COURT OF APPEALS
DECISION
DATED AND FILED

February 27, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP906-CR **Cir. Ct. No. 2004CF1587**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBB R. ROZANSKE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: GLENN H. YAMAHIRO, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 FINE, J. Robb R. Rozanske appeals from an order denying his motion for postconviction relief, following entry of a judgment on his guilty pleas

to intimidating a victim, stalking, and battery. *See* WIS. STAT. §§ 940.44(1), 940.32(2)(a), 940.19(1). Rozanske claims that his trial lawyer was ineffective because the lawyer did not object at sentencing to what Rozanske claims was a breach of the plea bargain. We affirm.

I.

¶2 Rozanske was accused of threatening and battering Darcy Hollub, a woman with whom he had a relationship, as well as locking her in rooms until she was forced to urinate on herself. The case was plea bargained. In exchange for Rozanske's guilty pleas, the State agreed to seek reduction of the felony false-imprisonment charge to misdemeanor intimidation of a victim. It also agreed to recommend probation:

> The State pursuant to negotiations is moving to amend count one of the information, that being a charge of false imprisonment, to a charge of intimidation of a victim in violation of Wisconsin statute 940.44(1). It's my understanding the defendant then would plead guilty to the remaining -- to the three counts.
>
> As to count two, the stalking charge, the State would recommend an imposed and stayed prison sentence and recommend that Mr. Rozanske be placed on probation for four years. The State will recommend or will be free to recommend any conditions of probation it deems appropriate at the time of sentencing, including condition time. I have, however, agreed to recommend that condition time be served with Huber release.
>
> As to the remaining two counts, the State will recommend a probationary disposition to run concurrent with count two. The defense is free to argue for whatever sentence it believes is appropriate.

¶3 The circuit court ordered a Presentence Investigation Report. The Report said that Rozanske was "a very violent and dangerous man," and

recommended "a prison sentence" to: (1) protect Hollub and the community, and (2) punish Rozanske.

¶4 At the sentencing hearing, Hollub described for the circuit court Rozanske's abuse, including:

- Rozanske did not allow her to have "access to car keys, [her] own money, telephones, or any communication with friends or family."
- Rozanske would "tear [Hollub's] clothes off [her] body or tear any clothing if [she] tried to get dressed."
- Rozanske "would make [Hollub] stay naked for hours and hours while he humiliated and beat [her]."
- It was "common for [Rozanske] to make [Hollub] clean the house naked sometimes in the middle of the night after waking [Hollub] from a sound sleep. While [Hollub] was naked, [Rozanske] would stand over [her] taunting, yelling and verbally abusing [her], mocking [her], threatening [her], kicking [her], threatening to hit [her] with a wooden rod and even urinated on [her.]"
- Rozanske "constantly" told Hollub that he "would murder [her] and [her] entire family if [she] ever left him."
- When Hollub was, periodically, able to escape, Rozanske "always found" her, telling her that she "can run, but [she] can't hide," and that he would "always find" her.
- Rozanske abused Hollub sexually. "Sex was something expected; and the word, 'no,' only meant [Hollub] was forced to submit to sexual abuse."

- Rozanske also kicked, slapped, punched, and strangled Hollub, pulled her hair, spat on her, as well as, as we have already seen, urinated on her.

Hollub asked the circuit court to "give [Rozanske] the most severe punishment possible … [f]or the safety of myself, my children, and society as a whole."

¶5 After hearing from Hollub, Hollub's daughter, and Hollub's psychotherapist, the circuit court also heard from Mike Crivello, a police officer involved in the case, who reflected on the horror Hollub had endured:

> I would like to tell the Court that although I thought I would give you some kind of gauge as to putting it into perspective related to other cases, I truly don't believe I've investigated a case that would be considered alike to this one. And what I mean by that is all the things that I learned that took place to this woman throughout my investigation was so much greater than what I could compare to any other case that I have investigated.
>
> And in fact, during the investigation, I believe that there were things that Ms. Hollub may have not been telling me that were even much worse than what she was willing to share; and after listening closely to her speak today, I find that that certainly was the case.
>
> I think to summarize my point, I certainly thank the Court for offering an officer an opportunity to make a statement at sentencing; and once again I'll say that this was a situation or a case greater than that I had been exposed to investigating in the past, even though I have investigated hundreds of domestic violence cases.

¶6 The prosecutor then explained the plea bargain to which the Milwaukee County district attorney's office agreed:

> Your Honor, the State is recommending that the Court impose a probationary sentence on the three cases that we're here for sentencing, intimidation of a witness and battery, counts one and three, and count two stalking. The State bases its recommendation upon the defendant's lack of criminal history, his acceptance of responsibility, and this Court's duty to protect the public.

The State is free to argue for any conditions that it deems appropriate, and we are going to be asking the Court to impose, obviously, a no-contact order, psychiatric evaluation and follow any indicated treatment, batterer's treatment; and we are going to ask the Court to impose a maximum of one year in the County Jail. The State clearly believes that this is a case that calls for penalty.

The State believes that by imposing and staying time on the defendant and putting him on probation as well as putting him in jail for the maximum that the Court can of a year with Huber, that the Court will maximize this Court's reach over the defendant, this Court's ability to sanction any contact the defendant might have with Ms. Hollub and in that way protect Ms. Hollub and the community.

I want to tell the Court that I think that we're all lucky to be here today, that Ms. Hollub and her family are here to address this Court, that it seems that Ms. Hollub is free of Mr. Rozanske and ready for the next chapter in his or her family life.

This came to the attention of law enforcement because of on March 19 of 2004, the day after Ms. Hollub was finally able to get out of the defendant's house as he was trying to get her back, he called her, told her he was going to kill himself, and lit a firecracker over his phone. Ms. Hollub immediately called 911 to report a shooting; and when the police arrived at the defendant's house and found him to be in fine condition, they came back to Ms. Hollub and asked if this was some kind of prank or some kind of joke; and it was at that point they began to unwrap the horrible rotten onion of the defendant's conduct, layer after layer, event after event, abuse after abuse.

This, frankly, could have been missed by law enforcement. So I'm thankful that law enforcement caught this and worked up the case and brought it to us. I'm thankful that I didn't charge this case. But I understand that Ms. Becker -- Ashley, Ms. Hollub's daughter, accompanied Ms. Hollub to the charging conference. Ms. Hollub, I think, was perhaps even ambivalent then about coming to the DA's Office to see what the criminal justice system could do for her and her family and address Mr. Rozanske's crimes.

I'm thankful Ms. Hollub came to that charging conference, and I'm thankful that the defendant is going to

> face a sanction, and I'm thankful Ms. Hollub is going to be hopefully free of the defendant.
>
> I ask this Court to follow the recommendation that we have tendered for the reasons set forth on the record. That's all I have.

¶7 After the prosecutor's comments, Rozanske's lawyer and several witnesses spoke on Rozanske's behalf. Rozanske then told the circuit court:

> I waited 41 years to find the right woman to marry me. I was the happiest person. I thought we were married.
>
> I was the happiest person when I thought we were married, but only to find out through my lawyer that [Hollub] was not legally divorced from her second marriage to marry me legally.
>
> ….
>
> If I would have known then what I know now, I would have handled many of the situations differently. I'm very sorry for what I have -- for what we have gone through.
>
> ….
>
> I'd like to move forward with my life, and I'm definitely no threat to [Hollub], her family or anyone.

The prosecutor responded:

> The defense presentation from the defendant and from all of his witnesses really makes it sound like this is just a relationship that went sour, and isn't it too bad that people can't get along, and the defendant regrets that Ms. Hollub and her family, you know, feel bad; and the presentation really comes off that there's nothing to distinguish this relationship from any other love relationship that goes south and there's plenty.
>
> The Court has heard from Ms. Hollub and her family about the impact they had. But I just want to point out that, first of all, the police were called because the defendant feigned suicide. After this was being investigated, the defendant called Ms. Hollub while she was at the district talking with the police and admitted that he kept her locked in rooms so that he would talk to her.

The circuit court told the prosecutor that it had "read all of it." The prosecutor responded: "All right. So I just -- I know the Court is going to see these facts for what they are. But this is not simply the story of a love that did not work out."

¶8 After extensively and insightfully considering the relevant sentencing factors, including the crimes, Rozanske's character, and the needs of the community, *see* ***State v. Ferguson***, 166 Wis. 2d 317, 325, 479 N.W.2d 241, 245 (Ct. App. 1991) (primary sentencing factors are the nature of the crime, the character of the defendant, and the rights of the public), the circuit court sentenced Rozanske to consecutive sentences on all three counts, totaling 102 months in prison, with 30 months of initial confinement and 72 months of extended supervision. To correct an error, the circuit court later commuted Rozanske's sentence to 90 months in prison, with 30 months of initial confinement and 60 months of extended supervision.

II.

¶9 Rozanske argues that he is entitled to resentencing because he claims that the comments by the prosecutor and the police officer breached his plea bargain. Rozanske's lawyer did not object to the comments at the sentencing hearing. Accordingly, we examine Rozanske's argument in the context of an ineffective-assistance-of-counsel claim to determine whether Rozanske's trial lawyer performed deficiently. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (defendant claiming ineffective assistance of counsel must establish that: (1) the lawyer gave deficient performance, and (2) the defendant suffered prejudice as a result); *see also* ***State v. Howard***, 2001 WI App 137, ¶26, 246 Wis. 2d 475, 492–493, 630 N.W.2d 244, 252 (defendant automatically prejudiced

where lawyer does not object to material and substantial breach of plea bargain). We begin with the prosecutor's comments.

¶10 The terms of the plea bargain and the content of the prosecutor's statements are not in dispute. Thus, our inquiry is whether as a matter of law the prosecutor's comments breached the plea bargain. ***State v. Williams***, 2002 WI 1, ¶20, 249 Wis. 2d 492, 509, 637 N.W.2d 733, 740 (whether State's conduct substantially and materially breached plea bargain is a question of law).

> A prosecutor who does not present the negotiated sentencing recommendation to the circuit court breaches the plea [bargain]. An actionable breach must not be merely a technical breach; it must be a material and substantial breach. … A material and substantial breach is a violation of the terms of the [plea bargain] that defeats the benefit for which the accused bargained.

Id., 2002 WI 1, ¶38, 249 Wis. 2d at 517, 637 N.W.2d at 744 (footnotes omitted). Accordingly, while a prosecutor need not enthusiastically recommend a plea bargain, *see* ***State v. Poole***, 131 Wis. 2d 359, 364, 394 N.W.2d 909, 911 (Ct. App. 1986), a prosecutor may not covertly convey to the trial court that a more severe sentence is warranted than that recommended, ***Williams***, 2002 WI 1, ¶42, 249 Wis. 2d at 518, 637 N.W.2d at 745.

¶11 Rozanske claims that several of the prosecutor's comments, when considered together, "directly undercut" his plea bargain by suggesting that probation was inappropriate. Rozanske specifically points to five observations by the prosecutor: (1) "The State clearly believes that this is a case that calls for penalty"; (2) by imposing one year in prison with Huber release privileges "the Court will maximize this Court's reach over the defendant"; (3) "I think that we're all lucky to be here today"; (4) Rozanske's conduct was analogous to a "horrible rotten onion"; and (5) "I'm thankful that I didn't charge this case." Rozanske

contends that the "combined weight" of these comments and the prosecutor's rebuttal statement "questioned the correctness of the charging decision, the sincerity of the defendant's remorse, and the propriety of permitting the defendant to remain in the community." We disagree.

¶12 A prosecutor must walk a "fine line" at a sentencing hearing between two important and competing principles of law. ***Id.***, 2002 WI 1, ¶44, 249 Wis. 2d at 519, 637 N.W.2d at 745. The public has the right to have the judge consider all relevant information during a sentencing hearing, ***Farrar v. State***, 52 Wis. 2d 651, 656–657, 191 N.W.2d 214, 217 (1971), while at the same time the defendant has a due-process right to the benefit of any plea bargain, ***State v. Smith***, 207 Wis. 2d 258, 271, 558 N.W.2d 379, 384 (1997). Upon examining the prosecutor's comments in the context of the entire sentencing proceeding, *see* ***Williams***, 2002 WI 1, ¶46, 249 Wis. 2d at 520, 637 N.W.2d at 745–746 (court must examine entire sentencing proceeding to evaluate prosecutor's comments), we conclude the prosecutor did not step over this "fine line."

¶13 It is undisputed that the prosecutor began by clearly and accurately expressing his sentencing recommendation to the circuit court; the prosecutor did not refer to, or imply that he agreed with, the recommendations in the Presentence Investigation Report or by the victim. *Cf.* ***id.***, 2002 WI 1, ¶50, 249 Wis. 2d at 521, 637 N.W.2d at 746 (breach of plea bargain where prosecutor "covertly implied" that additional information from the Presentence Investigation Report and victim "raised doubts regarding the wisdom of the terms of the plea" bargain); ***State v. Sprang***, 2004 WI App 121, ¶¶22–24, 274 Wis. 2d 784, 798–800, 683 N.W.2d 522, 529–530 (breach of plea bargain where prosecutor observed that Presentence Investigation Report and sex-offender assessment report disagreed with probation recommendation).

¶14 Moreover, and this is significant, the prosecutor was free under the terms of the plea bargain to recommend conditions of probation. *See* ***Sprang***, 2004 WI App 121, ¶21, 274 Wis. 2d at 798, 683 N.W.2d at 529 (terms of plea bargain which permitted prosecutor to argue length and terms of probation gave prosecutor "substantial latitude" to present negative information about defendant). As we have seen, the prosecutor argued for maximum jail time with Huber privileges as a condition of probation. In support of that request, the prosecutor had "substantial latitude" to discuss the "horrible rotten onion" of Rozanske's abuse, the difficulty of the investigation, and the need to protect Hollub and her family by "maximiz[ing the] Court's reach over the defendant." These factors were related to the three primary sentencing factors, *see* ***Ferguson***, 166 Wis. 2d at 325, 479 N.W.2d at 245, and fairly and properly targeted at the prosecutor's request for maximum confinement as a condition of probation, ***State v. Hanson***, 232 Wis. 2d 291, 302, 606 N.W.2d 278, 283–284 (Ct. App. 1999) (prosecutor may discuss negative facts to justify a recommended sentence within the parameters of a plea bargain); *see also* ***Ferguson***, 166 Wis. 2d at 324–325, 479 N.W.2d at 244 ("At sentencing, pertinent factors relating to the defendant's character and behavioral pattern cannot 'be immunized by a plea [bargain] between the defendant and the state.'") (quoted source omitted). Indeed, even a "prosecutor's comments [that are] compelling and delivered by 'strong words'" do not breach a plea bargain. ***State v. Jackson***, 2004 WI App 132, ¶15, 274 Wis. 2d 692, 700, 685 N.W.2d 839, 843. Here, however, the prosecutor's comments were measured and restrained, and were fully authorized by the plea bargain's acceptance of the State's right to "be free to recommend any conditions of probation it deems appropriate at the time of sentencing."

¶15 Rozanske also claims that the police officer's comments "severely undercut the probation recommendation" because they indicated that the abuse was "greater" than any other case the police officer had worked on, and "vouched for the truthfulness of all of Ms. Hollub's allegations, including those of which [the police officer] was previously unaware." (Italics omitted.) *See* ***Williams***, 2002 WI 1, ¶50, 249 Wis. 2d at 521, 637 N.W.2d at 746 (State may not imply that if it had known more about the defendant it would not have entered into the plea bargain.). We disagree.

¶16 Like prosecutors, "investigating officers may not undercut [a plea bargain] by making inconsistent recommendations." ***State v. Matson***, 2003 WI App 253, ¶25, 268 Wis. 2d 725, 739, 674 N.W.2d 51, 58. The police officer did not do that here. His comments were directed at the seriousness of the abuse that he learned about during his investigation. *See* ***Ferguson***, 166 Wis. 2d at 325, 479 N.W.2d at 245 (nature of the crime one of three primary sentencing factors). The police officer did not make any sentencing recommendation, and his reference to Hollub's allegations of additional abuse only reinforced his opinion that the abuse he investigated was serious. *Cf.* ***Matson***, 2003 WI App 253, ¶¶3, 13, 268 Wis. 2d at 731, 734, 674 N.W.2d at 54, 55 (investigating detective's letter to circuit court asking for maximum sentence undermined State's sentencing recommendation). This is the core of information that no plea bargain may agree to keep from the court. *See* ***State v. McQuay***, 154 Wis. 2d 116, 125, 452 N.W.2d 377, 381 (1990) ("Agreements by law enforcement officials, whether they be by the police or prosecutors, not to reveal relevant and pertinent information to the trial judge charged with the duty of imposing an appropriate sentence upon one convicted of a criminal offense, are clearly against public policy and cannot be respected by the courts.").

By the Court.—Order affirmed.

Publication in the official reports is not recommended.

¶17 CURLEY, J. (*dissenting*). I respectfully dissent. The majority tells us in painstaking detail about Rozanske's criminal conduct that led to the charges. Were this case about whether the punishment fit the crime, this information would be helpful. Inasmuch as the issue here is whether the State breached the plea agreement, reciting all of Rozanske's long-term, degrading, and abusive conduct does little to shed light on the issue.[1]

¶18 Originally, on March 24, 2004, Rozanske was charged with false imprisonment and stalking, both felonies, as well as misdemeanor battery. One year and two months later, the parties entered into a plea agreement. The State informed the trial court, the Honorable Marshall B. Murray, that the false imprisonment count was being amended to a charge of intimidation of a victim (a misdemeanor), and that Rozanske was prepared to plead guilty to the amended charge, as well as the two remaining charges. The State went on to explain that:

> As to count two, the stalking charge, the State would recommend an imposed and stayed prison sentence and recommend that Mr. Rozanske be placed on probation for four years. The State will recommend or will be free to recommend any conditions of probation it deems appropriate at the time of sentencing, including condition time. I have, however, agreed to recommend that condition time be served with Huber release.

[1] I agree with the majority that because the relevant comments were not objected to by Rozanske's counsel, the question of whether the plea agreement was breached must be viewed in the context of ineffective assistance of counsel under ***Strickland v. Washington***, 466 U.S. 608 (1984).

> As to the remaining two counts, the State will recommend a probationary disposition to run concurrent with count two. The defense is free to argue for whatever sentence it believes it appropriate.

¶19 Rozanske contested some of the allegations in the complaint. However, Rozanske's attorney advised the court that the facts that Rozanske agreed with constituted a sufficient factual basis for the charges. There was some confusion regarding the charges because the assistant district attorney in court was not the charging assistant district attorney. Eventually, the parties settled on the correct statutory provisions and the trial court accepted the pleas and found Rozanske guilty. In doing so, the trial court used the facts in the criminal complaint and the facts as stated on the record as the basis for Rozanske's guilty pleas. The trial court then ordered a presentence investigation report.

¶20 Approximately six weeks later, in front of a different judge, the Honorable Glenn H. Yamahiro, and with a different assistant district attorney representing the State, Rozanske appeared for sentencing. Rozanske disagreed with many of the factual statements and conclusions contained in the presentence investigation report which recommended two years' initial confinement on count two, and nine months' confinement on both misdemeanors, one to be served consecutively to count two's sentence. The trial court had also received several letters before sentencing concerning Rozanske. These included letters from the victim, Darcy Hollub, her mother, and her daughter. In addition, testifying at the sentencing hearing on behalf of the State were the victim, her psychotherapist, her daughter and a Milwaukee police officer.

¶21 The victim and her daughter gave a gut-wrenching account of Rozanske's criminal conduct and its effect on them and their family. The psychotherapist advised that Hollub was in treatment for post-traumatic stress

disorder and that she was very committed to treatment. The investigating Milwaukee police officer also wished to speak to the court, telling the judge that:

> I thought I would give you some kind of a gauge as to putting it into perspective related to other cases, I truly don't believe I've investigated a case that would be considered alike to this one. And what I mean by that is all the things that I learned that took place to this woman throughout my investigation was [sic] so much greater than what I could compare to any other case that I have investigated.
>
> And in fact, during the investigation, I believe that there were things that Ms. Hollub may have not been telling me that were even much worse than what she was willing to share; and after listening closely to her speak today, I find that that certainly was the case.

¶22 Following their testimony, the State recited only that the plea agreement calling for probation.[2] In doing so, the State reminded the court that it was "free to argue for any condition that it deems appropriate, and we are going to be asking for the Court to impose … a maximum of one year in the County Jail." The State then advised the court that: "The State clearly believes that this is a case that calls for penalty." Later, the assistant district attorney said: "I want to tell the Court that I think that we're all lucky to be here today, that Ms. Hollub and her family are here to address this Court," and, "I'm thankful that I didn't charge this case."

¶23 The trial court sentenced Rozanske on count two to thirty months of initial confinement and seventy-two months of extended supervision, and on

[2] Indeed, the actual agreement read at the guilty plea hearing was that the State would recommend four years' probation with the understanding that, following the completion of the presentence investigation report, the State could recommend any condition of probation with any potential incarceration to be with Huber release.

counts one and three to six months in the House of Correction, to be served concurrently with one another and count two. In other words, while the State recommended four years of probation with one year in the House of Correction, Rozanske received prison and jail sentences on all three counts.

¶24 An accused gives up a number of important constitutional rights when pleading guilty. When a defendant pleads guilty in a state criminal trial, the plea implicates three federal constitutional rights: (1) the privilege against compulsory self-incrimination, guaranteed by the Fifth Amendment; (2) the right to trial by jury guaranteed by the Sixth Amendment; and (3) the right to confront one's accusers. ***Boykin v. Alabama***, 395 U.S. 238, 243 (1969) (citations omitted). "[A]n accused has a constitutional right to the enforcement of a negotiated plea agreement." ***State v. Williams***, 2002 WI 1, ¶37, 249 Wis. 2d 492, 637 N.W.2d 733.

¶25 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.***, ¶38. 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***, 232 Wis. 2d 291, 301, 606 N.W.2d 278 (Ct. App. 1999).

¶26 Rozanske argues a breach of the plea agreement occurred, despite a recommendation for probation, by the combination of four aspects of the State's comments: (1) the assistant district attorney's remarks that "the State clearly

believes this is a case that calls for penalty"; (2) the assistant district attorney's comment that "I want to tell the Court that I think that we're all lucky to be here today, that Ms. Hollub and her family are here to address this court…"; (3) the assistant district attorney's declaration that, "I'm thankful that I didn't charge this case"; and finally, (4) the investigating officer's comment that "the things that I learned that took place to this woman throughout my investigation was [sic] so much greater than what I could compare to any other case that I have investigated." After reviewing the record, I agree that the State breached the plea agreement.[3]

¶27 Comments by the prosecutor that imply reservations about the sentencing recommendation taint the sentencing process, and thus, breach the plea agreement. ***State v. Poole***, 131 Wis. 2d 359, 364, 394 N.W.2d 909 (1986). Here, the State first infected the sentencing by alerting the trial court that the case clearly called for a penalty. This is because advising the court that the case "clearly call[ed] for a penalty" after recommending probation was inconsistent with the

[3] This case is distinguishable from ***State v. Hanson***, 232 Wis. 2d 291, 606 N.W.2d 278 (Ct. App. 1999), where the court found no breach. There, the prosecutor emphasized that she supported the plea agreement, but wanted to alert the court to certain factors:

> The first words spoken by the prosecutor when she made her sentencing remarks were a strong affirmation of the sentencing provisions of the plea agreement. The prosecutor explained that she was going to be "very … circumspect" in making her sentencing remarks because she was "aware what the plea agreement is." She further stated, "I certainly stand by the plea agreement." The prosecutor then emphasized that none of her remarks were meant to "contravene the plea agreement in any way" and that she was "not attempting in any way, shape or form, to backdoor a different recommendation than that which has previously been represented in terms of sentencing."

Id. at 301-02.

recommendation. Next, the prosecutor's assertion that the victim and her family were "lucky to be here today," strongly hinted to the trial court that Rozanske posed such a significant threat to the welfare of Hollub and her family that it was a wonder they survived to tell about it. Finally, the prosecutor distanced himself from the stated plea negotiation by advising the court that he was "thankful that I didn't charge this case," sending a clear, unambiguous message that, had he been the one to charge it, the recommendation would have been different.

¶28 In addition, the investigating detective in this case also gave a sentencing recommendation that undermined the State's recommendation. By telling the trial court that "the things that I learned that took place to this woman … was [sic] so much greater than what I could compare to any other case that I have investigated," coupled with his comment that "there were things that Ms. Hollub may have not been telling me that were even much worse than what she was willing to share, and after listening closely to her speak today, I find that that certainly was the case," signaled to the trial court that this was the most heinous case of domestic abuse that he has ever investigated, and that far worse things occurred to the victim than were known to him (or presumably, the charging assistant district attorney).

¶29 There is no doubt that had the assistant district attorney uttered these words to the court, a clear breach of the plea agreement would have occurred. "Because an investigative officer is the investigating arm of the prosecutor's office, principles of fairness and agency require us to bind the investigating officer to the prosecutor's bargain." ***State v. Matson***, 2003 WI App 253, ¶23, 268 Wis. 2d 725, 674 N.W.2d 51.

> Investigating officers are so integral to the prosecutorial effort that to permit one to undercut a plea agreement

> would, in effect, permit the State to breach its promise. If the prosecutor is obligated to comply with, plea bargain promises, then the prosecutor's investigating officers may not undercut those promises by making inconsistent recommendations. We conclude that statements of the investigating officer for purposes of the sentencing hearing are the statements of the prosecutor. A prosecutor may not undercut a plea agreement directly or by words or conduct. Nor may he do so by proxy.

Id., ¶25.

¶30 In other words, as I have already noted, the State may not accomplish by indirect means what it promised not to do directly. ***Hanson***, 232 Wis. 2d at 301. Here, both the assistant district attorney and the investigating officer breached the plea agreement. The cumulative effect of their less-than-enthusiastic endorsement of the sentencing recommendation was a material and substantial breach. *See* ***Williams***, 249 Wis. 2d 492, ¶38. Accordingly, I would conclude that Rozanske's trial counsel was ineffective and remand for resentencing.