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**DISTRICT I**

June 4, 2018

To:

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You are hereby notified that the Court has entered the following opinion and order:

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2017AP1796

State of Wisconsin v. Erik Rosales (L.C. # 2012CF1670)

Before Kessler, P.J., Brash and Dugan, JJ

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Erik Rosales appeals the circuit court's order denying his postconviction motion brought pursuant to WIS. STAT. § 974.06 (2015-16).<sup>1</sup> Rosales argues that the prosecutor breached the plea agreement. Alternatively, he argues that his trial counsel provided him with constitutionally

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

ineffective assistance by failing to object to the prosecutor's breach of the plea agreement. We affirm.

Rosales was sixteen years old when he helped his friend, Jose Ramos, attack and kill Ramos's mother's boyfriend because the boyfriend had allegedly sexually assaulted Ramos's sister. Rosales was charged with first-degree intentional homicide in the death and attempted first-degree intentional homicide against Ramos's mother, who was also injured, both as a party to a crime. Pursuant to a plea agreement, the prosecutor reduced the charges to first-degree reckless homicide and first-degree reckless injury, both as a party to a crime. The prosecutor also agreed to recommend a total of thirty years of initial confinement for both crimes, but was free to make statements about mitigating or aggravating factors.

The prosecutor asked that the presentence investigation report (PSI) be prepared without a sentencing recommendation. The circuit court agreed to the prosecutor's request, but its order failed to state that the PSI should be prepared without a recommendation. Consequently, the PSI included a recommendation that Rosales be sentenced to a total of thirteen to sixteen years of initial confinement and six to ten years of extended supervision.

At sentencing, the prosecutor argued that thirty years of initial confinement was appropriate and asked the circuit court to impose that amount of time. The prosecutor addressed aggravating and mitigating factors pertaining to the case and made the following comments about the PSI recommendation:

I seldom comment on this, and this is why I do not like presentence recommendations, but in my opinion, the presentence recommendation is preposterous. This lady who wrote the presentence, I think, was trying to write some cheap novel rather than trying to actually concern herself with a proper presentence.

She writes — just imagine what she’s thinking editorially when she wrote this, but she writes at the end, “These crimes are truly tragic and a man not only lost his life but also that” — and she quickly goes back to Mr. Rosales — “that a 16-year-old who never truly had a chance to experience life will find his life redefined by his lack of freedom and for what? So he could cover a fellow gang member’s back in some twisted form of family commitment. It just makes no sense,” you know.

Why, she’s editorializing like that, I don’t know, but I don’t think she should be doing that. I think her recommendation is extremely inappropriate, and I think that 30 years is a just sentence under this matter.

(*Id.* 10-11).

The circuit court rejected both the PSI recommendation of thirteen-to-sixteen years of initial confinement and the prosecutor’s request for thirty years of initial confinement. Instead, the circuit court imposed twenty-five years of initial confinement, explaining that the sentence would protect the community from Rosales for a substantial period of time, but also would result in his release when he will be about forty-two years old so he can enter society to make use of his rehabilitation.

“[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. “A prosecutor who does not present the negotiated sentencing recommendation to the circuit court breaches the plea agreement.” *Id.*, ¶38. “A prosecutor may convey information to the sentencing court that is both favorable and unfavorable to an accused, so long as the State abides by the plea agreement.” *Id.*, ¶44. ““The State may not accomplish by indirect means what it promised not to do directly, and it may not covertly convey to the circuit court that a more severe sentence is warranted than that recommended.”” *Id.*, ¶42 (citation omitted).

Rosales contends the prosecutor's comments about the PSI breached the plea agreement. We disagree. The prosecutor did not suggest, either explicitly or implicitly, that Rosales should receive more than thirty years of initial confinement. Rather, the prosecutor said that he did not agree with the PSI's much lower recommendation of thirteen to sixteen years of initial confinement. The prosecutor's comments *justified the thirty-year term of initial confinement* it agreed to as part of the plea agreement, but the prosecutor did not undercut the agreement by recommending more time. Therefore, the State did not breach the plea agreement.

Rosales next argues that he received ineffective assistance of trial counsel because his attorney did not object to the prosecutor's breach of the plea agreement. We have concluded that the prosecutor did not breach the plea agreement. Therefore, Rosales's claim that his trial counsel provided him with constitutionally ineffective assistance is unavailing.

IT IS ORDERED that the order of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21(a).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*