement were for Weigel to plead guilty to counts 1 and 3, and in exchange, the State agreed to dismiss counts 2 and 4 and have them read in, and to cap its sentencing recommendation at 20 years, including both initial confinement and extended supervision.[3] The State offered those terms on September 5, 2019, by email. (R. 91.)

The plea hearing occurred on October 10, 2019. (R. 72.) Though the court did not request the sentencing-recommendation portion of the plea agreement, Weigel pleaded guilty to counts 1 and 3, and counts 2 and 4 were dismissed and read in. (R. 72:14.) Weigel also signed a plea questionnaire form, which the court apparently saw, and which indicated that the State agreed to recommend a 20-year sentence. (R. 72:2–3; 24:1–2.)

Sentencing was initially scheduled for December 2019, but Weigel requested additional time to have a defense PSI prepared. (R. 76:2–3.) Her sentencing ultimately occurred on

[3] The postconviction court ruled that there was never an agreement for the State to cap its sentencing recommendation at 20 years. (R. 94:37.) The State concedes that at the time of the plea, there was an agreement that included the capped-at-20-years sentencing recommendation from the State. Accordingly, it does not respond to Weigel's argument to that effect. (Weigel's Br. 10–17.)

February 14, 2020, by the same judge who, ten days earlier, had sentenced Hopper. (R. 62.)

At Hopper's sentencing hearing, the State recommended a 20-year sentence. (R. 94:30.) The court gave Hopper 20 years of imprisonment, comprised of 15 years of initial confinement and five years of extended supervision; it also ordered five years of probation consecutive to that sentence. *See* Wisconsin Circuit Court Access *supra* note 1. The court went on to remark that Hopper was less culpable than Weigel because Weigel "clearly had an intention to kill her children by depriving them the way she did" and because she had previously neglected her two older children by similarly withholding nourishment and care. (R. 94:30.)

Accordingly, at Weigel's sentencing a week later, both parties understood that a 20-year period of imprisonment was the minimum that Weigel would expect to receive. To that end, and after discussing the matter with Weigel, both Weigel's attorney and the author of the alternative PSI recommended sentences that totaled 20 years, along with a consecutive five-year period of probation. (R. 94:9–10, 13.) Given those recommendations, Weigel's attorney focused his efforts on persuading the court to match, and not exceed, Hopper's combined sentence and probationary period, and to minimize Weigel's period of initial confinement. (R. 94:14, 18.)

C. Under the circumstances, the prosecutor's referring to the total number of years that Weigel was recommending was not a breach.

Weigel's argument on appeal appears to be premised on the notions that probation is a sentence, and that the State's promise for a 20-year sentence cap would include not just initial confinement and extended supervision, but also any periods of probation. Neither of those notions are correct.

To start, the State agreed to recommend a sentence of 20 years, including initial confinement and extended supervision. (R. 91.) The State made no promise to abstain from recommending a probationary period; its promise was limited to capping its recommended sentence. And it is well-settled that probation is "not considered a sentence." *State v. Dowdy*, 2010 WI App 158, ¶ 26, 330 Wis. 2d 444, 792 N.W.2d 230 (quoting *State v. Fearing*, 2000 WI App 229, ¶ 6, 239 Wis. 2d 105, 619 N.W.2d 115).

Accordingly, consistent with the plea agreement, the prosecutor recommended a sentence of 20 years. She highlighted the Department of Corrections' PSI writer's recommendation, which was consecutive sentences totaling 20 years. The prosecutor noted that she agreed with the writer's analysis and recommendation, calling it "spot on." (R. 62:31–32.) The prosecutor then observed that the defense PSI recommendation, which was for 20 years' incarceration plus five years of probation (R. 46:14–15), was "similar" and that Weigel had requested the same total amount that Hopper had received a week earlier. (R. 62:32.) She summed up that everyone agreed on that total, remarking, "Both parties agree that 25 years in total is appropriate." (R. 62:32.) The prosecutor then stated that she recommended 16 years' initial confinement. (R. 62:32.)

Ultimately, then, the only specific recommendation that the prosecutor made was for 16 years of initial confinement, which was below the 20-year cap it had promised. The rest of its remarks did not exceed its promise to cap its recommendation of initial confinement and extended supervision at 20 years. Again, the prosecutor recommended a sentence of no more than 20 years (based on the DOC PSI) plus an additional five years of probation (based on Weigel's recommendation and the alternative PSI), with a recommendation of a 16-year period of initial confinement. To the extent that the prosecutor referenced 25 years, she was

simply observing that the defense PSI's and Weigel's recommendation of a sentence-plus-probation totaled that much.

Hence, the prosecutor did not breach the plea agreement. She did not recommend periods of initial confinement and extended supervision totaling more than 20 years. Thus, counsel was not ineffective for not objecting to the prosecutor's sentencing recommendation, and this Court may affirm on that basis.

D. Even if the State's reference to "25 years in total" was a breach, it was not substantial and material under the unique circumstances of this case.

Assuming that the State's reference to and agreement with Weigel's request for 25 years total sentence plus probation breached the agreement, the next question is whether that breach was material and substantial. Normally, if a prosecutor entered a plea agreement promising to cap their sentencing recommendation at 20 years, and ultimately asked for 25, even implicitly, that would be a material and substantial breach. That is so because the defendant typically never argues for more imprisonment than what the State agrees to recommend. In other words, the defendant typically establishes the floor of a proposed range of punishment, and the State sets the ceiling, thus setting a range that many times will orient and calibrate the court's sentencing decision. Therefore, in those situations, the defendant has bargained for the State to limit itself to a particular ceiling of recommended confinement and supervision. So generally, the State's making a recommendation in excess of that ceiling deprives the defendant of that bargained-for benefit.

Here, though, events that occurred between the plea and sentencing substantially recalibrated both the State's and Weigel's expectations of her likely sentence. Hopper, who

the circuit court expressly said was less culpable than Weigel, received a sentence of 20 years—including 15 years of initial confinement and five years of extended supervision—along with five years of probation. Weigel's counsel then advised Weigel that she was unlikely to get less than that combined total. Counsel and Weigel agreed to aim for persuading the court to sentence her to 20 years (including initial confinement and extended supervision) and to order a five-year period of probation.

Accordingly, when the prosecutor pointed out that "both parties" agreed that "25 years in total" was appropriate (R. 62:32), it was not a substantial and material breach. That is so because Weigel, by submitting recommendations (both her own and the alternative PSI writer's) asking for 20 years' imprisonment plus five years' probation, implicitly modified terms of the agreement (again, to the extent that the agreement included an obligation by the State to abstain from proposing additional probation time). Thus, the State's suggestion that it was joining Weigel's recommendation for 25 years total was not a material and substantial breach because it did not deprive her of a bargained-for benefit.

Weigel relies on case law holding that the State may not indirectly or covertly suggest a sentence in excess of what it promises in plea negotiations. (Weigel's Br. 18–19.) But that law does not address the unusual circumstances and changed expectations that occurred here. Nor was the State's remark about agreeing with Weigel's recommendation the type of "less than a neutral recitation" or covert conveyance to avoid a duty under a plea agreement that courts have warned against. (Weigel's Br. 18 (quoting *Williams,* 249 Wis. 2d 492 ¶ 42) (citing *State v. Hanson,* 2000 WI App 10, ¶ 24, 232 Wis. 2d 291, 606 N.W.2d 278).) Rather, the State was acknowledging that the court had just heard many of the facts and details pertinent to Weigel's sentencing at Hopper's

hearing, and that because of that, no one was expecting Weigel to get a lower total than what Hopper had received.

Finally, Weigel also argues that the breach was material and substantial because it exceeded the State's promise to argue no more than 20 years. (Weigel's Br. 19–20.) Again, as noted, the prosecutor did not exceed her promise to cap her recommendation of initial confinement and extended supervision at 20 years. Even if it was implicit in the agreement that the State would remain silent as to any probation to be served beyond that 20-year cap, the breach was not material and substantial. That is so because the parties' expectations changed based on Hopper's sentence, such that Weigel adopted a strategy to persuade the court to impose the same sentence-plus-probation that Hopper had received. Thus, the State's reference to "25 years in total" did not deprive Weigel of any benefit. It was not, under the unusual circumstances here, a substantial and material breach.

E. Counsel's nonobjection to the alleged breach was not deficient.

Alternatively, even if the State materially and substantially breached the plea agreement when it stated its agreement with Weigel's recommendation of "25 years in total," counsel was not deficient for not objecting to the remark.

At the postconviction hearing, counsel testified that the strategy he and Weigel agreed to pursue at her sentencing was to argue for a sentence that matched Hopper's. (R. 94:14.) And counsel offered an alternative PSI and memorandum recommending a 20-year sentence plus five years of probation. Accordingly, counsel's not objecting to the State's suggestion that it was joining Weigel's recommendation was consistent with that sound strategy. Indeed, it would have been incongruous with that strategy for counsel to ask the court for

the same punishment that Weigel's less-culpable partner received, but then to also object when the State stated its agreement with the total time that Weigel was proposing.

As Weigel notes (Weigel's Br. 21–22), at the postconviction hearing, counsel could not recall noticing at sentencing when the State referenced "25 years in total." (R. 94:7, 18.) Counsel stated, "I may have just simply missed it." (R. 94:7.) Weigel frames these comments as concessions from counsel that he erred in failing to object. (Weigel's Br. 21–22.)

To start, counsel's statement that he did not remember the State's comment or why he didn't object was not a concession that the State breached the plea agreement. He simply didn't remember. In all events, even if counsel's statements could be understood to be an admission that he should have objected, counsel's subjective view is not controlling. Rather, deficient performance is an objective inquiry. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Here, counsel and Weigel strategized to persuade the court to sentence her to the same amount of time that Hopper received, which was 20 years' of combined initial confinement and extended supervision, and five years of probation. Objecting to the State's comment that the parties agreed to 25 years total, even if it was a material and substantial breach, would have been inconsistent with Weigel's strategy and arguably could have undercut the persuasive weight of her position. Accordingly, any apparent failure by counsel to object to the State's alleged breach was not objectively unreasonable, and therefore not deficient.

Finally, Weigel requests resentencing before a different judge as relief. (Weigel's Br. 22–23.) However, it is up to this Court to determine the appropriate remedy if it agrees with Weigel's position. *See Howard*, 246 Wis. 2d 475, ¶¶ 36–37. To that end, it may be that plea withdrawal would be the appropriate remedy if Weigel's arguments are meritorious. As

argued, however, the State maintains that no relief is warranted and that this Court should affirm.

In sum, the State did not breach its agreement; to the extent it referenced "25 years in total," it was simply echoing Weigel's request for a 20-year sentence and five years of probation. Even if that remark was a breach, under the unique circumstances of this case, it was not substantial and material and counsel's nonobjection was not objectively unreasonable.

CONCLUSION

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

Dated this 6th day of April 2022.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Sarah L. Burgundy
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) 294-2907 (Fax)
burgundysl@doj.state.wi.us

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 4,044 words.

Dated this 6th day of April 2022.

Electronically signed by:

Sarah L. Burgundy
SARAH L. BURGUNDY
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 6th day of April 2022.

Electronically signed by:

Sarah L. Burgundy
SARAH L. BURGUNDY
Assistant Attorney General