STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

STATE OF WISCONSIN,
Plaintiff-Respondent

v. Appellate Case No.: 2014AP001983-CR
Circuit Case No.: 2010CF1780
Milwaukee County

ERIKA LISETTE GUTIERREZ,
Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND DENIAL OF POST-CONVICTION MOTION ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY WAGNER PRESIDING

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

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Table of Contents

Issue Presented……5

Position on Oral Argument and Publication……6

Statement of Case and Facts……..…….6

Argument…….…....12

I. Gutierrez is entitled to withdraw her plea because the court failed to fully advise her of the deportation statute and because she will likely be deported as a result of this offense …….…….....12

a. Standard of Review……..…….12

b. General principles of law……..12

c. General principles of law as applied to Gutierrez's case…..……14

II. Gutierrez is entitled to withdraw her plea due to a collateral consequence …….…….....16

a. Standard of Review……..…….16

b. General principles of law……..16

c. General principles of law as applied to Gutierrez's case…..……18

I. Gutierrez is entitled to withdraw her plea due to ineffective assistance of counsel…….…….....19

a. Standard of Review……..…….19

b. General principles of law……..20

c. General principles of law as applied to Gutierrez's case…..……21

I. Gutierrez is entitled to a new trial in the interest of justice …….…….....22

a. Standard of Review……..……..22

b. General principles of law……...23

c. General principles of law as applied to Gutierrez's case…..……23

Conclusion……...26

Table of Authorities

Cases

Kemp v. State, 61 Wis.2d 125, 211 N.W.2d 792 (1973).....23
Pautz v. State, 64 Wis.2d 469, 219 N.W.2d 437 (1974) 23
Schultz v. State, 87 Wis.2d 167, 172, 274 N.W.2d 614 (1979) 23
State ex rel. Warren v. Schwartz, 219 Wis.2d 615, 579 N.W.2d 698 (1998) 16
State v. Bangert, 131 Wis.2d 246, 389 N.W.2d 12 (1986) ...16
State v. Brown, 2004 WI App 179, 276 Wis.2d 559, 687 N.W.2d 543. .....16, 17, 19
State v. Byrge, 2000 WI 101, 237 Wis.2d 197, 614 N.W.2d 477.....17
State v. Darcy N.L., 218 Wis.2d 640, 581 N.W.2d 567 (Ct. App. 1998) 23
State v. Douangmala, 253 Wis.2d 173, 646 N.W.2d 1 13
State v. Garcia, 2001 WI App 81, 234 Wis.2d 304, 610 N.W.2d 180.....13
State v. Hou Erik Vang, 2010 WI App 118, 328 Wis.2d 251, 789 N.W.2d 115.....13
State v. Johnson, 153 Wis.2d 121, 449 N.W.2d 845 (1990).21
State v. Lindell, 2000 WI App 180, 238 Wis.2d 422, 617 N.W.2d 500.....20
State v. Merten, 2003 WI App 171, 266 Wis.2d 588, 668 N.W.2d 750.....17
State v. Moffett, 147 Wis.2d 343, 433 N.W.2d 572 (1989)...20
State v. Murdock, 2000 WI App 170, 238 Wis.2d 301 ..23, 24, 25
State v. Mursal, 2013 WI App 125, 351 Wis.2d 180, 839.N.W.2d 173.....13, 14

State v. Negrete, 2012 WI App 92, 343 Wis.2d 1, 819 N.W.2d 749 13
State v. Poellinger, 153 Wis.2d 493, 451 N.W.2d 752 (1990) 22
State v. Riekkoff, 112 Wis.2d 119, 332 N.W.2d 744 (1983) . 17
State v. Rodriguez, 221 Wis.2d 487, 585 N.W.2d 701 (Ct. App. 1998) 16
State v. Sarinske, 91 Wis.3d 14, 280 N.W.2d 725 (1979) 23
State v. Thiel, 2003 WI 111, 264 Wis.2d 571, 665 N.W.2d 305 21
State v. Woods, 173 Wis.2d 129, 496 N.W.2d 144 (Ct. App. 1992) 17
State v. Wyss, 124 Wis.2d 681, 370 N.W.2d 745 (1985) 22
Strickland v. Washington, 466 US 668, 104 S. Ct. 2052 (1984) 20
The Landings LLC v. City of Waupaca, 2005 WI App 181, 287 Wis.2d 120, 713 N.W.2d 689 12

Statutes

8 U.S.C. §1227(a)(2)(A)(i) 16
Wis. Stat. § 752.35 22
Wis. Stat. § 971.08(1)(c) 12, 13, 14
Wis. Stat. § 971.08(2) 13

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APPEAL FROM A JUDGMENT OF CONVICTION AND DENIAL OF POST-CONVICTION MOTION ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY WAGNER PRESIDING

Issues Presented

1. Should Gutierrez be entitled to withdraw her plea because the court failed to fully advise her of the deportation statute and because she will likely be deported as a result of this offense?

   Answered by circuit court: No.

2. Should Gutierrez be entitled to withdraw her guilty plea due to the collateral consequence of the trial court viewing the video?

   Answered by circuit court: No.

3. Did Gutierrez receive ineffective assistance of counsel because of her attorney's errors regarding the video?

Answered by circuit court: No.

4. Is Gutierrez entitled to a new trial in the interest of justice?

Answered by circuit court: No.

Position on Oral Argument and Publication

Neither is requested, as the appeal can be resolved upon the parties' briefs and publication is not necessary.

Statement of the Case and Facts

On April 8, 2010, Gutierrez was charged with 8 counts of Physical Abuse of a Child (Intentional Causation, High Probability) contrary to Wis. Stat. § 948.03(2)(c) and 939.50(3)(f). The complaint alleged that between April 3, 2010 and April 4, 2010, Gutierrez intentionally caused bodily harm to her son, JG, born January 16, 2010, by placing her hand over her son's mouth. These actions were recorded on video at Children's Hospital. (R2).

JG was admitted to Children's Hospital on April 3, 2010 because he was suffering from possible seizures. At around 11:30 a.m., one of the nurses entered his room after JG had suffered a possible seizure. The nurse found JG unresponsive, but his respiration rate and pulse were normal. The nurse stayed in the room for an hour with JG and Gutierrez. (R72:2).

Two minutes after the nurse left the room, JG's patient alarm was activated. The nurse found JG pulseless, not breathing and a deep purple color. Gutierrez was allegedly the only person in the room with JG during those two minutes. JG recovered within one minute of the nurse coming back into the room. (R72:3).

JG was then transferred to a room equipped with video monitoring. Off and on, JG showed signs of distress that

ended when nurses responded to JG's room. On April 4, 2010, a different nurse reviewed the surveillance video; the video showed Gutierrez, on eight separate occasions, covering her son's mouth and face, or pinching JG's nose as though she was attempting to prevent him from breathing. Gutierrez never did this while there were medical professionals in the room. (R72:3).

Gutierrez admitted to police that she suffered from depression and that her depression made her harm her son. (R2).

From the beginning of the case, Gutierrez required the aide of a Spanish interpreter. (R77). At the initial appearance, Gutierrez's attorney, Anne Jaspers, argued that the complaint was multiplicitious because many of the counts happened back to back. (R77:5). The court denied the defense motion, and found probable cause. (R77:7). Gutierrez waived her preliminary hearing on April 19, 2010. (R78).

On May 4, 2010, Gutierrez entered a plea of not guilty by reason of mental disease or defect. (R79:2). On May 19, 2010, Gutierrez filed a *Miranda-Goodchild* motion. (R80). After various witnesses were called to testify, the State argued that Gutierrez was notified of her *Miranda* warnings, that she knowingly, voluntarily, and intelligently waived those warnings and chose to make a statement, and that she specifically stated she understood the warnings. The State argued that even given certain variations of dialects between the officer's Puerto Rican Spanish and Gutierrez's Mexican Spanish, that Gutierrez's statement was voluntary. (R85:46).

Gutierrez argued that the State was not able to show that the *Miranda* rights were adequately explained, and that she did not knowingly and intelligently waive those rights. (R85:47). The court found that the *Miranda* warnings were

given, and that based on the totality of the circumstances, the statement given was a "voluntary product of free and unconstrained will reflecting deliberateness of choice and not coerced and not a product of any improper police practices." (R85:53). Thus, the court denied the motion to suppress.

Dr. John Pankiewicz and Dr. Robert Rawski both examined Gutierrez with regard to the NGI plea. Dr. Pankiewicz supported the special plea while Dr. Rawski did not. Gutierrez entered a guilty plea as charged in counts two, three, five and six on July 26, 2010, and informed the court that there would still be a second phase in the case whereby she would challenge whether she was NGI. (R87:2). The rest of the counts were dismissed and read in. (R87:3).

Gutierrez waived the jury trial for phase two, and a court trial began on December 13, 2010. The court ultimately found that Gutierrez did not meet the requirements for an NGI plea. (R98). When making its decision, the court outlined all of the evidence that it had heard during the second phase of the case. First, the court noted that Reverend Suero had testified that Gutierrez had told him on two occasions that she was hearing voices while pregnant with JG, and was perturbed by the voices. (R98:8; App. 115).

Dr. Pankiewicz had testified that he was concerned why Gutierrez performed the actions at issue given the likelihood of being detected as her child was knowingly under video and audio surveillance. Dr. Pankiewicz provided a medical "basis for why the defendant might initially deny the auditory hallucinations, testifying that Gutierrez was suffering from major depression with psychotic features on the date of her offense." (R98:8; App. 115). Dr. Pankiewicz cited Revered Suero's statements that Gutierrez heard voices, and he acknowledged that Gutierrez had an understanding of wrongfulness because she stopped harming JG when someone walked in and did not act on the voices telling her to harm her

cellmate at the jail. (R98:8-9; App. 115-116). Dr. Pankiewicz concluded that in his medical opinion, Gutierrez lacked substantial capacity to appreciate the wrongfulness of her conduct and to conform her conduct to the requirements of law. (R98:9; App. 116).

Dr. Rawski testified that he believed Gutierrez's explanations for her actions were contradictory and incredulous. Dr. Rawski also questioned why Gutierrez attempted to act on the voices when she brought JG to the hospital for his medical benefit. However, he acknowledged that that did not mean she did not have auditory hallucinations or is not depressed. Dr. Rawski found it suspicious that Gutierrez heard voices in detailed intervals of every three days for 10 minutes. (R98:9-10; App. 116-117). Dr. Rawski concluded that Gutierrez did not lack substantial capacity to appreciate the wrongfulness of her conduct or to conform her conduct to the requirements of law. (R98:10; App. 117).

The court found that Gutierrez "stopped harming JG when medical staff came or when medical staff came to her child's attention. Both parties and their experts have recognized that the presence of videotaping JG at the hospital calls into the defendant's control over actions because of the high probability of being caught." (R98:11-12; App. 118-119). The court found also found that Dr. Rawski has "provided evidence that the defendant may have forgotten about the presence of the videotape all together. It is also questionable why the voices would have commanded the defendant to suffocate her child, but still permit her to take JG to the hospital for the initial treatment of possible seizures." (R98:12; App. 119).

The court also found that Gutierrez heard voices while incarcerated but that she had the capacity to appreciate the wrongfulness of any urges to harm her cellmate. (R98:12;

App. 119). Dr. Rawski testified that it was "unlikely that brief incarceration treatment would have such an immediate and powerful impact." (R98:12; App. 119).

The court found,

> Dr. Rawski's expert testimony on these issues most credible and weighed it accordingly. His testimony is also supported by the videotape. The defendant clearly stopped harming JG when the medical staff and her husband came in. Dr. Pankiewicz expert testimony is undercut by Dr. Rawski's opinion that if the voices were controlling as the defendant contends, she would have proceeded with her actions even at the risk of being caught. It is also undercut by the inconsistencies in the defendant's defense. It was not until six weeks after the events in question that the defendant brought up auditory hallucinations as an affirmative defense. This new defense arose when Dr. Pankiewicz met with-initially the defendant denied committing the actions at issue. Later she admitted to trying to suffocate JG due to depression.

(R98:13; App. 120).

The court noted that Gutierrez contended that she,

> did not report hearing the voices for six [weeks] because of her history of trauma, the presence of a language barrier and the cultural stigma. She also notes jail records reflect the defendant was diagnosed by the jail psychiatrist with depression with psychotic features. While this court does recognize there is evidence to support the defendant's position, it does not find her ultimate conclusion persuasive. As a matter of law there is a significant line between required medical treatment and lacking substantial capacity either to depreciate—to appreciate the wrongfulness of the conduct and conform her conduct to the requirements of law.

(R98:14; App. 121).

On April 20, 2011, Gutierrez was sentenced to three years of initial confinement and two years of extended supervision on all counts. All of the counts were run consecutive to one another. (R100).

There was a delay of several years during the appellate process because Gutierrez had multiple attorneys withdraw due to conflicts and a change in employment. On May 12, 2014, Gutierrez filed a post-conviction motion. (R66). First, she asked to withdraw her plea based on the fact that the court failed to fully advise her of the deportation statute and because she will likely be deported as a result of this offense. Second, Gutierrez asked to withdraw her plea due to a collateral consequence; she argued that the fact that the court was able to view the video of Gutierrez putting her hand over the baby's mouth was a collateral consequence. (R66).

Third, Gutierrez argued that she received ineffective assistance of counsel because her attorney failed to know that the video would be admitted into evidence. Fourth, Gutierrez argued that she is entitled to a new trial in the interest of justice; she believed the trial court's verdict in the responsibility phase was against the greater weight of the evidence presented at trial. (R66).

After reviewing the State's response brief and Gutierrez's reply brief, the circuit court denied the motion. First, the court stated that the court's immigration warnings were sufficient to comport with the required immigration warnings. (R74:2). The circuit court also argued that Gutierrez cannot show that her guilty plea is likely to result in deportation. (R74:3).

Second, the court ruled that the admission into evidence of the video recording during the second phase was not a collateral consequence of Gutierrez's plea during the first phase. The court argued that the "admission of the videotape was not dependent on whether the defendant entered a guilty plea during phase I." (R74:4).

Third, the court ruled that Gutierrez did not receive ineffective assistance of counsel regarding the video. The

court noted that "given [the evidence] and the defendant's admissions, there is no reasonable probability she would have been acquitted of any of these crimes, and there would have been every reasonable probability that she would have been convicted of *all eight counts* of physically abusing her child." (R74:4-5).

Finally, the court ruled that a new trial in the interest of justice was not warranted. (R74:5). A Notice of Appeal was timely filed. (R75).

Argument

I. Gutierrez is entitled to withdraw her plea because the court failed to fully advise her of the deportation statute and because she will likely be deported as a result of this offense.

a. Standard of review.

There is no argument about what the court said in this case as the warning is contained in the transcript. Thus, when there is a question of law as to the proper application of a statute to undisputed facts, the Court of Appeals reviews the issue *de novo*. *The Landings LLC v. City of Waupaca*, 2005 WI App 181, ¶5, 287 Wis.2d 120, 713 N.W.2d 689 (2005).

b. General principles of law.

Wis. Stat. § 971.08(1)(c) states,

> Before the court accepts a plea of guilty or no contest, it shall…address the defendant personally and advise the defendant as follows: "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law."

Wis. Stat. § 971.08(1)(c).

To withdraw a plea under Wis. Stat. § 971.08(2), a defendant's motion must allege two facts: (1) that the circuit court failed to advise the defendant of the deportation consequences as required by Wis. Stat. § 971.08(1)(c), and (2) that the defendant's plea is likely to result in the defendant's deportation, exclusion from admission to this country, or denial of naturalization. *State v. Negrete*, 2012 WI App 92, ¶23, 343 Wis.2d 1, 819 N.W.2d 749.

Case law states that circuit court should "recite with precision the statutory admonition." *State v. Hou Erik Vang*, 2010 WI App 118, ¶15, 328 Wis.2d 251, 789 N.W.2d 115. The Court has held that Wis. Stat. § 971.08(1)(c)

> is clear in its directive to the trial courts of this state. The statute not only commands what the court must personally say to the defendant, but the language is bracketed by quotation marks, an unusual and significant signal that the statute must be followed to the letter. While harmless error is sometimes a safety net for trial courts, it is not always a guarantee. We urge all trial courts to follow the express mandate of Sec. 971.08(1)(c).

State v. Garcia, 2001 WI App 81, ¶16, 234 Wis.2d 304, 610 N.W.2d 180, *overruled on other grounds by State v. Douangmala*, 253 Wis.2d 173, ¶42, 646 N.W.2d 1.

In *State v. Mursal*, the defendant argued that he was entitled to withdraw his plea because, "even though the substance of the trial court's warning fully complied with Wis. Stat. § 971.08(1)(c), the exact language used deviated from the statute." *State v. Mursal*, 2013 WI App 125, ¶15, 351 Wis.2d 180, 190, 839.N.W.2d 173, 177, *review denied*, 2014 WI App 14, 843 N.W.2d 708. The court noted that

> the trial court's Wis. Stat. § 971.08(1)(c) warning completely explained each of the elements listed in the statute. The trial court explained that if Mursal was not a citizen of the United States, his plea might result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law. Substantively, the trial court's warning complied

> perfectly with the statute, and linguistically, the differences were so slight that they did not alter the meaning of the warning in any way.

Mursal, 2013 WI App 125, ¶16.

c. General principles of law as applied to Gutierrez's case.

In this case, Gutierrez meets the first requirement, which is that the court failed to advise her as required by Wis. Stat. § 971.08(1)(c). While the trial court read through most of the required language, the trial court's warning did not fully comply with Wis. Stat. § 971.08(1)(c). During her plea hearing, the court asked her, "You also understand if you're not a citizen of the United States, your plea could result in deportation, exclusion or denial of naturalization?" (R87:4).

Therefore, the court did not substantively comply with the statute; the court simply said "exclusion" rather than "exclusion from admission to this country." The word "exclusion" can be vague, and a defendant, particularly one with a limited education such as Gutierrez, will not necessarily assume that they are being excluded from admission to this country.

At the trial court level, the State argued that the trial court's warnings substantially complied with the immigration warnings. The circuit court agreed, noting that,

> while the court stated "exclusion" rather than "exclusion from admission to this country," the court is not persuaded that the omitted language constitutes a material deviation from the language of the statute to warrant the extraordinary remedy of automatic plea withdrawal, particularly since the motion alleges only that a defendant with a limited education such as the defendant in this case "will *not necessarily* assume that they are being excluded from the admission to this country."

(R74: 2-3; App. 101-103).

Gutierrez has a limited education; she does not understand how the immigration process works or how deportation works. Gutierrez would not have pled had she known that she was going to be excluded from coming back into the country where her family now lives. It's a common misunderstanding because a defendant with a limited education will not necessarily assume that they are being excluded from admission to this country.

Gutierrez's crime appears to be one involving a crime of moral turpitude because it was a crime in which bodily harm was caused or threatened by an intentional act. Further, she was convicted of two or more offenses of any type and received an aggregate prison sentence of 5 year or more. Therefore, her crime would prevent her from being able to obtain lawful admission status in the United States and her plea is likely to result in deportation as soon as she is done serving her sentence. (R66:19).

The circuit court wrote that that Gutierrez argued that the crime appeared to be one involving a crime of moral turpitude, that her crime could prevent her from being able to obtain lawful admission status, and that her plea is likely to result in deportation as soon as she is done serving her sentence. The court held that case law requires a defendant to "allege facts demonstrating a causal nexus between the entry of a guilty plea and the federal government's likely institution of adverse immigration consequences." (R74:3; App. 103).

However, as the exhibit submitted to the circuit court illustrates, the language used for criminal inadmissibility and deportability grounds is "will or may prevent." (R66:19). Until Gutierrez is contacted by federal authorities regarding her immigration status, she cannot say for certain that she will be deported or denied admission to this country because she falls under the "will or may prevent" label. Further, her crime is not directly labeled by the government as one involving a

crime of moral turpitude; instead, it is described as "crimes in which bodily harm is caused or threatened by an intentional act." *See* 8 U.S.C. §1227(a)(2)(A)(i); (R66:19).

Obviously, based on the Gutierrez's actions, one can reasonably believe that the government will view her crime as one in which bodily harm was threatened by her intentional actions. Again, until the government contacts Gutierrez about deportation proceedings, there is no guarantee that they will view her crimes as such. However, it is highly likely, which leads to her being able to prove that her plea is likely to result in deportation as soon as she is done serving her sentence.

II. Gutierrez is entitled to withdraw her guilty plea due to a collateral consequence.

a. Standard of review.

The Court of Appeals will accept the "circuit court's findings of evidentiary or historical fact unless they are clearly erroneous. However, whether a plea was voluntary and knowingly entered is a question of constitutional fact that [the Court of Appeals reviews] independently." *State v. Brown*, 2004 WI App 179, ¶5, 276 Wis.2d 559, 687 N.W.2d 543.

b. General principles of law.

Any defendant that wishes to withdraw a guilty or no contest plea after sentencing must establish by clear and convincing evidence that withdrawal is necessary to avoid manifest injustice. *State ex rel. Warren v. Schwartz*, 219 Wis.2d 615, 635, 579 N.W.2d 698 (1998). The constitution requires that a plea must be knowingly, voluntarily and intelligently entered; a manifest injustice occurs when it is not. *State v. Rodriguez*, 221 Wis.2d 487, 492, 585 N.W.2d 701 (Ct. App. 1998). Any defendant that is denied a constitutional right may withdraw a plea as a matter of right. *State v. Bangert*, 131 Wis.2d 246, 389 N.W.2d 12 (1986).

"A direct consequence of a plea is one that has a definite, immediate, and largely automatic effect on the range of a defendant's punishment." *State v. Byrge*, 2000 WI 101, ¶60, 237 Wis.2d 197, 614 N.W.2d 477. A collateral consequence, "on the other hand, is indirect, does not automatically flow from the conviction, and may depend on the subsequent conduct of a defendant." *Id.*, ¶61. "The distinction between direct and collateral consequences essentially recognizes that it would be unreasonable and impractical to require a circuit court to be cognizant of every conceivable consequence before the court accepts a plea." *Id.* A defendant may withdraw the plea as a matter of right if the court fails to disclose a direct consequence of a plea. *State v. Merten*, 2003 WI App 171, ¶7, 266 Wis.2d 588, 668 N.W.2d 750. On the other hand, if the court does not disclose a collateral consequence of a plea, a defendant may not withdraw his plea on the basis of that lack of information. *Id.*

However, Wisconsin courts have permitted defendants to withdraw pleas that were based on a misunderstanding of the consequences, even when those consequences were collateral. *See, e.g., State v. Riekkoff*, 112 Wis.2d 119, 128, 332 N.W.2d 744 (1983); *State v. Woods*, 173 Wis.2d 129, 140, 496 N.W.2d 144 (Ct. App. 1992). In *State v. Brown*,

> Brown's plea agreement was purposefully crafted to only include pleas to charges that would not require him to register as a sex offender or be subject to post-incarceration commitment under Wis. Stat. ch. 980. Brown entered his pleas believing he would not be subject to those collateral consequences. Brown's belief was not the product of "his own inaccurate interpretation," but was based on affirmative, incorrect statements on the record by Brown's counsel and the prosecutor. The court did not correct these statements.

State v. Brown, 2004 WI App 179, ¶13, 276 Wis.2d 559, 687 N.W.2d 543. The court concluded "that Brown's pleas, as a matter of law, were not knowingly and voluntarily entered

and he must, therefore, be permitted to withdraw his pleas." *Brown*, 2004 WI App 179, ¶14.

c. General principles of law as applied to Gutierrez's case.

In Gutierrez's case, there was video of her allegedly smothering JG while he was a patient at Children's Hospital of Wisconsin. She believed that the video of her allegedly smothering her child would not be shown in court as long as she pled guilty during phase one and waived the jury trial for phase two. She believed this because her trial attorney, Attorney Jaspers, told Gutierrez that the video would never be shown to the court during phase two as it would be irrelevant to determining criminal responsibility. Attorney Jaspers advised Gutierrez that by pleading, the tremendously prejudicial video would never be seen by the fact-finder.

Attorney Jaspers was under this belief because the assistant district attorney had previously stated to her that she would play the video at trial only if the client did not waive the jury for phase two of the case and proceeded with a court trial on the issue of whether she was not guilty by reason of mental disease or defect. Gutierrez asserts that she relied on her attorney's incorrect advice when deciding to enter a guilty plea to phase one. She also asserts that had she known that the trial court would view the video during phase two, she would not have entered a guilty plea during phase one.

At the circuit court level, the State argued that the admission of the video was not a collateral consequence of Gutierrez's plea in phase one. (R72:7). The circuit court agreed, ruling that "the admission of the videotape was not dependent on whether the defendant entered a guilty plea during phase I; it was an appropriate use of evidence by the State during phase II." (R74:4; App. 104).

Gutierrez believes that the admission of the video was a collateral consequence. Gutierrez believed that by entering a plea during phase I, the fact finder would not view the video. She only entered the plea to avoid having the fact finder view the video. She misunderstood the consequences of entering her plea.

Gutierrez's case is similar to *Brown* because she was affirmatively misled to believe that by pleading guilty during phase one of the case she would not be subject to certain legal collateral consequences. She relied on her attorney's statement that the video would not be played in court during phase two. Gutierrez relied on a legal impossibility when entering her plea. At the time Gutierrez entered her guilty plea, the defense had never litigated whether the court would be able to view the video during phase two of the trial and thus could not promise that the court would not view the video. Further, both psychiatrists had explicitly referenced the video in forming their reports to the court regarding phase two of the trial, and thus, in all likelihood, there was no way to avoid having the fact-finder view the video.

Gutierrez's belief about what would happen during phase two of the trial was not a product of her own inaccurate interpretation of what her attorney told her; her attorney gave her legally deficient advice. Gutierrez believed that by entering her plea, the court would never see the video. If she was successful in not having the court view the video, she would keep the court from viewing an aggravating factor at sentencing. If the court was going to see the video anyway, she would have rolled the dice and went ahead with a jury trial.

III. Gutierrez is entitled to withdraw her guilty plea due to ineffective assistance of counsel.

a. Standard of review.

When the Court of Appeals reviews an ineffective assistance of counsel claim, the Court looks at the circuit court's findings of fact concerning the case's circumstances and the counsel's strategy and conduct under a clearly erroneous standard. *State v. Lindell*, 2000 WI App 180, ¶8, 238 Wis.2d 422, 429, 617 N.W.2d 500, 503, aff'd 2001 WI 108, 245 Wis.2d 689, 629 N.W.2d 223. However, the issue of whether a counsel's performance was deficient and prejudicial are questions of law which the Court of Appeals reviews *de novo*. *Id*.

b. General principles of law.

The legal advice that Gutierrez received from her trial attorney with regard to the video also amounts to ineffective assistance of counsel. In *Strickland v. Washington*, the United States Supreme Court established a two prong test for ineffective assistance of counsel. *Strickland v. Washington*, 466 US 668, 104 S. Ct. 2052 (1984). Under the first prong, the defendant must show that his counsel's performance was deficient. *Id*. For a counsel's performance to be deficient, it must be a result of mistakes rather than the result of a reasoned, deliberate defense strategy. *State v. Moffett*, 147 Wis.2d 343, 353, 433 N.W.2d 572 (1989).

Under the second prong, the defendant must show that, even if his counsel's performance was deficient, that the counsel's performance was prejudicial to the defendant. *Id*. For a counsel's performance to prejudice a defendant, the defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 US at 694. Reasonable probability "is a probability sufficient to undermine confidence in the outcome." *Id*.

A defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel'

guaranteed the defendant by the Sixth Amendment." *Id*. at 687. It should be noted that "every effort is made to avoid determinations of ineffectiveness based on hindsight…and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." *State v. Johnson*, 153 Wis.2d 121, 127, 449 N.W.2d 845 (1990). Further, in determining whether a defendant has been prejudiced as a result of counsel's deficient performance, a court may aggregate the effects of multiple incidents of deficient performance." *State v. Thiel*, 2003 WI 111, ¶60, 264 Wis.2d 571, 665 N.W.2d 305.

c. General principles of law as applied to Gutierrez's case.

In this case, Attorney Jasper's performance was deficient. When she told Gutierrez that the video would not be shown to the court, this was the result of a mistake rather than the result of a reasoned, deliberate defense strategy. She did not realize that the court could and would review the video during phase two of the trial.

At the circuit court level, the State argued that "Attorney Jaspers strategy of recommending that the Defendant enter pleas during phase I of the NGI trial was an imminently reasonable trial strategy. The Defendant was caught on video repeatedly smothering JG. The Defendant admitted to repeatedly smothering J.G. The State's evidence…implicating the Defendant in the charged offenses was overwhelming." (R72:10). The court noted that had Gutierrez not entered guilty pleas during phase one and proceeded to trial on all eight counts, the jury would have seen the video. Thus, the court felt that there is no reasonable probability that she would have been acquitted of any of these crimes. (R74:4-5; App. 104-105).

However flawed Gutierrez's decision to go to trial if the court was going to see the video, it was her decision whether to go to trial. It was her attorney's job to advise her on whether it was a good idea to go to trial and to negotiate the best deal possible. It was also her attorney's job to let Gutierrez know what would happen in court if she did or did not enter a guilty plea. The trial attorney simply did not know that the court would view the video. She was deficient in telling Gutierrez that the video would not be viewed by the fact finder.

Attorney Jasper's performance was also prejudicial. There is a reasonable probability that but for her unprofessional errors, the result of the proceeding would have been different because Gutierrez would not have entered a guilty plea. She only entered a guilty plea because she was promised that the fact-finder would not view the video if she entered a guilty plea. It's not the court's role to judge whether that was a good decision or not. It's Gutierrez's right whether she wants to take her case to trial, and she made that decision solely on the fact that nobody would ever see the video if she entered a plea.

IV. Gutierrez is entitled to a new trial in the interest of justice.

a. Standard of review.

The Court of Appeals has the discretionary power to reverse a conviction in the interest of justice. Under Wis. Stat. § 752.35, the court may grant a discretionary reversal if the real controversy has not been fully tried or if it is likely for any reason that justice has miscarried. *See State v. Wyss*, 124 Wis.2d 681, 735, 370 N.W.2d 745 (1985) *overruled on other grounds by State v. Poellinger*, 153 Wis.2d 493, 451 N.W.2d 752 (1990). The court may conclude that justice has miscarried if it determines that there is a substantial probability that a new trial would produce a different result.

See State v. Darcy N.L., 218 Wis.2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998).

b. General principles of law.

The court has examined several cases where a defendant requested a new trial in the interests of justice on the issue of mental responsibility. In *Kemp v. State*, 61 Wis.2d 125, 138, 211 N.W.2d 792 (1973) and *State v. Murdock*, 2000 WI App 170, ¶45, 238 Wis.2d 301, the court granted a new trial in the interests of justice on the issue of mental responsibility. On the other hand, in *Pautz v. State*, 64 Wis.2d 469, 479, 219 N.W.2d 437 (1974), *Schultz v. State*, 87 WIs.2d 167, 172, 274 N.W.2d 614 (1979), and *State v. Sarinske*, 91 Wis.3d 14, 49-50, 280 N.W.2d 725 (1979), the court denied it. Cases are looked at on an individual basis.

c. General principles of law as applied to Gutierrez's case.

In this case, during the second phase of the trial, Gutierrez had the burden to establish that she was not guilty by reason of mental disease or defect "to a reasonable certainty by the greater weight of the credible evidence." Wis. Stat. § 971.15(3). This required that she prove that she had a mental disease or defect, and that she lacked substantial capacity either to appreciate the wrongfulness of the conduct or to conform that conduct to the requirements of law. *See* WIS-JI-Criminal 605 (2011). Gutierrez believes that the evidence that showed that she lacked substantial capacity either to appreciate the wrongfulness of her conduct or to conform her conduct to the requirements of the law was the greater weight of the credible evidence. Thus, there is a substantial probability that a new trial would produce a different result.

There is no dispute that Gutierrez fulfilled the first prong, which is that she had a mental disease or defect at the

time she committed the crime; both medical professionals and the court agreed that she had a mental disease or defect. (R98:4; App. 111).

Gutierrez argues there is a substantial probability that a new trial would produce a different result. First, the court noted that Dr. Rawski said that Dr. Pankiewicz's expert opinion was undercut by the fact that Gutierrez did not bring up auditory hallucinations as an affirmative defense until six weeks after the incident. However, this ignores many factors. First, Reverend Suero had testified that Gutierrez had told him about auditory hallucinations on two prior occasions; this demonstrates that Gutierrez was not lying about the auditory hallucinations. It seems highly unlikely that she told Revered Suero weeks before the incident that she had auditory hallucinations to lay the framework for a possible NGI defense later down the road.

Second, it does not appear that Gutierrez was ever asked directly about voices in her head. She did not tell anybody after the incident that she was not hearing voices. In speaking with Gutierrez, appellate counsel has noted that Gutierrez is not the type of person to volunteer information; she will only answer the question as directly asked, and will not expand on the question.

Third, Gutierrez is Mexican; her culture is one in which mental health has a stigma attached. It would be incredibly difficult to admit that her actions were caused by voices in her head, and she may not have even known that it was a defense. The fact that she told only the reverend about the voices and did not tell her husband shows that she was ashamed of the voices in her head.

Further, there is a complete lack of evidence of alternative explanations for Gutierrez's behavior. *Murdock*, 2000 WI App 170, ¶44, 238 Wis.2d 301, 617 N.W.2d 175.

Gutierrez reported that her pregnancy was a planned pregnancy. She attended regular prenatal appointments so she could remain healthy through the pregnancy. She often took JG to either the doctor or the hospital because she was concerned about his health. There is no evidence that she did not deeply care for her son.

If her intent was to harm or kill JG, this could have easily been accomplished at home because there was little chance of being caught in her own home. Instead, she took JG to the hospital because she was concerned about him. This indicates that she did not want JG harmed or killed. There is simply no other rational or alternative explanation for Gutierrez's behavior except for that she was psychotic and unable to control her actions when she placed her hand over JG's mouth.

Additionally, just because Gutierrez appeared to understand the legality of her actions, which can be evidenced by the fact that she removed her hand from JG's face when the nurses came into the room, does not mean that she was able to control her behavior or appreciate its wrongfulness at the time of the incidents. *See Murdock,* 2000 WI App 170, ¶44. Gutierrez may have denied responsibility at the beginning, but that is also because she was afraid of being taken away from her family, including her husband and older son. Gutierrez may have been suffering from depression with psychotic features, but she still felt great love for her family, and was trying to do what was best for her family.

Lastly, there is more evidence that the court needs to examine. A unique aspect of this case is that Gutierrez was born in rural Mexico, is Spanish speaking, and does not understand the English language. Both of the doctors who examined her were English speakers who used a Spanish translator. Although both of the doctors asked substantially the same questions, they likely phrased the questions

differently. This would explain why each doctor received different answers. Further, Dr. Pankiewicz noted that a family friend believed that Gutierrez was "mentally disabled." While that is not an official diagnosis, it would also explain why Gutierrez gave differing answers to both doctors.

In speaking with Gutierrez, appellate counsel observed that Gutierrez gave different responses when the same question was asked different ways. It could be that Gutierrez is not able to process the subtle nuances in the asking of questions or that the question is getting lost in translation.

Therefore, a more in depth psychological consultation with a Spanish speaking psychiatrist would explain away inconsistencies between the two doctors' evaluations. Gutierrez does not need a standard psychological evaluation, but instead needs a psychological evaluation in Spanish that is tailored to her limitations.

Conclusion

For the reasons set forth above, Gutierrez respectfully requests that the Court of Appeals reverse the order of the circuit court and remand to the circuit court.

Dated this 8th day of November, 2014.

Respectfully submitted,

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I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 300 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 7,368 words.

Respectfully submitted,

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I certify that the text of the electronic appeal is identical to the text of the paper copy of the appeal.

Respectfully submitted

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I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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I certify that this brief or appendix was deposited in the U.S. mail for delivery to the Clerk of the Court of Appeals by first class mail, or other class of mail that is at least expeditious, on November 10, 2014. I further certify that the brief or appendix was correctly addressed and postage was pre-paid.

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