COURT OF APPEALS
DECISION
DATED AND RELEASED

FEBRUARY 13, 1996

No. 95-1647-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RALPH G. BARKE,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Oconto County: LARRY L. JESKE, Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Ralph Barke appeals his sentence for three counts of second-degree sexual assault of a child, having pleaded guilty to the charges. Barke received six years in prison on one count and ten years of consecutive probation on the other two counts. The trial court dismissed seven other sexual assault charges and read in five of the seven at sentencing. As part of the plea agreement, which the prosecutor described for the trial court at the plea

hearing, the prosecution promised to recommend the lesser of either a ten-year sentence or of whatever the presentence report recommended for one of the counts, with probation on the remaining two counts.

At the sentencing hearing, after the presentence report recommended a four-to-six year sentence for one count, the trial court asked the prosecutor to refresh the court's recollection on the plea agreement. The prosecutor then reiterated the agreement, including the conditions concerning the then lapsed, irrelevant ten-year figure. Barke argues that the prosecutor violated the plea agreement by rementioning the lapsed ten-year figure at the sentencing hearing once the presentence report had recommended a lesser sentence. He considers the violation both ordinary and plain error. We reject Barke's arguments and affirm his convictions.

Barke has given us no basis for resentencing. First, Barke did not object to the prosecutor's comments at sentencing and therefore waived the matter. ***State v. Smith***, 153 Wis.2d 739, 741, 451 N.W.2d 794, 795 (Ct. App. 1989). Barke also failed to object to the ten-year figure when the prosecution mentioned it at the plea hearing. Although Barke claims that ***Smith*** was wrongly decided, we disagree with this claim and are bound by prior decisions. Section 752.41(2), STATS. We note that Barke's six-year sentence fell within the four-to-six year range recommended by the presentence report and ultimately sought by the prosecution.

Second, Barke raises his plain error argument for the first time in his reply brief, and we therefore decline to consider it. ***Estate of Bilsie***, 100 Wis.2d 342, 346 n.2, 302 N.W.2d 508, 512 n.2 (Ct. App. 1981). Last, while we do not decide the matter, we find persuasive the State's argument that the prosecutor did not materially breach the plea agreement. The prosecutor had already mentioned the conditional ten-year sentence recommendation at the plea hearing, and he merely repeated this as background information at the sentencing hearing. The prosecutor never asked the sentencing court to impose a ten-year sentence. In short, we doubt the existence of any plain error.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.