STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2021AP1834-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ETTER L. HUGHES,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JONATHAN D. WATTS AND THE HONORABLE M. JOSEPH DONALD, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. After Defendant-Appellant Etter L. Hughes waived her preliminary hearing, did the circuit court properly allow the State to amend the charges against Hughes to first-degree reckless homicide and two counts of repeated physical abuse of a child for her role in the torture and abuse of her two young cousins, when the original complaint alleged that Hughes' co-actor, Mary Martinez, was the primary abuser?

The court found that the charges were transactionally related to the facts stated in the criminal complaint and the State properly amended the information.

This Court should affirm the circuit court. The original complaint clearly accused Hughes of participating in the physical abuse and neglect and the amended charges arose out of those facts. At any rate, the amendment was harmless, because Hughes pled to the charges alleged in the original complaint and not the amended charges.

2 Did the circuit court properly deny without a hearing Hughes' claim that trial counsel was ineffective for failing to object to the amendment of the complaint on various grounds?

The trial court found that counsel was not deficient because Hughes' alleged grounds for objection were meritless and would have been denied, and she was not prejudiced because if counsel had objected on these grounds the court would not have granted the motion, so Hughes would have been facing the same choice to go to trial on the amended information or plead to the original charges that she was in when she decided to accept the plea.

This Court should affirm the circuit court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case deals only with the application of settled law to the facts, which the briefs should adequately address.

SUPPLEMENTAL STATEMENT OF THE FACTS

On November 29, 2016, a car pulled into the ambulance bay at St. Luke's hospital and Etter L. Hughes jumped out, calling out that she had "an unresponsive baby." (R. 1:3.) The first victim, seven-year-old Tyler,[1] had to be physically carried into the emergency room by hospital staff. (R. 1:3.) Hughes was accompanied by another child, nine-year-old Jake. (R. 1:3.) Hughes said she was the boys' cousin and that she found Tyler unresponsive when she woke up. (R. 1:3.) Hughes passed a handwritten note to the security guard, Ikeya Thigpen. (R. 1:3.) It blamed Jake for the extensive injuries over Tyler's body. (R. 1:3.)

Tyler was admitted to St. Luke's Hospital. (R. 1:3.) He was "pulseless, unresponsive, and cold to the touch." (R. 1:3.) CPR was administered and Tyler was intubated. (R. 1:3.) He "coded multiple times, the longest of which lasted 40 minutes" before doctors were able to get a pulse back. (R. 1:3.) A pediatric child abuse specialist documented that Tyler's body was marked with a litany of wounds on almost every body part, some old and scarred over and some fresh, including marks that indicated he had been beaten with a looped cord or belt and several ligature lacerations indicating he'd been bound at the wrists, ankles, and neck at some point. (R. 1:3–4.) Tyler was also severely malnourished, weighing only 44

[1] The State uses pseudonyms for all of the children involved in this case.

pounds and with his bones prominently visible beneath his skin. (R. 1:4.) The doctor concluded that Tyler's severe malnutrition and multiple patterned injuries in various stages of healing were "consistent with cruelty and torture." (R. 1:4.) Police were immediately notified due to the concern that Tyler had been the victim of prolonged and severe child abuse. (R. 1:3–4.)

Tyler was transferred to Children's Hospital of Wisconsin, but he coded again. (R. 1:3.) After significant CPR and medications were administered without success, the decision to cease life-saving measures was made. (R. 1:3.) Tyler died at 4:45 p.m., roughly five hours after arriving at St. Luke's. (R. 1:3–4.)

Jake was hospitalized for life-threatening malnutrition the same day. (R. 1:2, 5–6.) He was also found to have similar injuries to Tyler over his whole body, including multiple healed and fresh wounds, ligature scars, and abundant looped cord injuries. (R. 1:5.)

Hughes told police that she was originally from Helena, Arkansas, and decided to move her family to Milwaukee in August, 2016, to find a better job. (R. 1:5.) Hughes' second cousin, Tyler and Jake's mother, was supposed to move her family to Milwaukee as well, and sent the boys ahead with Hughes. (R. 1:5.) Their mother never relocated from Arkansas, however, and Hughes' fiancé was arrested and sent back to Arkansas. (R. 1:5.) Thereafter Hughes reached out to Martinez, whom Hughes had met in prison while Hughes was serving a sentence for another child homicide, for a place to stay. (R. 1:5.) Martinez allowed Hughes, Hughes' 13-year-old son Lewis, Tyler, and Jake to move into the house Martinez shared with her adult son Carlos Gonzalez. (R. 1:5–6.)

Hughes said Tyler and Jake had rampant behavior problems and these made Martinez extremely angry to the point of expressing deep hatred for them and a desire to hurt

them. (R. 1:6.) Hughes said she had noticed the boys' extreme weight loss but had no explanation for it; she also said she had noticed the numerous injuries on the boys but believed they were the result of Jake and Tyler fighting. (R. 1:6.) Hughes eventually said that she believed Martinez had been abusing the children. (R. 1:6.)

Gonzalez, however, told a very different story. He had personally witnessed Hughes beating Jake and Tyler, and she had given Martinez permission to "physically discipline" them as well. (R. 1:7.) Gonzalez knew that Martinez routinely beat them, too, because he could hear her doing so from his bedroom. (R. 1:7.) Gonzalez also recalled an incident when he returned home and found the children tied up and seated on the floor behind the couch. (R. 1:7.) Martinez told him Hughes had tied them. (R. 1:7.)

During a forensic interview, Jake said Martinez routinely beat the boys with extension cords, belts, shoes, and her fists. (R. 1:7.) The night before Tyler's death, Martinez had beaten both boys with an extension cord and kicked Tyler in the head. (R. 1:7.) When Tyler became unresponsive, Martinez refused to let Hughes call 911 and kicked them all out of the house. (R. 1:7.) Jake said Martinez also forbid him and Tyler from eating any of the food in the house. (R. 1:7.) In a separate forensic interview Lewis confirmed what Jake said about the routine beatings from Martinez and the prohibition on Tyler and Jake eating. (R. 1:8.) Lewis said he would prepare the boys food after Martinez was out of the room. (R. 1:8.)

The State charged both Martinez and Hughes with several crimes related to the boys' prolonged torture and Tyler's death, including neglecting a child resulting in death as a party to a crime, neglecting a child causing great bodily harm as a party to a crime, and repeated physical abuse of a child as a party to a crime. (R. 1:1–2.) Hughes was also

charged with two counts of failure to prevent bodily harm to a child. (R.1:2.)

Hughes and Martinez conceded that the facts in the complaint established probable cause and waived the preliminary hearing. (R. 42:3–6.) Both entered not guilty pleas and the matter was scheduled for bail hearings. (R. 42:6–7.) The two cases were severed shortly after that and proceeded separately. (R. 38:2.)

Hughes's trial on the four counts charged against her in the original complaint was set for June 5, 2017. (R. 1:1–3; 44:3.) At a bail hearing in March 2017, however, the State informed the court and the defense that in the months leading up to trial, Jake, now safe in a foster home, began making further disclosures detailing severe physical abuse of both boys perpetrated by Hughes herself. (R. 39:4.) It informed the court and the defense that "[i]f this case proceeds to trial . . . these charges are going to be increased against Ms. Hughes in large part because the additional investigation has proven she played a much more active role in the abuse of these children." (R. 39:5.)

The State provided Hughes with copies of all of the videotaped witness statements it intended to introduce at trial including Jake's recent disclosures from a second forensic interview conducted on January 27, 2017. (R. 91.) A week before the final pretrial hearing, the State informed the defense that it intended to amend the charges against Hughes to reflect her more active participation in the abuse. (R. 92.)

Accordingly, on the morning of the final pretrial conference, the State filed an amended information. (R. 12; 43:3.) This changed count one to first-degree reckless homicide as a party to a crime for Tyler's death, and added two counts of repeated physical abuse of a child causing great bodily harm as a party to a crime. (R. 12; 43:3.) Hughes did

not object to the amendment, waived reading of the charges, and entered not guilty pleas. (R. 43:3.)

A few days after the amendment and having reviewed everything the State had sent in discovery, defense counsel noted that the strength of the State's case had "become even more apparent," and inquired if the State would consider a plea. (R. 93:5.) The parties eventually agreed that Hughes would plead no contest to the charges alleged in the original information: one count of child neglect resulting in death, one count of child neglect resulting in great bodily harm, and two counts of failure to prevent bodily harm to a child. (R. 93:1.) The two physical abuse of a child counts would be dismissed, and the State would recommend "substantial prison" but not a specific term of years at sentencing. (R. 93:1.)

The circuit court accepted the plea and ultimately sentenced Hughes to 20 years of initial confinement and 15 years of extended supervision. (R. 32:46–47; 40:16–17.)

Hughes thereafter moved to withdraw her plea, alleging that the amended charges were not transactionally related to the facts alleged in the criminal complaint and that trial counsel was thus ineffective for failing to object to the amendment. (R. 87:1–2.) The circuit court denied the motion without a hearing. (R. 100.) Hughes appeals.

ARGUMENT

I. The amended charges were legally and factually sufficient.

A. The amended charges were plainly transactionally related to the facts stated in the complaint.

"[A] district attorney may, where a preliminary examination is waived, file an information for any offense or offenses growing out of or relating to the transaction charged in the criminal complaint." *Thies v. State*, 178 Wis. 98, 105,

189 N.W. 539 (1922). More recently, this Court interpreted Wis. Stat. § 971.01(2), the modern preliminary examination statute, as providing the same: "the legislature intended to permit a district attorney to file *any* charge in the information so long as it was based on . . . the facts set out in the complaint when a preliminary hearing is waived." *State v. Michels*, 141 Wis. 2d 81, 88, 414 N.W.2d 311 (Ct. App. 1987). This requirement is met as long as "the information charge is related to the same events set out in the complaint regardless of the level of the charge." *Id.* at 89. A charge is considered factually related to another charge if it "involved the same participants and witnesses, occurred at the same time and place, relied on the same physical evidence and allegedly arose from the same motive." *State v. Williams*, 198 Wis. 2d 516, 535, 544 N.W.2d 406 (1996).

All of those requirements are met here. The amended complaint charged Hughes with first-degree reckless homicide as a party to a crime for Tyler's death and maintained the neglect resulting in great bodily harm charge as to Jake. (R. 12:1.) It also added two counts of repeated physical abuse of a child as a party to a crime, one for each boy. (R. 12:2.) The original criminal complaint stated that both Jake and Tyler were severely malnourished and showed innumerable wounds, both fresh and healed. (R. 1:3–5.) And while Hughes blamed Martinez for all of the abuse, the complaint said Gonzalez reported to police that he had witnessed Hughes striking the children. (R. 1:5–7.) He further reported that Hughes gave Martinez permission to "physically discipline" the boys and relayed that when he found the boys tied up behind the couch, he was told that Hughes was the one who had tied them. (R. 1:7.) The original complaint charged Hughes with neglect resulting in Tyler's death and neglect resulting in great bodily harm to Jake, both as a party to a crime, meaning the original complaint clearly implicated Hughes as one of the abusers. (R. 1:1.)

So, the amended charges quite obviously arose out of the same transaction relayed in the original criminal complaint in this case. The transaction alleged in the original complaint was the severe and ongoing abuse of both boys during the time they lived in Martinez's home and in which both Martinez and Hughes participated. (R. 1:3–8.) The amended information also alleged that Hughes participated in the severe and ongoing abuse of both boys while they resided with Martinez—in other words, the amended charges involved the same participants and witnesses, occurred at the same time and place, relied on the same physical evidence and arose from the same motive as the charges in the original complaint. (R. 12.) The new charges simply reflected that Hughes was more directly involved in beating and torturing the boys than was originally known.

Hughes' claim that "there is nothing in the complaint that establishes that [she] intentionally aided and abetted in the abuse" of the boys is plainly false. (Hughes' Br. 22.) Hughes fails to address that Gonzalez specifically told police that he witnessed Hughes striking the children. (R. 1:7; *See* Hughes' Br. 23–24.) Both boys had horrific injuries all over their bodies that any caregiver would notice and that were plainly inconsistent with legal "physical discipline." (Hughes' Br. 22–24.) And Hughes utterly ignores Jake's disclosures that Hughes was actively involved in the abuse. These facts alone are sufficient to support the charges that Hughes aided and abetted Martinez in abusing the children.

And the fact that "there is no additional corroborating evidence" beyond Gonzalez's statement to show that Hughes was the person who tied the children up is immaterial. (Hughes' Br. 23–24.) Of course there is no corroborating evidence for this apart from Gonzalez's statement; it was an act of child abuse that occurred in the defendants' residence and the only people who witnessed it were the defendants, Gonzalez, and the victims. Under Hughes' theory no one could

ever be charged with child abuse unless the person was somehow caught on camera perpetrating the abusive act, because witness accounts would be insufficient to support charges. That is absurd.

In sum, Hughes waived a preliminary hearing, and that allowed the State to amend the charges to any crime that arose out of the same transaction alleged in the original complaint. Hughes' amended charges arose out of the ongoing and severe abuse of the two boys by both Martinez and Hughes—which is the same transaction that gave rise to the original charges. The circuit court properly denied this claim.

B. Hughes' multiplicity allegation is forfeited and moot.

Hughes claims that counts three and four in the amended information—charging Hughes with one count of failure to prevent harm for each boy pursuant to Wis. Stat. § 948.03(4)—were multiplicitous with counts five and six—charging Hughes with one count of repeated acts of abuse causing great bodily harm to each boy pursuant to Wis. Stat. § 948.03(5)—because Wis. Stat. § 948.03(5)(c) prohibits charging a defendant with repeated acts of abuse and with failure to prevent abuse if the charges cover the same time frame. (Hughes' Br. 24–31.) As explained below, Hughes is due no relief on this claim for multiple reasons.

1. Hughes forfeited her multiplicity arguments by operation of law.

Wisconsin Stat. § 971.31(2) requires a party to raise "defenses and objections based on defects in the institution of the proceedings, insufficiency of the complaint, information or indictment . . . before trial . . . or be deemed waived." And generally, "a guilty, no contest, or *Alford* plea 'waives all nonjurisdictional defects, including constitutional claims.'" *State v. Kelty*, 2006 WI 101, ¶ 18, 294 Wis. 2d 62, 716 N.W.2d

886 (footnote omitted) (citation omitted). "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent" claims of constitutional error that occurred before the entry of the plea. *Tollett v. Henderson*, 411 U.S. 258, 267 (1973).

It is also universally recognized that "[i]ssues not raised in the circuit court are deemed [forfeited].[2]" *State v. Carprue*, 2004 WI 111, ¶ 36, 274 Wis. 2d 656, 683 N.W.2d 31. "The [forfeiture] rule serves several important objectives. Raising issues at the trial court level allows the trial court to correct or avoid the alleged error in the first place, eliminating the need for appeal." *State v. Huebner*, 2000 WI 59, ¶ 12, 235 Wis. 2d 486, 611 N.W.2d 727. "It also gives both parties and the trial judge notice of the issue and a fair opportunity to address the objection." *Id.* For this reason, "a specific, contemporaneous objection is required to preserve error." *State v. Delgado*, 2002 WI App 38, ¶ 12, 250 Wis. 2d 689, 641 N.W.2d 490.

When a specific and timely objection is not made, "the normal procedure in criminal cases . . . is to address [forfeiture] within the rubric of the ineffective assistance of counsel." *Carprue*, 274 Wis. 2d 656, ¶ 47 (citation omitted). However, ineffective assistance of trial counsel is itself a claim that is not preserved for appellate review unless the defendant presents an ineffective assistance challenge in a postconviction motion to the circuit court that specifically addresses trial counsel's failure to object on these grounds. *See State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675,

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[2] The Wisconsin Supreme Court in *State v. Ndina*, 2009 WI 21, ¶¶ 28–33, 315 Wis. 2d 653, 761 N.W.2d 612, discussed the difference between "waiver" and "forfeiture" and recognized that this rule is more consistent with the concept of forfeiture than waiver.

677–78, 556 N.W.2d 136 (Ct. App. 1996) ("Claims of ineffective trial counsel . . . cannot be reviewed on appeal absent a postconviction motion in the trial court."); *State v. Balliette*, 2011 WI 79, ¶ 24, 336 Wis. 2d 358, 805 N.W.2d 334 ("the defendant must show that '*particular* errors of counsel were unreasonable'") (emphasis in original). Stated differently, alleging that counsel was ineffective for failing to object on one ground does not preserve for review any and all other claims of ineffective assistance that could conceivably be raised for failing to object on other grounds.

The record shows that trial counsel never objected to the amended charges on multiplicity grounds. And Hughes did not claim in her postconviction motion that counsel was ineffective for failing to raise a multiplicity challenge prior to the plea; her allegations were that trial counsel should have objected to the information on the grounds that they lacked a factual basis and deprived Hughes of adequate notice of the charges against her. (R. 87:17–19.) Accordingly, Hughes has both waived and forfeited this claim.

Regardless, as explained below, any potential multiplicity problem was cured when Hughes entered her no contest plea and therefore Hughes is due no relief even if she had properly raised this claim in the circuit court.

2. Hughes' multiplicity claim is moot because the amended charges were dismissed.

Even if Hughes' multiplicity claim were properly preserved (which it is not), it nonetheless fails for being moot. Hughes pleaded no-contest to the original charges, and the amended charges were dismissed. Accordingly, a ruling relating to whether the amended charges were multiplicitous can have no practical impact on the outcome of the case.

"[T]he Double Jeopardy Clause provides three separate protections." *State v. Davison*, 2003 WI 89, ¶ 19, 263 Wis. 2d

145, 666 N.W.2d 1. "It protects against a second prosecution for the *same offense* after acquittal. It protects against a second prosecution for the *same offense* after conviction. And it protects against multiple punishments for the *same offense*." *Id.* (emphasis in original). Crimes are considered the same offense if they are identical in law and fact. *State v. Trawitzki*, 2001 WI 77, ¶ 21, 244 Wis. 2d 523, 628 N.W.2d 801.

As is relevant to Hughes' claim, it is a violation of the double jeopardy clause of the Wisconsin and federal constitutions to convict a defendant of multiple counts that the Legislature intended to comprise only a single crime with a single punishment. *State v. Anderson*, 219 Wis. 2d 739, 746, 580 N.W.2d 329 (1998); *Davison*, 263 Wis. 2d 145, ¶ 29. However, "in discussing multiplicity, a reference to 'charges' must be employed carefully, because it is permissible to *charge* more than one count, even if the state may not punish a defendant on more than one count." *Davison*, 263 Wis. 2d 145, ¶ 38; *see also* Wis. Stat. § 939.65 ("if an act forms the basis for a crime punishable under more than one statutory provision, prosecution may proceed under any or all such provisions").

The State does not dispute that Wis. Stat. § 948.03(5)(c) arguably evinces legislative intent not to impose cumulative punishments for violating both Wis. Stat. § 948.03(5) and for individual acts charged under the other subsections of Wis. Stat. § 948.03 that occurred within the same time frame. Nevertheless, Hughes' multiplicity claim is moot. "An issue is moot when its resolution will have no practical effect on the underlying controversy." *State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶ 3, 233 Wis. 2d 685, 608 N.W.2d 425. A multiplicity claim is moot where, as here, the charges that would have constituted multiple convictions violative of legislative intent are dismissed. *State v. Parr*, 182 Wis. 2d 349, 362–63, 513 N.W.2d 647 (Ct. App. 1994). Hughes was not punished multiple times for the same offense; she was

punished once each for four distinct offenses, and none of those offenses were charged contrary to Wis. Stat. § 948.03(5)(c). There is no relief this Court can grant Hughes on her multiplicity claim that she has not already received by virtue of the State dismissing the amended charges.

C. Hughes' claim that the amendment was improper because it erroneously informed her of the maximum penalty she faced fails because any error in the State's amended information was clearly harmless.

At bottom, Hughes' multiplicity and factual basis claims seem to actually be an argument that her plea was not knowingly, voluntarily, and intelligently entered because the allegedly improper amended charges made her think she was facing more time than she actually was when she agreed to plead no contest to the original charges. (Hughes' Br. 24–31.) But any error in this regard was harmless.

The State made very clear that it intended to increase the severity of the charges Hughes was facing, and it did so long before it filed the amended information; so, by the time Hughes entered her plea she was well aware she was going to be facing more prison time than she was initially no matter what the amended charges were. (R. 39:4–5; 92.) Given Jake's additional disclosures and the severity of these offenses, had counsel objected to the repeated acts counts five and six on multiplicity grounds, in all likelihood the State simply would have dropped counts three and four, the two lower-grade Class H failure-to-protect felonies. And the addition of counts five and six charging Hughes with one count of repeated physical abuse of a child for each boy were not the only changes the State made in the amended information. It also amended count one up from child neglect resulting in death, a Class D felony, to first-degree reckless homicide, a Class B felony. (R. 1:1; 12:1.)

So, even had Hughes objected to the amended information, there is no reasonable probability that Hughes would have opted for trial instead of taking the plea. The facts alleged in the initial complaint plainly implicated Hughes as participating in the abuse, so a challenge to the amendment on that ground would have been denied. And had Hughes objected on multiplicity grounds and the State dropped the two failure to aid charges, at a minimum Hughes would still have been facing an additional possible 53 years of prison exposure on the amended information versus the original charges.[3] And that is assuming that the State would not have replaced counts three and four with two other charges that would not have been prohibited by section 948.03(5)(c), such as two counts of causing mental harm to a child under Wis. Stat. § 948.04 or aggravated battery under Wis. Stat. § 940.19(5).

It is simply not possible that Hughes would have evaluated the benefit of pleading no contest to the original charges any differently had the allegedly improper charges been removed from the amended information when doing so still would have subjected Hughes to over 100 years of incarceration: more than double the potential exposure on the original charges. Any impropriety in the amended charges was harmless beyond a reasonable doubt because it cannot have possibly had any substantial effect on Hughes' evaluation on the benefit of taking the plea even if the failure to aid charges would have been dropped.

[3] The maximum penalty Hughes could receive on the original charges was 49.5 years; the maximum she could have faced for counts one, two, five, and six of the amended information was 102.5 years.

II. Hughes did not plead sufficient facts to warrant a hearing on her ineffective assistance claim.

A. When a circuit court summarily denies an ineffective assistance of counsel claim, the only issue on appeal is whether the defendant is entitled to a *Machner* hearing.

An evidentiary hearing is a prerequisite to raising a claim of ineffective assistance of counsel on appeal. *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Defendants are not entitled to a hearing, however, simply because they raise an ineffective assistance claim; a hearing is required only if the defendant's motion was properly pled. *State v. Allen*, 2004 WI 106, ¶ 10, 274 Wis. 2d 568, 682 N.W.2d 433. "[T]o adequately raise a claim for relief, a defendant must allege 'sufficient material facts—*e.g.*, who, what, where, when, why, and how—that, if true, would entitle the defendant to the relief he seeks.'" *State v. Romero-Georgana*, 2014 WI 83, ¶ 37, 360 Wis. 2d 522, 849 N.W.2d 668 (citation omitted).

The sufficiency of the allegations in the motion is not the end of the inquiry. "[A] circuit court has the discretion to deny a defendant's motion—even a properly pled motion . . . without holding an evidentiary hearing if the record conclusively demonstrates that the defendant is not entitled to relief." *State v. Sulla*, 2016 WI 46, ¶ 30, 369 Wis. 2d 225, 880 N.W.2d 659.

When the circuit court denies an ineffective assistance of counsel claim without holding a hearing, the question before this Court is narrow: whether a hearing is warranted because the circuit court erred in denying the motion on its face. *State v. Sholar*, 2018 WI 53, ¶ 54, 381 Wis. 2d 560, 912 N.W.2d 89. When deciding this question this Court looks only to the sufficiency of the allegations in the four corners of the defendant's motion in the circuit court, and not to any

additional allegations in the defendant's appellate brief. *Allen*, 274 Wis. 2d 568, ¶ 27.

"'Whether a defendant's [postconviction motion] "on its face alleges facts which would entitle the defendant to relief" and whether the record conclusively demonstrates that the defendant is entitled to no relief' are questions of law that [an appellate court] review[s] de novo." *Sulla*, 369 Wis. 2d 225, ¶ 23 (citation omitted). If the motion does not contain the requisite material facts, "presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief," then this Court reviews the circuit court's decision to grant or deny a hearing "under the deferential erroneous exercise of discretion standard." *Id.*

B. It is the defendant's burden to plead sufficient facts that would establish constitutionally deficient performance by counsel and prejudice to the defense.

Ineffective assistance claims are evaluated using the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prevail under *Strickland*, a defendant must prove that his counsel's performance was both deficient and prejudicial. *Strickland*, 466 U.S. at 687.

"To prove deficient performance, a defendant must show specific acts or omissions of counsel that are 'outside the wide range of professionally competent assistance.'" *State v. Arredondo*, 2004 WI App 7, ¶ 24, 269 Wis. 2d 369, 674 N.W.2d 647 (citation omitted). To prove prejudice, "the defendant must show that [counsel's deficient performance] actually had an adverse effect on the defense." *Strickland*, 466 U.S. at 693. This requires a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Romero-Georgana*, 360 Wis. 2d 522, ¶ 41 (citation omitted). In the plea context, this requires a showing that absent counsel's

unprofessional errors, the defendant "would not have pleaded guilty and would have insisted on going to trial." *State v. Bentley*, 201 Wis. 2d 303, 312, 348 N.W.2d 50 (1996).

C. Hughes' ineffective assistance claim did not warrant a hearing because it was insufficiently pled and conclusively refuted by the record.

Hughes has misunderstood the issue before this Court. Because the circuit court denied her ineffective assistance claim without holding a *Machner* hearing, the question before this Court is not whether counsel was ineffective. It is whether Hughes sufficiently pled her motion with facts that were not refuted by the record to entitle her to a hearing. But Hughes has not addressed the sufficiency of her motion; she argues her ineffective assistance claim on the merits. (Hughes' Br. 32–38.) By failing to address the issue of sufficiency of her motion, Hughes has failed to meet her burden on appeal. *See, e.g., State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). Nevertheless, the record shows that the circuit court properly denied her motion without holding a hearing.

As explained above, the record conclusively demonstrates that Hughes' claim that the amendment to the information was improper or that it somehow rendered Hughes' plea infirm is meritless. Accordingly, trial counsel cannot have performed deficiently or prejudicially by failing to object to it; counsel is not ineffective for failing to make meritless objections. *See State v. Reynolds*, 206 Wis. 2d 356, 369, 557 N.W.2d 821 (Ct. App. 1996); *see also Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009) (holding that the Supreme Court has expressly disavowed a "nothing to lose" standard for ineffective assistance claims). That alone defeats Hughes' ineffective assistance claim, meaning a hearing was unnecessary. However, Hughes' motion was properly denied for another reason: it was inadequately pled.

Hughes did not meet the *Allen* requirements to sufficiently allege deficient performance or prejudice in her postconviction motion. (R. 87:16.) Regarding deficient performance, all Hughes stated in her motion was that "[w]hat is plain is that trial counsel should have objected to the amendment of the information in this case but failed to do so," causing Hughes to be deprived of adequate notice of the new charges and therefore "counsel's error falls outside the realm of reasonable, effective representation" and "Hughes has satisfied the first prong of the *Strickland* test." (R. 87:16.)

That is a conclusory allegation without any facts to support it, and one that ignores the record. The record shows that trial counsel and Hughes were made well-aware months before the State filed the amended information that the State planned to amend and increase the charges to more accurately reflect Hughes' role in the children's abuse. (R. 39:4–5.) Both counsel and Hughes knew the underlying facts: both boys had been demonstrably, severely abused at Hughes' and Martinez's hands, resulting in Tyler's death. And both trial counsel and Hughes knew long before the amended information was filed that Jake was disclosing Hughes' active participation in the abuse and were provided with his forensic interviews. (R. 39:4–5; 91.) The amended charges hardly came as a surprise, and they were not based on any evidence Hughes and counsel did not know about well before the trial date.

More importantly, though, Hughes failed to plead any facts that would address the fundamental question here: why it was objectively unreasonable performance for trial counsel to *advise Hughes to take the plea*. (R. 87:15–19.) After all, there are "countless ways to provide effective assistance in any given case," *Strickland*, 466 U.S. at 689, and a defendant who pleads guilty upon the advice of counsel "may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not

within [the range of competence demanded of attorneys in criminal cases]." *Hill v. Lockhart*, 474 U.S. 52, 56–57 (1985) (quoting *Henderson*, 411 U.S. at 267).

The circumstances here show that counsel's advice to take the plea was eminently reasonable. The State's evidence against Hughes was overwhelming, particularly once Jake revealed the extent of her involvement in the abuse. (*See* R. 32:12.) The hospital meticulously documented the horrific condition the boys were in including their litany of injuries and extreme malnutrition, and took over 150 photographs of their injuries. (R. 1:3–5; 32:9.) The State had moved to introduce the videos of Jake's forensic interviews. (R. 16.) Martinez agreed to cooperate with law enforcement and the State was prepared to call her to testify against Hughes. (R. 13:1; 32:13–14.) And the State likely would have moved to introduce the facts underlying Hughes' previous conviction for neglect causing death of a child as other acts evidence to prove Hughes' identity as one of the perpetrators, had the case gone to trial.

In short, Hughes was certain to be convicted of multiple very serious felonies if the case went to trial no matter which set of charges was submitted to the jury. The State was unwilling to accept a plea to anything less than the charges filed in the original complaint, and even that was a substantial concession from what the State initially offered. (R. 93:3.) And Hughes has failed at all levels to suggest that she had any viable defense whatsoever to any of the charges, original or amended. There was nothing unreasonable about defense counsel advising Hughes to take the plea in these circumstances; in fact, it arguably would have been deficient for counsel to advise Hughes to do anything else.

Nor did Hughes truly plead any facts that would establish that she would have insisted on going to trial if counsel would have objected to the amendment, because she failed to acknowledge that the State would have just adjusted

the charges in response to any objection. (R. 87:17–19.) Her claim that she would have insisted on going to trial if counsel objected seems to be based only on an erroneous assumption that, had counsel objected to the amendment, the State would have simply dropped all of the new charges and reverted back to the original information. (R. 87:17–19.) But there is nothing to support that; the State had been maintaining for months that it was planning to amend the charges to something more serious. In the end, the absolute best Hughes could have hoped for from trial counsel objecting would be that the State would have been required to refile the case and hold a preliminary hearing on the new charges—and she has utterly failed to show that the State could not meet its probable cause burden on the new charges.

Moreover, Hughes postconviction motion does not provide anything explaining why she would have opted for a trial on any set of charges, original or amended. (R. 87:17.) It says only that "Hughes maintained her innocence" and "maintained a trial posture" through the proceedings. (R. 87:17.) That does not explain why she would have gone to trial on any set of charges in light of the State's obtaining Jake's statements implicating her directly as one of his abusers and Gonzalez and Martinez's cooperation with law enforcement. As explained above, the evidence against Hughes was damning. There is no possible way she would have had even a slim hope of acquittal on any of the charges at trial, original or amended, and by pleading guilty to the original charges she reduced her sentencing exposure by more than half and would at least be able to argue at sentencing that she had accepted responsibility and did not put Jake through the ordeal of a trial.

Nothing Hughes pled in her motion was sufficient to establish either deficient performance or prejudice even if she proved the facts alleged at a hearing. Accordingly, the circuit court properly exercised its discretion in refusing to hold one.

CONCLUSION

This Court should affirm the decision of the circuit court.

Dated this 16th day of February 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 5,940 words.

Dated this 16th day of February 2022.

Electronically signed by:

Lisa E.F. Kumfer
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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 16th day of February 2022.

Electronically signed by:

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