

THE UTAH COURT OF APPEALS

STATE OF UTAH,
Appellee,

v.

JAMES ARLAN WEBER,
Appellant.

Opinion
No. 20241246-CA
Filed October 8, 2026

Eighth District Court, Vernal Department
The Honorable Clark A. McClellan
No. 231800661

Emily Adams and Jessica Hyde Holzer,
Attorneys for Appellant

Derek E. Brown and Lindsey L. Wheeler,
Attorneys for Appellee

JUDGE RYAN M. HARRIS authored this Opinion, in which
JUDGES MICHELE M. CHRISTIANSEN FORSTER and
DAVID N. MORTENSEN concurred.

HARRIS, Judge:

¶1 James Arlan Weber pled guilty to one count of aggravated child abuse, a second-degree felony, and one count of child abuse, a class A misdemeanor, and the district court later sentenced him to prison. Weber now appeals his sentence, asserting that his attorneys rendered ineffective assistance in various respects. In addition, Weber asks us to remand this case to the district court, pursuant to rule 23B of the Utah Rules of Appellate Procedure, for further proceedings that would allow him to supplement the record to support additional claims of ineffective assistance, including certain claims related to his underlying plea. For the reasons discussed herein, we deny Weber's rule 23B motion and

affirm his sentence, but we remand the case to the district court for the limited purpose of correcting the presentence investigation report's (PSI) incorrect labeling of his misdemeanor charge.

BACKGROUND¹

The Abuse

¶2 Matthew² lived with his biological mother (Mother) until he was three years old, at which time he was adopted by Weber, who may be Matthew's biological father. For the next six years, Matthew lived with Weber, Weber's wife (Stepmother), and Stepmother's four children, all of whom are older than Matthew.

¶3 A few days before Matthew's ninth birthday, he ran away from home, and a concerned citizen found him. Matthew told the citizen that "he ran away from home because he was bad," and the citizen took Matthew to the police station, where Matthew told officers that he had "left home because his parents were mean, tied him up, and hit him with things." He also stated that "his parents did not feed him." When asked about "a large bruise on his cheek," Matthew claimed his stepbrother had caused it.

¶4 Later, a police officer (Officer) went to Matthew's home to investigate. Officer met Weber there and asked him why Matthew "was so small for his age," and Weber said he didn't know because he had adopted Matthew when he was three and that

1. Weber entered into a plea agreement with the State, so there was no trial. Accordingly, "the facts recited here come from the charging document, the plea agreement form, the plea hearing, the [PSI], and the sentencing hearing." *State v. Rynhart*, 2025 UT App 148, n.1, 585 P.3d 57, *cert. denied*, 585 P.3d 48 (Utah 2026).

2. We use pseudonyms for the child in question as well as for his stepsiblings.

Matthew had “always been small.” Weber also confirmed that the bruise on Matthew’s cheek “was from [Matthew] wrestling around” with his stepbrother. Officer then returned Matthew to the home and released him to Weber and Stepmother’s care, and he notified the Utah Division of Child and Family Services (DCFS) of the incident.

¶5 A few days later, a detective (Detective) arranged for Matthew to be interviewed at the Children’s Justice Center (CJC). When Matthew arrived, Detective noted that Matthew “appear[ed] to be very small and emaciated.” Detective could “see all of [Matthew’s] ribs and vertebrae,” and he observed that Matthew’s “knee bones [were] much larger than his calves and thighs” and that his “hands and wrists [were] very small.” Matthew told Detective that he had “marks on his wrist” from a “rope” that he had often been tied up with, and Detective “observed a small, mostly healed scab on [Matthew’s] right wrist.” Detective concluded, “based on [Matthew’s] physical condition,” that Matthew had been “bound for long periods of time” and that “nutrition [had been] withheld.”

¶6 During the interview, Detective asked Matthew “why he was there,” and Matthew suggested that it was “because he had tried to kill [Stepmother].” Matthew explained that, some three years earlier, when he was six, he had “held a knife over [Stepmother’s] head” and “she [had] woke up to find him like that,” and that he had “not talked to anyone about it.” Detective redirected Matthew to the day he ran away, and Matthew stated that while his family members “were all asleep,” he had gotten “into the peanut butter, pizza, tater tots, and chicken nuggets, and left.” Matthew explained that “he felt bad about getting food because it made [Stepmother’s] blood pressure go up” and made “the rest of them go hungry.” He also stated that “he would get tied up to stop him from getting into all the food and for his own safety” and that the last time he had been “tied up” was two days ago, on his ninth birthday.

¶7 While Matthew was being interviewed, another officer went to the home and met with Matthew's family. There, Weber and Stepmother explained that Matthew had been "in their home for the past five and a half years" and that, at first, everything had been "fine," other than Matthew's "small stature and the fact that he eats everything." But they claimed that Matthew had recently become "defiant," and they reported several instances of bad behavior from Matthew, including Stepmother "waking up to [Matthew] holding a knife over her head," Matthew "putting a cord around [his stepbrother's] neck," and Matthew putting cleaning solution in the family's coffee maker. Stepmother also explained that Matthew would "get up in the middle of the night and eat all the leftovers, or drink a bottle of ranch [dressing], or eat a jar of mayonnaise." And Weber stated that this required the family to "sleep in shifts to prevent [Matthew] from getting into the kitchen." They told the officer that their home had cameras and "some of these incidents could be viewed on the cameras." Stepmother denied that Matthew had "ever [been] tied up or tied to the bed," but Weber "admitted he ha[d] tied [Matthew's] hands up twice, for his own protection, for about 20 minutes each time."

¶8 During this family interview, Matthew's fifteen-year-old stepbrother (Ben) stated that when Matthew had been tied up, it was "usually because he [wouldn't] sleep or because he [had gone] into the kitchen [to eat] food." Officer asked "what it looks like when [Matthew] is tied up," and Weber interjected by asking, "[U]sually, it's just his hands, right?," to which Ben replied, "Yeah, it's usually just his hands, and he is not tied to the bed." Ben added that "the rope[] is normally over [Matthew's] sleeves so it won't leave a mark." Ben then retrieved the rope that had been used to tie Matthew up, and he gave it to the officer.

¶9 After these interviews, DCFS removed all of the minor children from Weber and Stepmother's care and transported Matthew to the hospital. DCFS took the two of the children—Ben and his thirteen-year-old brother (Brooks)—to the CJC. At the hospital, Matthew weighed thirty-seven pounds, and medical

personnel conducted an assessment of Matthew. After participating in that assessment, a doctor observed as follows:

I suspect that [Matthew] has also suffered prolonged psychological/emotional abuse alongside his nutritional neglect, contributing to psychosocial dwarfism. With current information, the totality of injuries and findings identified in [Matthew] cannot plausibly be explained by accidental injury, preexisting medical illness, reasonable discipline, or benign events. Therefore, these injuries should be considered consistent with inflicted trauma (e.g., child abuse) and nutritional neglect. [Matthew] is at significant risk of further harm if returned to the hands of the caregiver who inflicted these injuries without interventions.

Over the two and a half weeks following his removal from Weber's home, Matthew "gained 6 pounds," "[h]is ribs and vertebrae [became] no longer visible, and he appeared much healthier."

¶10 At the CJC, Ben and Brooks were interviewed. Ben was "asked where the idea to tie [Matthew] up came from," and he said, "[Weber] came home and [Matthew] was standing in the corner for punishment . . . [and] he was banging his head on the wall," so "[Weber] suggested they tie him up for about three hours so he could calm down." Ben stated that "at most" Matthew had been tied up "for four or five hours," and that when Weber and Stepmother "realized he had been tied up that long, they were like, 'oh crap'" and they went and untied him. Ben also stated that Weber and Stepmother "made sure it was not longer than 24 hours and that it didn't affect his muscles or give him rashes."

¶11 Ben also told the interviewer that "[Matthew] would say things for the shock of it," like "talking about being homosexual because he thought it would shock everyone." Ben admitted to

tying Matthew “up by his feet,” even though “Weber told him he wasn’t supposed to do that.” Ben said he “was sick of [Matthew] getting into things in the kitchen and that’s why he tied his feet.”

¶12 Officers also interviewed Stepmother’s twenty-year-old daughter (Cara), who stated that Weber and Stepmother had used “food [as] a punishment” for Matthew. She said, “It would be taken away from him and he would not be allowed to eat, sometimes two to three days out of the week.” She stated that she thought Matthew “was in trouble so much for taking food that he just didn’t ask for any.” And regarding Weber and Stepmother’s overall treatment of Matthew, Cara said that it was “as if they were babysitting him and not like he was part of the family.”³

The Charges and Plea Deal

¶13 A few days after the children were removed from Weber and Stepmother’s care, Weber was arrested and charged with four second-degree-felony counts of aggravated child abuse.⁴ Eventually, Weber entered into a plea agreement with the State, in which he agreed to plead no contest to (a) one count of aggravated child abuse, a second-degree felony, in violation of Utah Code section 76-5-109.2, for “caus[ing] serious physical injury to a nine-year-old child by withholding food and starving him to the point that he required hospitalization,” and (b) one count of non-aggravated child abuse, a class A misdemeanor, in

3. Around this time, Stepmother and Stepmother’s other adult daughter (Chelsey) were also interviewed by law enforcement, but the contents of their interviews were not included in the record, so we address the relevant contents of those interviews more fully below, in connection with our discussion about Weber’s rule 23B motion.

4. Stepmother was also arrested and charged, but her charges were dealt with in a separate case not at issue here. We include information about her case only where it is relevant to this appeal.

violation of Utah Code section 76-5-109, for “physically [tying] up a nine-year-old with a rope on at least two different occasions.” The State agreed to dismiss the other two charged counts.

¶14 At the plea hearing, the court reiterated the terms of the plea agreement, stating, “So it looks like, to me, that you are admitting to . . . aggravated child abuse, intentional or knowing, as a second-degree felony. And child abuse intentionally or knowingly, as a [c]lass A? Is that what you understand . . . you’re doing?” Weber responded in the affirmative. The court explained that the elements of the two charges were “essentially the same” and that it’s “the severity of the charge, or the potential penalty that’s different.” When the court asked Weber whether he understood, Weber again responded affirmatively. The court also addressed Weber’s attorney (Counsel), asking, “[D]o you believe that [Weber] understands the rights that he’s waiving?” Counsel responded by saying, “[W]e’ve talked a bunch over the past few weeks. And then we talked yesterday and went over it . . . [T]hen he went over the paperwork on his own and let us know that he understood it. And so I do believe he understands it.”

¶15 After the court recited the facts giving rise to the allegations—most of which are recited above—Counsel stated that Weber was “not contesting that food was withheld, or that [Matthew] was tied up on a couple of occasions,” but that Weber “did just want to make one supplement to add to the facts in that [Matthew] was 37 pounds, but later on, he was also found to have a medical condition that may have contributed to his weight loss, too.” The court accepted the additional fact, and it later ordered Adult Probation and Parole (AP&P) to prepare a PSI in advance of the sentencing hearing.

The PSI

¶16 AP&P prepared a PSI, and on the first page it listed the offenses as “aggravated child abuse . . . second-degree felony” and “*aggravated* child abuse . . . class A misdemeanor.” (Emphasis

added.) The PSI also included a factual summary of the events leading up to Weber's arrest. And as relevant here, the PSI further stated that "[e]lectronics were taken as evidence and reviewed" and that "[s]everal messages between [Weber] and [Stepmother] were located," including messages where Weber referred to Matthew as a "little fucker" and stated that he was "going to get rid of [Matthew] as soon as [he got] home." AP&P recommended that Weber receive the statutory prison sentence, despite the fact that the sentencing guideline matrix indicated that the recommended sentence should be jail as a condition of probation. In the PSI, AP&P offered its view that a deviation from the matrix recommendation was justified because the crimes were particularly egregious, Weber had a significant criminal history, and Weber had taken "no accountability for the injuries [Matthew] sustained."

The Sentencing Hearing

¶17 On the day of the sentencing hearing, Counsel was out of town, so the attorney who had been representing Stepmother (Sentencing Counsel) stepped in to represent Weber. This was convenient because Stepmother's sentencing hearing had been scheduled for the same date and time and had been completed just prior to the beginning of Weber's. The court began Weber's hearing by clarifying that Weber had pled guilty to "[t]wo counts, aggravated child abuse, second-degree felony, and [c]lass A misdemeanor" and by asking Sentencing Counsel, "Is that correct?" Sentencing Counsel answered in the affirmative. The court then asked what Sentencing Counsel thought the court should do, and Sentencing Counsel responded by apparently referencing Stepmother's sentencing hearing, which had just concluded, stating, "Your Honor, you've heard the majority of it, and I'm not going to repeat too much. I would like to make a couple of distinctions here." Sentencing Counsel then acknowledged that Weber did have something of a criminal history, but he pointed out that those crimes were "over 10 years old." He also noted that Weber had made "a full relinquishment

of [his] parental rights” and there was therefore “no chance that he [would] be seeing” Matthew again, and he argued that this action showed that Weber “knew things were serious and [that] he took them seriously.” For its part, the State asked the court to follow the PSI’s recommendation and sentence Weber to prison, arguing specifically “that a prison sentence be imposed.”

¶18 After considering these arguments, the court stated that it was “going to follow the recommendation of the State . . . and sentence [Weber] to one to 15 years in the Utah State Prison.” It explained its reasoning as follows:

This is the kind of case that speaks out. And part of my role, I feel, at times, is to make sure the public understands the importance of caring for children and set a standard in the community. And I think I would be remiss if I didn’t recognize that the community here would expect me to do this in a case like this where . . . such egregious torture was inflicted on a child.

And the court told Weber that he had caused “pain and suffering that was unnecessary and just cannot be allowed to happen.”

ISSUES AND STANDARDS OF REVIEW

¶19 Weber now appeals his sentence, arguing that Counsel and Sentencing Counsel rendered constitutionally ineffective assistance in various respects. In addition, Weber has filed a motion, pursuant to rule 23B of the Utah Rules of Appellate Procedure, asking us to remand the case to the district court for further proceedings to allow him to supplement the record in support of additional ineffective assistance claims, some of which go not just to his sentence but also to the entry of his plea. “A claim of ineffective assistance of counsel raised for the first time on appeal presents a question of law, which we consider de novo.”

State v. King, 2018 UT App 190, ¶ 11, 437 P.3d 425 (cleaned up). And “a remand under rule 23B is available only upon a nonspeculative allegation of facts, not fully appearing in the record on appeal, which, if true, could support a determination that counsel was ineffective.” *State v. Tuinman*, 2023 UT App 83, ¶ 53, 535 P.3d 362 (cleaned up).

ANALYSIS

¶20 To succeed on an ineffective assistance claim, Weber must make a two-part showing: (1) that counsel’s performance was deficient and (2) that this deficient performance “prejudiced the defense.” *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984); accord *State v. Scott*, 2020 UT 13, ¶ 28, 462 P.3d 350. Failure to prove either component is fatal to the claim; “[u]nless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.” *Strickland*, 466 U.S. at 687. Thus, “if either is lacking, the claim fails and this court need not address the other.” *State v. Kufirin*, 2024 UT App 86, ¶ 55, 551 P.3d 416 (cleaned up).

¶21 The first part of the test requires Weber to show that his attorneys’ performance “fell below an objective standard of reasonableness.” *Scott*, 2020 UT 13, ¶ 31 (cleaned up). When determining reasonableness, courts often look to whether counsel’s actions were motivated by trial strategy. *See id.* ¶ 35 (“[T]he performance inquiry will often include an analysis of whether there could have been a sound strategic reason for counsel’s actions.”). And while “the ultimate question is not whether there was a possible strategic reason for counsel’s conduct, but instead whether that conduct was objectively reasonable,” *see id.*, “[i]f it appears counsel’s actions could have been intended to further a reasonable strategy, a defendant has necessarily failed to show unreasonable performance,” *State v. Ray*, 2020 UT 12, ¶ 34, 469 P.3d 871.

¶22 If deficient performance is established, Weber must next show that he was prejudiced by that performance. To establish prejudice, he “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. A defendant trying to show that there is a “reasonable probability of a different outcome” faces “a relatively high hurdle to overcome.” *State v. Garcia*, 2017 UT 53, ¶ 44, 424 P.3d 171.

¶23 In this case, Weber alleges—or attempts to allege—that his attorneys rendered ineffective assistance in the following four respects: (1) when neither Counsel nor Sentencing Counsel objected to the PSI’s incorrect labeling of his misdemeanor charge as “aggravated”; (2) when Sentencing Counsel didn’t argue more specifically for probation at the sentencing hearing; (3) when Counsel didn’t discuss certain trial strategy items with him prior to him entering his guilty plea; and (4) when neither Counsel nor Sentencing Counsel sought to correct certain information contained in the PSI that Weber claims “painted an incomplete picture of Matthew’s complications.” Weber acknowledges that the record does not support his third or fourth ineffective assistance claims, so he has filed a motion, pursuant to rule 23B of the Utah Rules of Appellate Procedure, asking us to remand this case to the district court for additional factfinding. We address each of Weber’s arguments, in turn.

I. Mislabeling of the Misdemeanor Charge

¶24 Weber first argues that his attorneys rendered ineffective assistance by not objecting to the PSI’s incorrect labeling of his misdemeanor charge. Specifically, he argues that “an ‘aggravated’ label” makes a crime look worse than it was and that this labeling

matters for things like future parole hearings.⁵ The State disagrees, arguing that Weber’s attorneys could have had a strategic reason not to object to a “one-word typographical error” and that, in any event, Weber was not prejudiced. We find merit in Weber’s argument.

¶25 Weber pled guilty to one count of aggravated child abuse, a second-degree felony, and one count of *non-aggravated* child abuse, a class A misdemeanor. The PSI, however, listed the offenses as “aggravated child abuse,” a “second-degree felony,” and “*aggravated* child abuse,” a “class A misdemeanor.” (Emphasis added.)

¶26 Attorneys have a duty to ensure that the terms of any plea agreement are accurately described in the PSI. *See* Am. Bar. Ass’n, *Criminal Justice Standards for the Defense Function*, Standard 4-6.3(a) (4th ed. 2017), https://www.americanbar.org/groups/criminal_justice/resources/standards/defense-function/ [<https://perma.cc/KM6K-2MZV>] (“Defense counsel should ensure that any written disposition agreement accurately and completely reflects the precise terms of the agreement, including the prosecution’s promises and the client’s obligations.”). If an attorney perceives an inaccuracy in the PSI, Utah law provides a route for the attorney to seek correction. *See* Utah Code § 77-18-103(5)(a)(i) (“If there is an alleged inaccuracy in the presentence investigation report that is not resolved . . . before sentencing: . . . the alleged inaccuracy shall be brought to the attention of the court at sentencing . . .”). Here, neither Counsel nor Sentencing Counsel sought to correct the PSI’s incorrect labeling of Weber’s misdemeanor charge, and in our view a reasonable attorney would have done so at or before the sentencing hearing.

¶27 The State resists this conclusion by arguing that Weber’s attorneys could reasonably have opted not to object to the

5. Both parties agree that the mislabeling did not impact Weber’s sentence.

apparent typo because it “was inconsequential.” But the error here was not inconsequential, as we discuss below, in connection with our analysis of the second prong of the ineffective assistance test. With regard to Weber’s deficient performance argument, we see no reasonable strategic purpose for opting not to ask for correction of the error, and a reasonable attorney would have done so in this situation.

¶28 As for prejudice, the parties agree that Weber’s sentence was not affected by the error. Indeed, the district court was well aware that the second charge to which Weber pled guilty was a class A misdemeanor, and the court sentenced Weber accordingly. Thus, Weber makes no assertion that his sentence was adversely affected by the error in the PSI.

¶29 But Weber does argue that the error is likely to harm him in the future, noting that the PSI’s incorrect label “can be utilized against him in future settings, such as parole hearings.” And the State does not meaningfully dispute Weber’s contention that the mislabeled charge could be used against him in the future. Indeed, Utah law makes clear that “a defendant’s PSI may be utilized in future settings, such as parole hearings.” *State v. Samulski*, 2016 UT App 226, ¶ 18, 387 P.3d 595 (cleaned up); *see also State v. Post*, 2015 UT App 162, ¶ 11 n.7, 354 P.3d 810 (“Even where inaccuracies in a PSI do not affect a defendant’s sentence, it is necessary that the defendant’s objections be resolved on the record because the statements in a defendant’s PSI may be utilized in future settings, such as parole hearings.” (cleaned up)); *State v. Monroe*, 2015 UT App 48, ¶ 10, 345 P.3d 755 (“[E]ven though the sentence was not flawed . . . , the PSI will follow [the] [d]efendant through the justice system, and it is important to make appropriate corrections to the report.”). And on the facts presented here, we do not view it as unduly speculative for Weber to claim that the labeling of the charges contained in his PSI could very well have an adverse impact on him in the future.

¶30 As of the time of the charged crimes, an aggravated-child-abuse charge required the State to prove that a defendant caused “serious physical injury” to a child, while a non-aggravated-child-abuse charge required only a showing of “physical injury.” Compare Utah Code § 76-5-109(3) (2023) (“Any person who inflicts upon a child *physical injury* or, having the care or custody of such child, causes or permits another to inflict *physical injury* upon a child is guilty of an offense as follows: . . . if done intentionally or knowingly, the offense is a class A misdemeanor.” (emphasis added)), with *id.* § 76-5-109.2(2) (“An actor commits aggravated child abuse if the actor: (a) inflicts upon a child *serious physical injury*; or (b) having the care or custody of such child, causes or permits another to inflict *serious physical injury* upon a child.” (emphasis added)).

¶31 “Physical injury” was statutorily defined as “an injury to or condition of a child which impairs the physical condition of the child, including: (i) a bruise or other contusion of the skin; (ii) a minor laceration or abrasion; (iii) failure to thrive or malnutrition; or (iv) any other condition which imperils the child’s health or welfare and that is not a serious physical injury.” *Id.* § 76-5-109(1)(e). By contrast, “serious physical injury” was defined as “any physical injury or set of injuries that: (A) seriously impairs the child’s health; (B) involves physical torture; (C) causes serious emotional harm to the child; or (D) involves a substantial risk of death to the child.” *Id.* § 76-5-109(1)(f)(i). The statutory definition also included several examples of serious physical injuries, including “any combination of two or more physical injuries inflicted by the same person, either at the same time or on different occasions”; “any conduct toward a child that results in severe emotional harm, severe developmental delay or intellectual disability, or severe impairment of the child’s ability to function”; and “any conduct that results in starvation or failure to thrive or malnutrition that jeopardizes the child’s life.” *Id.* § 76-5-109(1)(f)(ii)(E), (G), (J). Under the applicable statutes, an aggravated-child-abuse charge required the State to prove that a

defendant had engaged in conduct that was significantly more egregious than the conduct necessary to prove a non-aggravated-child-abuse charge. Under these circumstances, there is an appreciable risk that a parole board examining the issue after the fact could draw an inaccurate conclusion about the nature of the injuries Weber admitted to inflicting upon Matthew.

¶32 Accordingly, we agree with Weber that his attorneys rendered ineffective assistance by not seeking to correct the mislabeling of his misdemeanor charge in the PSI. While this error did not adversely affect Weber's sentence, Weber has demonstrated a reasonable possibility of prejudice with regard to future events. We therefore remand this case to the district court for the limited purpose of correcting the PSI to fix the error by removing the "aggravated" label from his agreed-upon non-aggravated class-A-misdemeanor charge.

II. Not Arguing for a Lesser Sentence

¶33 Next, Weber argues that Sentencing Counsel rendered ineffective assistance at the sentencing hearing when he "did not argue that [Weber] should be placed on probation." The State disagrees, asserting first that Sentencing Counsel at least impliedly argued that Weber should be placed on probation and that the district court understood the gist of the argument, and further asserting that Weber has not demonstrated prejudice in any event. We agree with the State.

¶34 After reviewing the transcript of the sentencing hearing, we can see Weber's point: Sentencing Counsel did not ever expressly argue that the court should suspend any prison sentence and afford Weber the privilege of probation. But we also take the State's point that Sentencing Counsel was incorporating by reference a lot of the argument he had just made during Stepmother's sentencing hearing, telling the court, "Your Honor, you've heard the majority of it, and I'm not going to repeat too much. I would like to make a couple of distinctions here." The

transcript of Stepmother's hearing is not a part of the record submitted to us, so we of course cannot be sure that an argument for probation was expressly made there either. But at Weber's hearing, Sentencing Counsel went on to make certain arguments that don't seem to make sense other than in the context of an argument for probation: that Weber's criminal history was "over 10 years old" and was "all old stuff" that "doesn't show any negative trend"; that Weber had made a "full relinquishment of parental rights" and that there was therefore "no chance that he [would] be seeing" Matthew again; and that Weber had taken serious steps to change his behavior and accept responsibility. And the State, in response to Sentencing Counsel's argument, appeared to believe that it was arguing against a probation recommendation; the prosecutor made specific arguments rebutting Sentencing Counsel's points and concluded by asking, "on behalf of the State, that a prison sentence be imposed." From context, then, it appears to us that the court understood that it was being asked to decide between probation and prison; indeed, after considering Weber's allocution, the court made a specific ruling that it was "going to follow the recommendation of the State here, and sentence [Weber] to one to 15 years in the Utah State Prison."

¶35 The question before us, then, is whether Sentencing Counsel had an obligation to make a *more express* argument for probation and, if he had, whether such an argument would have made a difference in the outcome of the hearing. Here, we can assume, for purposes of our analysis and without deciding, that Sentencing Counsel performed deficiently by not making a more explicit argument for probation, because we conclude that, even if he had made such an argument, there is no reasonable probability that the outcome of the sentencing hearing would have been any different. *See State v. Aitken*, 2022 UT App 21, ¶ 12, 505 P.3d 1159 ("Where it is readily apparent from the record that a defendant suffered no prejudice, a court need not determine whether counsel's performance was deficient before examining

the prejudice suffered by the defendant as a result of the alleged deficiencies.” (cleaned up)).

¶36 “Prejudice occurs when there is a reasonable probability that, but for an attorney’s unprofessional errors, the result of the proceeding would have been different, and a reasonable probability is a probability sufficient to undermine confidence in the outcome.” *State v. Vine*, 2025 UT App 147, ¶ 73, 580 P.3d 401 (cleaned up). “Prejudice analysis is counterfactual. To decide whether a [proceeding] affected by error is reasonably likely to have turned out differently we have to consider a hypothetical—an alternative universe in which the [proceeding] went off without the error.” *State v. Ellis*, 2018 UT 2, ¶ 42, 417 P.3d 86.

¶37 Here, we therefore must envision a counterfactual sentencing hearing in which Sentencing Counsel did more than make *implied* arguments for a suspended prison sentence and probation and instead argued *expressly* and more forcefully for that outcome. But we don’t see a reasonable probability of a different outcome in that hypothetical hearing. Given the arguments Sentencing Counsel already made, in our view the differences between the actual hearing and the hypothetical one amount to a few lines of argument making a more express plea for probation, as well as some additional emphasis on the factors supporting that position, including more explicit reference to the fact that the sentencing guideline matrix supported probation. We see no reasonable probability that these things would have changed the outcome.

¶38 Indeed, the district court already had all of this information. It was aware, from reviewing the PSI, that the matrix indicated that probation should be considered. And it was aware that AP&P and the State were recommending otherwise. It was also aware of the fact that Weber’s criminal history was quite dated. And it was aware that Weber had taken certain steps since his arrest—including relinquishing his parental rights—to help ensure that he wouldn’t harm Matthew again. But even knowing

all of this information, the court still sentenced Weber to prison, explaining that it considered this case exceptional and that Weber had, in its view, inflicted “egregious torture” on Matthew.

¶39 In this situation, we simply don’t think a more express argument from Sentencing Counsel would have made a difference in the outcome of the hearing. Thus, we reject Weber’s second claim of ineffective assistance on prejudice grounds.

III. The Rule 23B Motion

¶40 Weber next asks us to grant his motion, filed pursuant to rule 23B of the Utah Rules of Appellate Procedure, seeking remand to the district court for supplementation of the record to support additional claims of ineffective assistance of counsel. Under that rule, a defendant “may move the court to remand the case to the [district] court for entry of findings of fact, necessary for the appellate court’s determination of a claim of ineffective assistance of counsel.” Utah R. App. P. 23B(a). “We apply a four-part test to evaluate rule 23B motions.” *State v. Samora*, 2021 UT App 29, ¶ 50, 484 P.3d 1206 (cleaned up). “First, the motion must allege facts not already in the record. Second, those factual allegations must not be speculative. Third, the allegations must demonstrate that counsel performed deficiently, and fourth, the allegations must show that counsel’s deficient performance prejudiced the defendant.” *State v. Tuinman*, 2023 UT App 83, ¶ 103, 535 P.3d 362 (cleaned up).

¶41 In his motion, Weber identifies two additional ineffective assistance claims that he acknowledges are not currently supported by the record. First, he posits that Counsel rendered ineffective assistance by not discussing certain trial strategy matters with him prior to entry of his plea. Second, he believes that Counsel and Sentencing Counsel rendered ineffective assistance by not seeking to supplement the factual recitation contained in the PSI. We address these potential claims, in turn.

A. Pre-Plea-Deal Claims

¶42 Weber claims that Counsel rendered ineffective assistance by not discussing certain matters with him before he entered into the plea agreement, a circumstance that Weber claims resulted in him entering an unknowing guilty plea. We discuss the matters to which Weber points more fully below, but in summary we agree with the State’s position that Weber cannot show prejudice even if the additional evidence he identifies were in the record.

¶43 To demonstrate prejudice for purposes of an ineffective assistance claim in the context of a guilty plea, a defendant must show “a reasonable probability that, but for counsel’s errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). And to make this showing, the defendant must show “that a decision to reject the plea bargain would have been rational under the circumstances.” *State v. Walker*, 2013 UT App 198, ¶ 42, 308 P.3d 573 (cleaned up). This is an objective test, and so a defendant must do more than simply allege that the defendant would have insisted on going to trial but for counsel’s mistakes. *See Gray v. State*, 2017 UT App 93, ¶ 11, 400 P.3d 1081 (“A defendant’s mere allegation that [the defendant] would have insisted on trial but for . . . trial counsel’s errors . . . is ultimately insufficient to entitle the defendant] to relief.” (cleaned up)). And it is the defendant who “bears the burden of demonstrating that the plea was not knowingly and voluntarily made.” *State v. Young*, 2023 UT App 26, ¶ 12, 527 P.3d 1107.

¶44 In determining whether a defendant has shown prejudice in this context, a reviewing court must “look to the factual circumstances surrounding the plea to determine whether [the] defendant would have proceeded to trial” in the absence of counsel’s error. *See Gray*, 2017 UT App 93, ¶ 11 (cleaned up). One important piece of the puzzle, in this context, is the strength of the State’s case. *See Walker*, 2013 UT App 198, ¶ 42 (“Courts review the strength of the prosecutor’s case as the best evidence of

whether a defendant in fact would have changed [the defendant's] plea and insisted on going to trial." (cleaned up)). Another important piece of the puzzle is the favorability of the plea agreement offered by the State; indeed, where the State's case is strong, and the plea deal on the table is favorable, a defendant will have a difficult time demonstrating prejudice in this context. *See Lee v. United States*, 582 U.S. 357, 367 (2017) (stating that "[a] defendant without any viable defense" and who is "facing . . . long odds" at trial "will rarely be able to show prejudice from accepting a guilty plea that offers [the defendant] a better resolution than would be likely after trial"). And yet another piece of the puzzle is the gravity of the alleged mistake made by counsel; here, courts must evaluate how much of a difference it would have made to the plea assessment process had counsel not made the mistake in question. *Cf. Gray*, 2017 UT App 93, ¶ 11 (stating that where "the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the prejudice inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial" (cleaned up)).

¶45 Looking at these pieces, we conclude that there is no reasonable probability that Weber would have rejected the plea deal even in the absence of the attorney errors he alleges. First, the State's case against Weber was very strong. Perhaps the best evidence the State had was Weber's own admissions that the family took great pains—even sleeping in shifts at night—"to prevent [Matthew] from getting into the kitchen" and that Weber himself had "tied [Matthew's] hands up twice, for his own protection, for about 20 minutes each time." Indeed, at the plea hearing, Counsel stated that Weber was "not contesting that food was withheld, or that [Matthew] was tied up on a couple of occasions." Thus, the State had evidence from Weber's own mouth that he had denied Matthew food and had tied him up. And Weber's admissions were corroborated by a host of credible evidence. Matthew himself told police that "his parents were

mean, tied him up, and hit him with things” and that “his parents did not feed him.” Matthew’s stepbrothers acknowledged that Matthew was often tied up and that they sometimes participated. And Matthew’s stepsister Cara said that Weber and Stepmother had used “food [as] a punishment” for Matthew and that the family treated Matthew “as if they were babysitting him and not like he was part of the family.”

¶46 In addition to this strong testimonial evidence, the State also possessed physical evidence that powerfully supported its case. Detective, when he saw Matthew, observed that Matthew’s physical condition was poor and that it looked like Matthew had been “bound for long periods of time” and that “nutrition [had been] withheld.” When Matthew was seen by medical professionals, he weighed in at thirty-seven pounds, far less than a nine-year-old should weigh.⁶ A doctor who treated Matthew thereafter observed that “the totality of injuries and findings identified in [Matthew could not] plausibly be explained by accidental injury, preexisting medical illness, reasonable discipline, or benign events.” And Matthew gained six pounds in the first two and a half weeks he was out of Weber’s care. All of this evidence, taken together, points overwhelmingly toward the conclusion that Weber tied Matthew up and did not provide him with sufficient nutrition.

¶47 Second, the plea deal offered to Weber appears to us to be favorable under the circumstances. As noted, Weber faced four second-degree-felony charges of aggravated child abuse. Under the plea agreement, however, the State agreed to dismiss two of the charges altogether and to reduce a third charge to a class A misdemeanor. Given the strength of the State’s overall evidence,

6. Nine-year-old boys typically weigh between 50 pounds (5th percentile) and 90 pounds (95th percentile). *See 2 to 20 years: Boys Stature-for-age and Weight-for-age percentiles*, U.S. Centers for Disease Control & Prevention, <https://www.cdc.gov/growthchart/s/data/set2clinical/cj41c071.pdf> [<https://perma.cc/FX8Y-NVMH>].

these were significant concessions. A decision to go to trial here bore a significant risk of conviction on all four second-degree-felony charges.

¶48 Finally, when we examine the specific nature of the items Weber now identifies, we do not think any of these things—or even all of them taken together—would realistically have changed Weber’s mind about whether to accept the favorable plea deal in the face of such strong evidence. Weber references various matters outside the record that he claims to have been unaware of at the time he entered the plea agreement and that he claims “strongly supported his defense.” The specific matters that Weber claims Counsel did not discuss with him are these:

- Certain medical records showing (a) that Matthew had chronically low weight and (b) that Mother was a carrier of a certain form of muscular dystrophy. From this evidence, Weber wants to argue that Matthew might have had a medical condition that caused his low weight and that his low weight had nothing to do with maltreatment.
- Information from the various police reports in the case, including (a) parts of Stepmother’s police interview, wherein Stepmother stated that in 2017, Matthew was diagnosed with “failure to thrive” and that Matthew had often exhibited “bad behavior”; (b) parts of Chelsey’s police interview, wherein she stated that “her parents [weren’t] abusive, and they had great intentions” and that Weber’s actions in monitoring Matthew were attempts to protect him from self-harming; and (c) a reference to Matthew’s CJC interview, wherein Detective apparently “asked [Matthew] if someone did

something to him that he did not think was right, and he said, ‘No, not really.’”

- Information indicating that the text messages found on Weber’s and Stepmother’s phones—including Weber’s texts referring to Matthew as a “little fucker” and stating that he was “going to get rid of [Matthew] as soon as [he got] home”—may have been obtained in violation of the Fourth Amendment to the United States Constitution and that it may have been possible to obtain an order suppressing them.

¶49 In support of his rule 23B motion, Weber also includes his own sworn affidavit, wherein he avers, “Had I seen the transcript of [Stepmother’s] interview with police, the transcript of [Chelsey’s] interview with police, [Detective’s] narrative report of Matthew’s . . . CJC interview, [and] all medical records related to Matthew, and had I known that evidence of text messages between my [w]ife and I were obtained illegally, I would not have pled no-contest to the charged crimes.”

¶50 But as noted, this inquiry is not a subjective one, and Weber’s averment is not enough to demonstrate prejudice here. *See Gray*, 2017 UT App 93, ¶ 11 (“A defendant’s mere allegation that [the defendant] would have insisted on trial but for . . . trial counsel’s errors . . . is ultimately insufficient to entitle [the defendant] to relief.” (cleaned up)). We must consider whether, under the totality of the factual circumstances surrounding the plea, this new information would have been enough to make an objective person change his or her mind about whether to accept the plea deal offered. *See id.* And in this case, we don’t think any of this new information—even taken together—would have changed things.

¶51 First, the medical records in question show only that Mother was a *carrier* of a form of muscular dystrophy; as Weber

explains it, Matthew would have had this disorder only if Matthew's biological father had *also* been a carrier, and there is no indication—either in the record or in Weber's rule 23B submissions—that Weber or any other possible biological father was a carrier or that Matthew actually had the disorder. It is thus rank speculation as to whether Matthew might have had any such disorder. In addition, the medical records in question also show that when Matthew was four years old, he was evaluated at a hospital and that "[h]is growth and weight gain [were] poor (. . . <1st percentile for weight)" and that this was "likely due to poor intake rather than cardiac in nature." Thus, the records provide no meaningful support for Weber's contention that Matthew's small size was due to genetics. Moreover, even if the records could provide some support for that contention, that would have done little to benefit Weber's case. While withholding food is a highly questionable form of discipline for any child, withholding food from a child with a genetic disorder that keeps him chronically underweight would be particularly egregious.

¶52 Second, the police report evidence from Stepmother, Chelsey, and Matthew is not all that helpful to Weber's case. Stepmother's and Chelsey's statements about Matthew's bad behavior are irrelevant: it is no defense to a child abuse charge to say that the child deserved it. Stepmother's statement that Matthew had been characterized as "fail[ing] to thrive" when he was two years old—before he came to live with Weber—is marginally helpful, but that statement is not corroborated by medical records or other evidence, and one wonders if Stepmother would have sufficient foundation to know that. Similarly, Chelsey's opinion that Weber and Stepmother weren't "abusive" and "had great intentions" also does little to overcome the State's evidence; the same is true of Matthew's statement about the propriety of the abuse.

¶53 Third, the text messages that Weber now believes might have been suppressible were but a minor part of the State's case. We will readily assume, for purposes of this part of our analysis

but without deciding, that a motion to suppress those messages would have succeeded. But excising the text messages from the State's case would have done little to weaken it. It follows, then, that a reasonable person would not have chosen to forgo this favorable plea deal simply because he or she knew that it might be possible to obtain an order suppressing the text messages.

¶54 In short, the State's case was strong, the plea deal on offer was favorable, and the items to which Weber now points would have been extremely unlikely to have made a difference in a reasonable person's decision-making process in assessing whether to accept the plea offer. For these reasons, even if the additional items were incorporated into the record, Weber would not be able to show that he was prejudiced by any error Counsel made in not discussing these items with him prior to his plea.

B. Additional PSI Claims

¶55 Weber also claims that his attorneys rendered ineffective assistance by not attempting to supplement the factual recitation contained in the PSI. Specifically, he claims that either Counsel or Sentencing Counsel should have made a motion asking the district court to order AP&P to amend the PSI's factual recitation to include a reference to medical records showing Matthew's chronic low weight and Mother's genetic testing, arguing that the PSI, as submitted, "painted an incomplete picture of Matthew's complications." The State claims that Weber's attorneys did not perform deficiently by opting not to raise this issue because a reasonable attorney, under these circumstances, could have decided not to seek to supplement the PSI's factual recitation. We agree with the State.

¶56 An attorney who elects to forgo a futile motion or objection does not render deficient performance. *See State v. Whytock*, 2020 UT App 107, ¶ 43, 469 P.3d 1150 ("When seeking particular relief would be futile, an attorney does not perform deficiently by failing to seek it." (cleaned up)). And again, "while the ultimate

question is not whether there was a possible strategic reason for counsel's conduct, but instead whether that conduct was objectively reasonable, if it appears counsel's actions could have been intended to further a reasonable strategy, a defendant has necessarily failed to show unreasonable performance." *State v. Repsher*, 2025 UT App 50, ¶ 46, 568 P.3d 1095 (cleaned up).

¶57 Here, Weber does not claim that the PSI contained incorrect factual information; rather, he argues that additional information was required because, as written, the PSI "painted an incomplete picture of Matthew's complications." However, Weber's attorneys had no statutory obligation to seek to include additional information in the PSI when the current factual recitation contained accurate information. *See* Utah Code § 77-18-103(5)(a)(i)(A) ("If there is an alleged *inaccuracy* in the presentence investigation report that is not resolved . . . before sentencing: . . . the alleged inaccuracy shall be brought to the attention of the court at sentencing" (emphasis added)). Further, Weber's attorneys could have reasonably decided to forgo making the particular motion Weber identifies here, because they could reasonably have believed that this battle wasn't one worth fighting. *See State v. Cartwright*, 2026 UT App 78, ¶ 53, 592 P.3d 614 (concluding that an attorney had not rendered ineffective assistance by declining to lodge an objection, on the basis that the attorney "could have reasonably viewed an objection to this question as a battle not worth fighting"), *cert. denied*, 594 P.3d 1083 (Utah 2026). Counsel and Sentencing Counsel could reasonably have believed that the addition of this information was extremely unlikely to have made a difference to the court's sentencing decision. Indeed, they could reasonably have believed that pushing for this information to be included in the PSI could have caused the court to believe that Weber was reluctant to take responsibility for his actions; after all, AP&P, in suggesting a deviation from the matrix's recommendation, had offered its view that Weber had taken "no accountability for the injuries [Matthew] sustained."

¶58 For these reasons, even if the additional information was incorporated into the record, Weber could not demonstrate that his attorneys rendered ineffective assistance by opting not to seek its inclusion in the PSI's factual recitation. We therefore deny Weber's rule 23B motion.

CONCLUSION

¶59 We affirm Weber's sentence and deny his rule 23B motion because Weber has not demonstrated that, with regard to those matters, his attorneys rendered ineffective assistance. But we agree with Weber that his attorneys rendered ineffective assistance in not seeking to correct the PSI's mislabeling of the class A misdemeanor offense to which Weber pled guilty, and we therefore remand this case to the district court for the limited purpose of correcting that error.
