

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 6, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP2913-CR

Cir. Ct. No. 2003CF308

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN K. GOODSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: HAROLD V. FROEHLICH, Judge. *Reversed and cause remanded with directions.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PETERSON, J. Brian Goodson appeals a judgment of conviction for two counts of possession of a short-barreled shotgun and one count each of fourth-degree sexual assault, disorderly conduct and unlawful use of a phone,

contrary to WIS. STAT. §§ 941.28(2), 940.225(3m), 947.01 and 947.012(1)(a), as well as an order denying his motion for postconviction relief.¹ Goodson argues he was denied effective assistance of counsel because his trial counsel failed to object when the prosecutor breached the plea agreement. We conclude that the prosecutor's comments at the sentencing hearing were a material and substantial breach of the plea agreement and that, therefore, Goodson was denied effective assistance of counsel. We reverse and remand for a new sentencing hearing.²

BACKGROUND

¶2 On June 6, 2003, Goodson was arrested by officers from the Appleton Police Department, who were responding to a domestic disturbance call. Goodson was eventually charged with second-degree sexual assault, disorderly conduct, unlawful use of a phone, and two counts of possession of a short-barreled shotgun. He entered into a plea agreement and agreed to plead no contest to a reduced charge of fourth-degree sexual assault and the remaining four charges. The State agreed to recommend a sentence of eighteen to twenty-four months' confinement on one of the shotgun charges and a consecutive five-year period of probation on the remaining charges.

¶3 At the sentencing hearing, the prosecutor began her comments by discussing the presentence report, stating:

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

² Goodson raises additional issues challenging the court's exercise of sentencing discretion. Because we conclude that Goodson is entitled to a new sentencing hearing, we need not address these additional arguments. See *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

I really think that the recommendation is actually a fairly good recommendation. The agent is recommending a total of 15 months incarceration. Basically recommending the maximum on the three misdemeanor charges, all to run consecutive, with five years of probation on the two felony charges.

She then told the court that Marie Keyther, who was Goodson's wife and the victim of the misdemeanor offenses, wanted to make a statement.

¶4 Keyther detailed how Goodson subjected her and her children to thirteen years of "ongoing physical, verbal, psychological, financial and emotional abuse" Keyther concluded, "I agree with the District Attorney's recommendation of asking the Court to sentence Brian to the maximum thirteen years in prison and five years probation."

¶5 The prosecutor then stated:

Your Honor, as Marie just stated, through my conversations with her, I understand that she thinks that a prison recommendation, or prison sentence is the most appropriate here. She is the one that has had to live with the thirteen years of abuse. That is really what this case is about. It's about the abuse of Marie.

The prosecutor proceeded to explain that Goodson had failed to take responsibility for his actions, instead blaming Keyther. She pointed out that Goodson was charged on two counts of possessing a short-barreled shotgun, but he actually owned three and Keyther indicated he kept them under their bed. She concluded by saying:

As you review this case you will see that his behavior has been nothing but controlling, abusive and threatening. I would ask the Court to take all that information into account when determining what the appropriate sentence is for Brian.

¶6 The court sentenced Goodson as follows: the maximum six year sentence, consisting of three years' confinement and three years' extended supervision, on one of the shotgun charges; the maximum nine-month sentence on the sexual assault charge, consecutive to the prison sentence; withheld sentence on the second shotgun charge, with six years' probation, consecutive to the prison sentence; and the maximum ninety-day jail sentences on the two remaining charges to run concurrent to the prison sentence. Goodson's total sentence was forty-five months of confinement followed by nine years of supervision.

¶7 Goodson filed a motion for postconviction relief, contending he was entitled to a new sentencing hearing before a different judge because the State breached the plea agreement. The circuit court held a *Machner*³ hearing. Trial counsel testified he did not have time to object to the prosecutor's comments, nor did he confer with Goodson about whether to object. The court indicated it understood the prosecutor to be recommending the fifteen months suggested in the presentence report, concluded the plea agreement had not been breached and denied Goodson's motion.

STANDARDS OF REVIEW

¶8 The facts surrounding the terms of the plea agreement and the State's conduct that allegedly breached that agreement are undisputed. Accordingly, our review involves determining whether the undisputed facts meet the legal standard for a breach of a plea agreement. This is a question of law that

³ *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

we review independently. *State v. Williams*, 2002 WI 1, ¶5, 249 Wis. 2d 492, 637 N.W.2d 733.

¶9 We also review Goodson’s ineffective assistance of counsel claim, which presents a mixed question of fact and law. *State v. Erickson*, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). We do not disturb the circuit court’s factual findings unless they are clearly erroneous. *Id.* However, whether counsel’s conduct amounts to ineffective assistance is a question of law that we review independently. *Id.*

DISCUSSION

¶10 Goodson argues he is entitled to resentencing because the prosecutor’s comments breached his plea agreement. Because defense counsel did not object, we examine Goodson’s argument in the context of his ineffective assistance of counsel claim. However, whether counsel was ineffective primarily hinges on whether the prosecutor’s comments in fact breached the plea agreement and thus we first turn to that threshold question.

¶11 “[A]n accused has a constitutional right to the enforcement of a negotiated plea agreement.” *Williams*, 249 Wis. 2d 492, ¶37. As our supreme court explained:

A prosecutor who does not present the negotiated sentencing recommendation to the circuit court breaches the plea agreement. An actionable breach must not be merely a technical breach; it must be a material and substantial breach. When the breach is material and substantial, a plea may be vacated or an accused may be entitled to resentencing.

Id., ¶38.

¶12 A violation of the plea agreement’s terms constitutes a material and substantial breach when it “defeats the benefit for which the accused bargained.” *Id.* Explicit breaches are material and substantial, but so are implicit end-runs around plea agreements. *See State v. Liukonen*, 2004 WI App 157, ¶9, 276 Wis. 2d 64, 686 N.W.2d 689. In other words, “the state may not accomplish through indirect means what it promised not to do directly, and it may not covertly convey to the trial court that a more severe sentence is warranted than that recommended.” *State v. Hanson*, 2000 WI App 10, ¶24, 232 Wis. 2d 291, 606 N.W.2d 278.

¶13 Goodson’s plea included an agreement by the State to cap its sentencing recommendation at eighteen to twenty-four months’ confinement. At the sentencing hearing, the prosecutor began by endorsing the presentence investigation’s recommended sentence of fifteen months’ confinement. Goodson agrees that this initial recommendation was consistent with the plea agreement. However, Goodson argues that the prosecutor’s subsequent comments constituted a material and substantial breach of his plea agreement.

¶14 Goodson contends that the prosecutor’s comments after Keyther’s statement distanced the State from the agreed-upon sentencing recommendation and thus breached the plea agreement. He argues a breach occurred by the combination of three aspects of the prosecutor’s comments: (1) her failure to disavow Keyther’s statement of agreement with the State’s recommendation for “the maximum thirteen years in prison”; (2) her comments indicating Goodson was of bad character; and (3) her comments urging the court to consider all the information to reach an “appropriate sentence.” Taken together, Goodson argues, the prosecutor implicitly endorsed Keyther’s recommendation for the maximum prison sentence in breach of the agreed-to sentencing recommendation.

¶15 The State argues the negative information about Goodson included in the prosecutor's comments was proper, supported the recommended sentence and was relevant to factors the sentencing court must consider. "[N]othing prevents a prosecutor from characterizing a defendant's conduct in harsh terms, even when such characterizations, *viewed in isolation*, might appear inconsistent with the agreed on sentencing recommendation." *Liukonen*, 276 Wis. 2d 64, ¶10. However, we evaluate the prosecutor's remarks in the context of the entire sentencing proceeding.⁴ *Williams*, 249 Wis. 2d 492, ¶46. Goodson does not argue that the prosecutor's comments on his character themselves constituted a breach; rather, when taken together with the prosecutor's other comments, they implicitly constituted an argument for a sentence that exceeded the agreed-upon sentence.

¶16 The State also criticizes Goodson's failure to cite authority to support the contention that, in order to comply with a plea agreement, it must either disavow a victim's statement or reiterate its recommended sentence. It argues that "the State should not be held responsible for what the victim said." However, the prosecutor did more than simply fail to disavow Keyther's statement that she "agreed with the District Attorney's recommendation" for the "maximum thirteen years in prison." Instead, the prosecutor followed Keyther's statement by focusing the court's attention on Keyther and the harm Goodson inflicted on her, indicating Goodson's abuse of Keyther is "really what this case is about."

⁴ The inquiry does not turn on whether the court was influenced by the breach. *State v. Sprang*, 2004 WI App 121, ¶24 n.6, 274 Wis. 2d 784, 683 N.W.2d 522. Therefore, we do not consider the sentencing court's statement that it understood the prosecutor to be recommending fifteen months' confinement. *See id.*

¶17 Additionally, while no legal authority requires the State to repeat or reiterate its sentencing recommendation, the prosecutor's failure to do so here supports Goodson's argument that the comments, as a whole, breached the plea agreement. *Cf. Williams*, 249 Wis. 2d 492, ¶51 ("The prosecutor's affirmation of the plea agreement was not adequate to overcome the prosecutor's covert message to the circuit court that a more severe sentence was warranted than that which had been recommended."). The prosecutor concluded her comments by asking the court to impose an "appropriate sentence," not the agreed-to sentence, taking into account all the information—information that included Keyther's agreement with the State for the maximum thirteen years in prison and Goodson's bad character.

¶18 We agree with Goodson that the three aspects of the State's comments, combined, gave the impression that the State was backing away from the agreed-to sentence recommendation and instead adopting that of the victim, Keyther. Accordingly, the State's comments "undercut the essence of the plea agreement," *id.*, ¶46, and constituted a substantial and material breach of Goodson's plea agreement.

¶19 Having concluded that the State breached the plea agreement, we turn to the merits of Goodson's ineffective assistance claim. To establish ineffective assistance of counsel, a defendant must show both that trial counsel's performance was deficient and that the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 697 (1984); *State v. Pitsch*, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). Performance is deficient if it falls outside the range of professionally competent representation, measured by the objective standard of what a reasonably prudent attorney would do under the circumstances. *Pitsch*, 124 Wis. 2d at 636-37. Generally, prejudice is demonstrated where, but for counsel's deficient performance, there was a reasonable probability of a different

trial outcome. *State v. Erickson*, 227 Wis. 2d 758, 773, 596 N.W.2d 749 (1999). However, when trial counsel’s deficient performance involves the failure to object to a material and substantial breach of a plea agreement, the defendant is automatically prejudiced. *State v. Sprang*, 2004 WI App 121, ¶25, 274 Wis. 2d 784, 683 N.W.2d 522.

¶20 Here, Goodson’s trial counsel testified that he did not object because he was focused on Keyther’s comments and discussing with Goodson whether to request a continuance in order to respond to them. The record provides no strategic reason for failing to object. Further, trial counsel testified he never discussed with Goodson whether to object to the prosecutor’s comments. We have previously held that even where counsel has a sound strategic reason for not objecting to a prosecutor’s comments in breach of a plea agreement, counsel’s failure to discuss that decision with the defendant amounts to deficient performance. *Id.*, ¶28. Such a failure to consult is “tantamount to entering a renegotiated plea agreement without [a defendant’s] knowledge or consent.” *Id.*, ¶29. Accordingly, we conclude that counsel’s failure to object to the prosecutor’s material and substantial breach of the plea agreement amounts to ineffective assistance. We remand the case to the circuit court for a new sentencing hearing.

By the Court.—Judgment and order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

