STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2021AP1834 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ETTER L. HUGHES,

Defendant-Appellant.

On Review from a Judgment of Conviction and from an Order Denying Postconviction Motion, Entered in Milwaukee County Circuit Court, the Honorable J.D. Watts Presiding

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REPLY BRIEF OF THE DEFENDANT-APPELLANT

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ARGUMENT

I. The probable cause section of the criminal complaint lacked a factual basis for the newly added counts one, five and six, nor was there any specificity regarding counts five and six, and as a result, the filing of the amended information by the State should not have been permitted by the court.

In its response to Ms. Hughes' opening brief, the State argues that her claims must be denied. First, the State asserts that there was probable cause in the original complaint supporting the addition of the four charges, and therefore, there are no grounds for the claim itself. Next, the State argues that while there may be both statutory and constitutional bars to charging Ms. Hughes with multiplicitous counts, she forfeited the right to challenge this when her counsel did not object ahead of the plea and asserts that she likewise forfeited her right to appeal because she did not raise this as a claim of ineffective assistance of counsel. Finally, the State claims that counsel misunderstands the general nature of this appeal as it relates to ineffective assistance of counsel and that trial counsel's advice to enter into a plea and forgo trial was generally reasonably. Each of these claims is without merit and the State's argument as a whole ultimately misses the both the nuance of the legal errors in this case, as well as the magnitude of the prejudice that has been inflicted on Ms. Hughes.

At the heart of this appeal is Ms. Hughes' claim that she did not have a full and proper understanding

of the costs and benefits of the plea offer due to fundamental problems with the filing of the amended information, and as a result, she has been prejudiced because her plea was not knowing and voluntary. Underlying that general claim are several reasons in which her plea was not knowing and voluntary.

- First, there was not probable cause in the criminal complaint substantiating the four additional charges, and therefore, the court erred in granting leave to file the information and trial counsel was ineffective for not objecting to the information.

- Second, any factual support underlying the two charges of child abuse, failing to prevent harm, is the identical evidence underlying the original charges of physical abuse of a child, repeated acts, causing bodily harm, and therefore, the complaint continues to lack an independent probable cause for the new counts and the court should not have permitted the filing. Additionally, there was a statutory prohibition pursuant to section 948.03(5)(c) on the filing of the new charges. Because Ms. Hughes never actually faced conviction for all four counts, her plea was not knowing and voluntary and a manifest injustice has occurred. Trial counsel was likewise ineffective for failing to identify this issue and correctly inform Ms. Hughes of the costs and benefits of the plea bargain, and as a result, she has been prejudiced.

While the State addresses some of these issues, it does so in a piecemeal fashion, largely ignoring relevant case law, legal issues and the general magnitude of the error that has occurred. To illustrate, Ms. Hughes offers the following:

A. The State broadly claims that the facts in the complaint support the four additional charges included in the amended information but fails to illustrate with any specificity how exactly they substantiate the new charges without implicating a multiplicity issue.

In response to Ms. Hughes' position that the criminal complaint lacks a factual basis to support the additional charges in the amended information, the State asserts that the new charges that appeared in the amended information were transactionally related to the allegations set forth in the probable cause section of the criminal complaint. (Respondent's Br. at 11-14). The State writes that "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." (Respondent's Br. at 12, quoting *State v. Michaels,* 141 Wis. 2d 81, 88, 414 N.W. 311 (Ct. App. 1987). A charge is "factually related to another" 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.'" (Respondent's Br. at 12, quoting *State v. Williams*, 198 Wis. 2d 516, 535, 544 N.W.2d 406 (1996)). Ms. Hughes does not quarrel with these principles.

What the State fails to address, however, is that the complaint does not offer support raising to the level of probable cause for the addition of the new charges. The State points out that the complaint details a statement provided by Gonzalez. He allegedly saw Ms. Hughes "strike" J.W. and T.W., though the complaint does not say that this happened on more than one occasion or the manner in which the "strike" occurred. Additionally, the complaint states that Gonzalez claimed that his mother was given permission to "physically discipline" J.W. and T.W. and also on one occasion, he was told Ms. Hughes had tied the boys up. There is no report as to when this occurred or how close in proximity this was to the hospitalization of J.W. and T.W., and there is likewise no allegation that any of these specific instances detailed by Gonzalez caused bodily harm to the children.

The additional counts added in the criminal complaint, however, require far more substantiation than this, even for a probable cause finding. Notably, count one, neglecting a child, causing death, was upgraded to first degree reckless homicide, party to a crime. The amended information also added two counts of physical abuse of a child, repeated acts causing bodily harm. These three charges are plainly not substantiated by facts set forth in the complaint, even when taken in tandem with Gonzalez's statements. These new counts without question rely on the January 2017 statement of J.W. which came weeks after the preliminary hearing waiver. Thus, these charges do not rely upon the same evidence and motivations as those the original complaint. Therefore, their addition was not permitted by section 971.01(2), *Stats. See Williams*, 189 Wis. 2d at 535. This reality is highlighted by the fact that

the State pointed to this very evidence in support of its argument on appeal. (Respondent's Br. at 13). Additionally, the State's exhibits to its postconviction motion response also demonstrate the new charges were based upon facts learned during the continued investigation. (91).

Therefore, the State has failed to demonstrate that leave to file the amended information was appropriate under these circumstances, and thus the three new charges were improperly considered by Ms. Hughes when she was considering whether or not to accept the plea negotiation. *See Douglas*, 2018 WI App 12, ¶¶17-18; *Dillard*, 2014 WI 123, ¶¶39, 66.

B. The State incorrectly cites the holding of *State v. Kelty*, and in turn, incorrectly asserts that Ms. Hughes forfeited her right to challenge her plea.

The State incorrectly argues that Ms. Hughes forfeited her multiplicity challenge both at the time of plea and in the postconviction motion. To begin, the State writes: [G]enerally, "a guilty, no contest, or *Alford* plea 'waives all nonjursidicitonal defects, including constitutional claims.'" (Respondent's Br. at 14). The State cites *State v. Kelty*, 2006 WI 101, 294 Wis. 2d 62, 716 N.W.2d 886, as precedent. *Kelty*, however, not only does not stand for the principle set forth by the State, but it actually provides for the opposite.

As detailed in Ms. Hughes' opening brief, the *Kelty* court opined: "We do not hold that a double jeopardy claim may never be waived. We simply hold that a plea of guilty to a charge does not waive a claim

that-judged on its face-the charge is one which the State may not constitutionally prosecute." *State v. Kelty*, 2006 WI 101, ¶¶ 24, 39, 294 Wis. 2d 62, 716 N.W.2d 886, quoting *U.S. v. Broce*, 488 U.S. 562, 576 (1989), quoting *Menna v. New York*, 423 U.S. 61, 63, n. 2 (1975). In other words, no party, including the State, may supplement the factual basis on appeal to justify the charging of potentially multiplicitous offenses and review is limited to only those facts known to the circuit court at the time of the plea. *See State v. Steinhardt,* 2017 WI 62, ¶16, fn. 13, 375 Wis. 2d 712, 896 N.W.2d 700. Therefore, it is disingenuous to argue that "[Ms.] Hughes forfeited her multiplicity arguments by operation of law," citing *Kelty* as precedential authority, as *Kelty* makes now such rule. Moreover, the State fails to address whether or not the multiplicity claim can be resolved on the record in this case as a result. (Respondent's Br. at 14). Here, the law and the record are clear. There was plainly a multiplicity issue, as well as a due process challenge, and this court must resolve the issue in favor of Ms. Hughes based upon the record.

First, the facts in the case demonstrate that there is a clear multiplicity issue. *See State v. Anderson*, 219 Wis. 2d 739, 746, 580 N.W.2d 329, 333 (1998). Additionally, state statute irrefutably prohibited the charging of Ms. Hughes as it did when it filed the amended information. Section 948.03(5)(c), *Stats.*, plainly states that "[t]he state may not charge in the same action a defendant with a violation of [948.03(5)] and with a violation involving the same child under [948.03](2), (3), or (4), unless the other violation occurred outside of the" specified period of time related to the charging of crime of repeated acts of physical abuse against the same child.

The amended information and complaint demonstrate an indisputable due process violation and multiplicity issue – the allegations underlying counts three and four of the amended information are such that those counts are lesser included offenses of counts five and six based upon the overlap of fact and the language of the statutes guiding conviction. *See State v. Anderson*, 219 Wis. 2d at 746.

Moreover, the legislature specifically prohibited in its passage of section 948.03(5)(c), *Stats.*, the charging of both the individual acts of physical abuse of a child and repeated acts of physical abuse of a child for conduct occurred in the identical time frame as they do in this case. Thus, both charging and conviction of these offenses in unison was prohibited by law. Both the court and trial counsel should have identified this issue, and Ms. Hughes' plea runs afoul with the due process protections of the Sixth and Fourteenth Amendments of the U.S. Constitution because she was incorrectly led to believe that she faced the possibility of imprisonment when no such reality existed.

When a defendant has been provided misinformation about the consequences of the pending criminal charges, as Ms. Hughes was in this case, a "defendant's capacity to knowingly, intelligently, and voluntarily choose between accepting the State's plea offer and proceeding to trial" has been undermined. *See Douglas*, 2018 WI App 12, ¶16, citing *Dillard*, 2014 WI 123, ¶¶69-70. Under such circumstances, a manifest injustice has occurred, and a defendant is entitled to plea withdrawal accordingly. *Id.*

Additionally, there has been a constitutionally infirm deprivation of effective representation if a defendant can demonstrate: (1) counsel's performance was deficient, and (2) counsel's errors or omissions prejudiced the defendant. *See Strickland v. Washington*, 466 U.S. 668 (1984); *Smith*, 207 Wis. 2d at 273. This occurs if counsel's improper legal advice led a defendant who had intended to take the case to trial to enter a plea based upon a fundamental misunderstanding of the costs and benefits of the plea bargain. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985). That is just what occurred here. For these reasons, Ms. Hughes must be entitled to plea withdrawal. *See Douglas*, 2018 WI App 12, ¶¶17-18; *Dillard*, 2014 WI 123, ¶¶39, 66.

II. Trial counsel was ineffective as a matter of law by failing to object to the amended information filed by the State and for providing Ms. Hughes with incorrect advice about the value of the plea agreement, and Ms. Hughes suffered substantial prejudice as a result.

The State disingenuously writes that Ms. Hughes' postconviction motion and subsequent pleadings regarding her claim of ineffective assistance of counsel were insufficiently pled and that counsel has mistaken the issues. In support of its request for the court of appeals to affirm the decision of the circuit court, the State asserts for the first time that the postconviction claims of ineffective assistance of counsel were insufficiently pled. (Respondent's Br. at 22-25). The State continues, alleging that counsel misunderstands the relevant legal questions before this court because there was

never a *Machner* hearing in this matter, and as a result, the only question for this court's consideration is whether Ms. Hughes "sufficiently pled her motion with facts that were not refuted by the record to entitle her to a hearing." (Respondent's Br. at 22). Ms. Hughes has made no such error.

Here, the circuit court did not deny Ms. Hughes a *Machner* hearing because she failed to sufficiently plead her claim. (100:12-13). The circuit court concluded that Ms. Hughes was not entitled to relief because trial counsel was not deficient in the court's view because there was no error in the acceptance of the amended information. The circuit court, of course, had already concluded in its written decision that it believed the three new charges to be supported by probable cause, that adequate notice of the new charges was provided and that there was no multiplicity violation. Therefore, the court concluded:

> Had counsel objected to the amended information on grounds that probable cause was lacking…or that the defendant was not given adequate notice…there is not reasonable probability that the pleading would have been struck, and the defendant would have been faced with the same options.

(11:13).

As a result, this appeal is rightly focused on whether the circuit court was correct in finding there was sufficient factual basis underlying the amended information and that no multiplicity violation occurred.

That the circuit court failed to grant a *Machner* hearing[1] is of no consequence to this appeal, as it did not do so for any reason other than the circuit court concluding that trial counsel's alleged errors were not legally deficient. Further, whether trial counsel was deficient and whether the appellant has demonstrated prejudice are reviewed *de novo*, with the court of appeals ruling independently of the trial court. *See State v. Johnson*, 153 Wis. 2d 121, 127-128, 449 N.W.2d 845 (1990).

The State continues wrongly down the forfeiture route in its brief, arguing that Ms. Hughes failed to "plead any facts that would address the fundamental question[2] here: why it was objectively unreasonable performance for trial counsel to *advise Hughes to take the plea.*" (Respondent's Br. at 23). The State goes on to claim that there are many ways to provide effective assistance, and for that reason, the real question is whether it was bad legal advice for advising Ms. Hughes to enter a plea. (Respondent's Br. at 23-24). These arguments completely miss the point and ignore the fundamental principles of due process implicated in this appeal and that serve as the foundation of the criminal justice system.

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[1] Here, the court denied the postconviction IAC claim without an evidentiary hearing because it concluded that Ms. Hughes was not entitled to relief as a matter of law, not because there were sufficiency issues with the postconviction motion. This is permissible pursuant to *State v. Howell*, 2007 WI 57, 301 Wis. 2d 350, 734 N.W.2d 48.

[2] The question is whether counsel's deficient representation resulted in Ms. Hughes entering a plea that was not knowing, intelligent, and voluntary.

All criminal defendants – even those accused of the most serious, distasteful crimes – are entitled to all of the rights and privileges that our federal and state constitutions provide. The State seems to argue that Ms. Hughes can be denied enforcement of her due process rights on appeal because she was, in its view, "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." (Respondent's Br. at 24). But the right to effective counsel, the right to make the State prove you guilty beyond a reasonable doubt, and the right to choose to forgo trial and enter a plea, knowing all the benefits and costs of the bargain before doing so are *her* rights. Those are *her* choices. Better put by the late Justice Ruth Bader Ginsburg:

> A defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her or reject the assistance of legal counsel despite the defendant's own inexperience and lack of professional qualifications…These are not strategic choices about how best to *achieve* a client's objectives; they are choices about what the client's objectives in fact *are*.

McCoy v. Louisiana, 584 U.S. ___, 6-7 (2018).

The State confuses the two. It is irrelevant whether it was reasonable for trial counsel to advise Ms. Hughes to accept a plea bargain (and Ms. Hughes does not concede that it was). All that matters for the purposes of this appeal is whether Ms. Hughes was properly informed of the value of the plea negotiation before her and whether she faced a real possibility of conviction on the new additional offenses that had been added through the filing of the amended information.

Because Ms. Hughes was not given all of the facts ahead of entry into that plea due to trial counsel's errors and misunderstanding regarding the law, her plea was not knowing and voluntary. Trial counsel's errors resulted in a clear manifest injustice and therefore, prejudice has resulted.

CONCLUSION

For all the reasons set forth above, Ms. Hughes moves this court for an order granting her plea withdrawal and returning the matter to the trial court for further proceedings consistent with the holding of this court.

Dated this 17th day of March, 2022.

Respectfully submitted,

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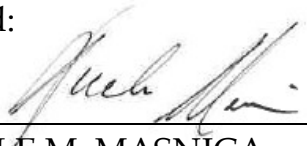
CERTIFICATION AS TO FORM/LENGTH

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 2,975 words.

Dated this 17th day of March, 2022.

Signed:



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