STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2019AP001770-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN ANTHONY TAYLOR,

Defendant-Appellant.

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On Appeal from a Judgment of Conviction Entered in Milwaukee County Circuit Court, the Honorable Jeffrey A. Wagner Presiding.

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# BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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## ISSUE PRESENTED

1. Was Mr. Taylor entitled to withdraw his plea prior to sentencing?

The circuit court denied Mr. Taylor's motion to withdraw his plea. (92:45)

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Taylor requests publication as this case will help to clarify the legal standards pertaining to presentencing plea withdrawal motions. Oral argument is not requested given the straightforward facts.

## STATEMENT OF THE CASE

A criminal complaint filed on September 30, 2016 charged Mr. Taylor with a single count of repeated sexual assault of a child contrary to Wis. Stat. § 948.025(1)(d). (2:1).

Mr. Taylor resolved his case by pleading no contest to an amended charge of child enticement contrary to Wis. Stat. § 948.07(1). (48:1); (App. 101). Mr. Taylor then filed a motion to withdraw his plea prior to sentencing. (35). After holding a hearing, the circuit court denied the motion in an oral ruling. (92:45); (App. 105).

Following the denial of the plea withdrawal motion, the Honorable Jeffrey A. Wagner sentenced Mr. Taylor to a term of imprisonment. (48:1); (App. 101).

Mr. Taylor then filed a postconviction motion requesting post-sentencing plea withdrawal on other grounds. (62). The circuit court held a hearing and denied the motion.[1] (67).

This appeal follows. (69).

## STATEMENT OF RELEVANT FACTS

Background

According to the criminal complaint, Mr. Taylor is alleged to have had sexual contact with A.B., the daughter of his then-girlfriend, on several occasions between July 7, 2015 and September 20, 2016. (2:1). The complaint indicates that the contact began when A.B. was five and a half years old and continued until she was nearly seven years of age. (2:1). The allegations in the complaint are derived from a forensic interview conducted on September 20, 2016. (2:1). According to A.B.'s detailed allegations, the contact began at a prior residence and continued to escalate once the family moved into their then-current home. (2:2). While some of her allegations involved delayed reports, other incidents described by

[1] That claim is not being renewed on appeal.

A.B. were closer in time to when the forensic interview was conducted. (2:2).

Pretrial Proceedings

After Mr. Taylor was arraigned on October 24, 2016, the case appeared to be moving quickly toward a scheduled trial date of February 8, 2017. (72:16; 73:2). On December 13, 2016, Mr. Taylor rejected the State's offer (not placed on the record) and asked that the matter be left on for trial. (74:2). The parties requested another final pretrial, however, for "[the assigned D.A.'s] sake." (74:2).

At the final pretrial on February 6, 2017, counsel for Mr. Taylor, Attorney Stephen Sargent, informed the court that Mr. Taylor had requested that he withdraw due to a disagreement over defense strategy. (76:3). In addition, the prosecutor indicated that she was seeking an adjournment of the trial because she was new to the case and had just returned from maternity leave. (76:3). The prosecutor indicated that the State had not subpoenaed either the forensic interviewer or the nurse practitioner who examined the child for possible injuries, both of whom the State considered "essential witnesses." (76:3). Because the State was requesting a new date and because Attorney Sargent was the first attorney appointed to Mr. Taylor, the court therefore granted the motion to withdraw and canceled the scheduled jury trial. (76:6).

The State Public Defender (SPD) appointed a new lawyer, Attorney Richard Voss, later that week.

(77:2). When he appeared at the next final pretrial on February 13, 2017, however, Attorney Voss told the court that he had only recently obtained the discovery file and was not sure it was complete. (77:2). He asked for additional time to verify that he had "everything." (77:2). The court set the matter for trial on May 22, 2017. (77:2).

However, Attorney Voss almost immediately filed a motion to withdraw, citing a "breakdown" in communication and deterioration in his relationship with Mr. Taylor. (19:2). The court held a hearing on the motion on March 8, 2017. (78). The State took no position and indicated it had a speedy trial in another case which conflicted with the May 22 trial date. (78:3). Mr. Taylor informed the court that he had tried to tell his lawyer the police attempted to interview him while he was represented by counsel and, in response, his lawyer "cussed" at him. (78:3). He told the court that Attorney Voss was otherwise an "okay" lawyer and that he was only asking Mr. Voss to withdraw because he had been "cuss[ed]" at and disrespected. (78:3-4). The court granted the motion to withdraw. (78:4).

At the next hearing on March 22, 2017, Mr. Taylor appeared with new counsel, Attorney Russell Jones. (79:2). While Attorney Jones indicated that he "literally just got the file," he nonetheless told the court that he would be ready for the scheduled trial date. (79:2). The State, however, reiterated its concern that a speedy trial scheduled in another court branch for the same date was a potential

conflict. (79:3). Roughly two weeks later, the State therefore filed a motion to adjourn the trial date. (20:1). The State's motion was granted on the day of the scheduled trial, without objection from the defense. (81:2). The trial was adjourned to August 14, 2017. (81:2). Mr. Taylor then filed a speedy trial demand. (21).

However, on July 26, 2017, the State asked for a third adjournment of the trial. (22:1). As grounds, the prosecutor indicated that she would be attending a conference on the date of the scheduled trial. (22:1). Attorney Jones did not object. (82:2). The court therefore rescheduled the jury trial to October 30, 2017. (82:2).

While Attorney Jones expressed no issue with the October 30 trial date on the record, he subsequently filed a motion indicating that he had inadvertently overlooked a scheduling conflict. (24:2). Attorney Jones therefore asked that the matter be reset for trial on November 6, 2017. (24:2). The court was apparently unable to accommodate that date, however, and scheduled the trial for December 6, 2017. (83:2).

On October 16, 2017, Attorney Jones filed a motion to withdraw, citing a breakdown in communication and the fact that Mr. Taylor had filed an Office of Lawyer Regulation (OLR) grievance against him. (25:1). At a hearing on the motion, Attorney Jones indicated his belief that the OLR

grievance mandated his withdrawal.[2] (84:2). Mr. Taylor complained that his attorney had only come to see him on one occasion, and that meeting lasted only five or ten minutes. (84:3). He also expressed dissatisfaction that his speedy trial request was not being taken seriously, although the court told him "It's not a speedy sir, right." (84:3).[3] Mr. Taylor did not directly request new counsel, telling the court he wanted a chance to talk to his lawyer "before anything going on." (84:4). Attorney Jones again referenced the OLR complaint, telling the court he did not think he could continue to represent Mr. Taylor. (84:6). He also rejected the importance of meeting with Mr. Taylor in custody. (84:6). The court granted Attorney Jones' motion to withdraw. (84:6).

Roughly one month before the scheduled trial date, Attorney Kerri Cleghorn was then appointed to represent Mr. Taylor. (85:2). Attorney Cleghorn

[2] While no Wisconsin authority has interpreted this situation, persuasive case law from other jurisdictions, as well as opinion of the State Bar of Wisconsin, appears to suggest Attorney Jones was mistaken on this point and that a bar complaint does not create a *per se* conflict of interest. *See Grady v. Commonwealth of Kentucky*, 325 S.W.3d 333 (Ky. 2010); *State v. Bryant*, 179 P.3d 1122, 1137 (Kan. 2008); *see also* https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=88&Issue=2&ArticleID=23866

[3] Mr. Taylor never withdrew his speedy trial demand and there appears to have been no statutory authority for the court disregarding it merely because Mr. Taylor was serving a prison sentence on another case.

informed the court that she was not available for the scheduled trial date and that she had not been informed of that date when she agreed to take the case as an SPD appointment. (85:2). She asked for an adjournment. (85:2). The motion was granted and the trial adjourned to January 24, 2018. (85:3).

Plea

On the day of the scheduled trial, Mr. Taylor accepted a plea agreement from the State. (87:2). According to the terms of that agreement, the State agreed to amend the charge to child enticement and to then recommend six years of initial confinement followed by nine years of extended supervision, concurrent to Mr. Taylor's revocation sentence. (87:2).

Relevant to this appeal, Mr. Taylor was colloquied about his mental health during that hearing. (87:3). He told the court that he was receiving treatment for a mental illness. (87:3). The following exchange occurred:

> The Court: And you're receiving medication?
>
> Mr. Taylor: Yes, I am.
>
> The Court: That does not impair your ability to understand what we're doing here, does it?
>
> Mr. Taylor: I mean—
>
> The Court: You understand everything?

> Mr. Taylor: In a way I do because I haven't took my meds in, like, two days so—
>
> The Court: Pardon? But you understand—you understand what we're doing though, right?
>
> Mr. Taylor: Yes.

(87:4).

The court then asked defense counsel about the matter:

> The Court: Okay. And counsel, you're satisfied the defendant's intelligently, voluntarily and knowingly waiving those constitutional rights?
>
> Counsel: I am, Your Honor. If I may make a brief record.
>
> My client had indicated to me that he did not get his Prozac this morning. He was transferred from Waupun Correctional yesterday afternoon. I inquired as to whether he thought that it affected his ability to understand. And he said basically that he – it was being explained to him in a way that he could understand. He was asking me appropriate questions based on what our conversation was about and the changes in his plea. So I don't believe he's compromised in any way.

> The Court: So you believe he's competent to proceed?
>
> Counsel: I do.

(87:5-6).

A few moments thereafter, the circuit court accepted Mr. Taylor's plea without making any specific findings as to whether it was knowing, intelligent, and voluntary. (87:6).

Plea Withdrawal Motion

On February 12, 2018, the parties appeared for sentencing. (88). On that date, Attorney Cleghorn informed the court that Mr. Taylor had asked her to file a plea withdrawal motion. (88:2). The circuit court instructed counsel to file her motion by the end of that week and set another court date to determine whether an evidentiary hearing would be required. (88:5). If an evidentiary hearing was ordered, the court instructed counsel that she would need to withdraw. (88:5).

Later that week, Attorney Cleghorn filed a motion on Mr. Taylor's behalf requesting plea withdrawal. (35). The motion alleged that Mr. Taylor's plea was entered "hastily and in confusion;" "without adequate consultation with prior defense

counsel;"[4] and "despite the assertion of innocence." (35:1). The motion also noted the swift nature of the plea proceedings, with Mr. Taylor only being given an opportunity to review the plea documents "immediately before the plea hearing." (35:2). According to the motion, Mr. Taylor was given only ten minutes to make a decision as to whether he would accept the plea or go to trial on the original charge. (35:3).

The motion further asserted that the plea colloquy clearly reflected: (1) Mr. Taylor was "supposed to be on medication" at the time of the plea but that (2) he "was not given it by jail staff that day." (35:2). The motion alleged that Mr. Taylor had informed counsel following his plea that "he is now on his medication and had made a mistake." (35:2). The motion further asserted that Mr. Taylor had quickly informed his attorney of his desire to withdraw the plea, contacting her seven days after the plea hearing to inform her that he had made a mistake.[5] (35:3). Finally, the motion reasserted Mr. Taylor's innocence and included an assertion that he was "confused at the time" of the plea hearing. (35:3).

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[4] Attorney Cleghorn appears to have been referring to herself, as she was the lawyer who appeared at the plea hearing.

[5] The testimony at the ensuing motion hearing established that this call was actually initiated by defense counsel, as Mr. Taylor was incarcerated at that time.

The State filed a written response setting forth several reasons why it believed the motion should not be granted. (36).

First, the State argued that Mr. Taylor had failed to satisfy the "fair and just" standard for plea withdrawal, citing both *State v. Rhodes*, 2008 WI App 32, 307 Wis. 2d 350, 746 N.W.2d 599 and *State v. Jenkins*, 2007 WI 96, 303 Wis. 2d 157, 736 N.W.2d 24. (36:2). The State cited these authorities for the proposition that "[t]he trial courts in both *Rhodes* and *Jenkins* found that there was not a credible fair and just reason given for plea withdrawal and the higher courts upheld that finding as within the courts' discretion." (36:2).

The State specifically argued that this matter was closely analogous to the situation in *Rhodes***,** which "involved a defendant seeking plea withdrawal prior to sentencing on the claim that he was innocent, coerced into pleading guilty on the day of trial by counsel, and made a hasty decision." (36:2). The State also argued that Mr. Taylor's claim about medication was an insufficient basis for plea withdrawal under the controlling legal standard without more detail from Mr. Taylor. (36:3).

Second, the State argued that plea withdrawal would substantially prejudice the State. (36:3). The State pointed out that the matter had been pending since 2016 and that the plea agreement had allowed the victim to obtain "closure with this case." (36:3). Therefore, "[a]llowing the Defendant to withdraw his

plea would result in substantial prejudice to the State due to the State needing to now call this child to testify at trial." (36:3). The State also asserted that "the child's memory undoubtedly fades" as a result of the age of the case and the age of the child. (36:3-4).

Hearing on Motion to Withdraw Plea

In light of the pleadings, the circuit court determined that Mr. Taylor was entitled to an evidentiary hearing. (89:3). Attorney Scott Anderson was therefore appointed to litigate the plea withdrawal motion. (37:1).

On May 7, 2018, the parties appeared for a hearing on the motion. (92). Mr. Taylor testified that he anticipated going to trial on the scheduled jury trial date, although he did express some dissatisfaction with his attorney's level of preparation. (92:5). He described a short meeting which occurred in a holding cell immediately prior to his guilty plea, in which his lawyer communicated the plea offer to him. (92:5-8). According to Mr. Taylor, he was actually putting on his court clothes when his attorney brought him the proposed plea offer. (92:15). He described signing the plea forms, although he was ambivalent as to whether he understood that paperwork, stating that, "in a way I did and a way I didn't." (92:8).

Mr. Taylor further testified that he is diagnosed with post-traumatic stress disorder and that he takes Prozac to manage that condition. (92:9-10). According to Mr. Taylor, he is supposed to take

the medication every day. (92:11). However, he testified that he was not given his medication on the day he entered his plea. (92:11). As a result, he stated that he "felt pressured" and "couldn't think clearly." (92:11). He acknowledged that the court inquired about his medication during the plea colloquy, although he could not state why he did not tell the judge he was not thinking clearly at the time of his plea. (92:12).

Mr. Taylor also stated that the charges "rubbed [him] wrong" and that he did not understand why the charged offense was amended to child enticement, which he understood to mean that he "persuaded a person going into this room or this building or something like that." (92:13). He asserted that this charge did not have anything to do with the facts of his case. (92:13). Mr. Taylor also testified he did not understand "why I went from a higher to a lower charge." (92:13). Mr. Taylor acknowledged that his attorney told him the plea was to his "benefit," but expressed skepticism that "it really was." (92:14).

Mr. Taylor stated that when he returned to Waupun Correctional, where he was serving his revocation sentence, he "was able to take [his] medication, to really sit down and think about this […]." (92:14). He realized he had made the wrong decision and pleaded "to something [he] didn't do." (92:15).

Mr. Taylor described a phone call he had with his lawyer shortly after returning to the institution,

in which he told her he wished to withdraw his plea. (92:17). He stated he felt pressured both by her actions prior to the plea being entered and by his lack of medication at the time he entered the plea. (92:17).

On cross-examination, the State pointed out Mr. Taylor had met with his attorney the day before the trial to discuss the case. (92:20). Mr. Taylor acknowledged meeting with his attorney, who "told [him] what the allegations were" but denied that his lawyer ever went over a video of the forensic interview during that meeting.[6] (92:20). He asserted he "really wanted to go to trial" and that this was his "whole plan." (92:21).

On the day he entered his plea, Mr. Taylor described his lawyer pushing him to accept the State's offer, telling him "this is the last time you're probably going to get a good plea like this […]." (92:21). Mr. Taylor testified that he asked for more time, telling his lawyer that he had not been given his medication. (92:21). When asked about his answers during the plea colloquy, Mr. Taylor remembered being asked about medication but also stated he believed this "was really a big part for my lawyer to bring to his attention as well." (92:23).

In order to rebut Mr. Taylor's claims, the State called prior counsel, Attorney Kerri Cleghorn, as its witness. (92:26). She denied not being prepared for

[6] The significance of this line of cross-examination is unclear to undersigned counsel.

trial, telling the court that she had done "the normal stuff." (92:28). She also testified that Mr. Taylor was "insisting" on a trial for the majority of the time that she represented him. (92:29).

With respect to the development of the plea, Attorney Cleghorn testified she had actually run into the assigned prosecutor "on the street" the day prior to the trial. (92:31). According to Attorney Cleghorn, the prosecutor informed her that she "may be interested in modifying the offer" without giving any specifics. (92:31). Attorney Cleghorn shared this information in a meeting that evening with Mr. Taylor. (92:31). At the conclusion of the meeting, however, he remained firm in his desire to go to trial. (92:31).

The next morning, Attorney Cleghorn came to court expecting the case to go to trial. (92:32). While waiting for the trial to commence, she received the amended offer from the State. (92:33). She shared the offer with Mr. Taylor, who "had a lot of questions." (92:35). She stated that Mr. Taylor told her "he was in between a rock and a hard place." (92:36). Attorney Cleghorn told Mr. Taylor she "wished we had more time to talk about this" and acknowledged it was a "very difficult decision." (92:36-37). She told the court she "had enough time to answer [Mr. Taylor's] questions to the extent that [she] was able." (92:37). However, "there were a lot of questions that [she] didn't have answers to." (92:37). Mr. Taylor was specifically interested in how she believed the evidence would come in at trial, questions which

counsel apparently declined to speculate about. (92:37).

On cross-examination, Attorney Cleghorn also testified Mr. Taylor "wasn't in a situation where he wanted to say guilty." (92:39). She therefore told Mr. Taylor to take a no contest plea because that "was somewhere in the middle." (92:39). She testified that she could not recall when Mr. Taylor told her he did not have his medication. (92:40).

The State also submitted a letter from Andrea Dexter, an "Ongoing Case Manager" with an organization by the name of "SaintA." (39). Ms. Dexter was not called as a witness at the actual hearing. Ms. Dexter's letter asked the court to deny Mr. Taylor's motion for plea withdrawal. (39:2). According to Ms. Dexter, A.B. was "confused" as to why Mr. Taylor was not in prison because "when you do something bad, you have to endure the consequences." (39:2). According to Ms. Dexter, A.B. "did not put up a fight" when asked to attend court related to this case. (39:2). "She understood that she had to do her part so that Mr. Taylor would be sent to prison." (39:2). Ms. Dexter also stated that A.B. "was prepared to testify" on the date of the scheduled trial but was "relieved" when Mr. Taylor took a plea. (39:2). According to Ms. Dexter, A.B. was then told "she wouldn't have to come to court anymore and that Mr. Taylor would get some sort of consequences for his bad behavior." (39:2).

Because Mr. Taylor had not yet been sentenced at the time the letter was written, A.B. was apparently "confused and disappointed." (39:2). However, "if Mr. Taylor withdraws his guilty plea, [the victim] will still want to move forward with the charges and she will try to remember as much as possible to testify […]." (39:2). Ms. Dexter stated that this process was causing A.B. "stress" and asserted:

> If she is told that Mr. Taylor was allowed to withdraw his guilty plea and that now she has to go back to court, this will directly contradict what she was told previously. She will have the added stress of potentially having to see him in court, having to talk to strangers about the abuse, not knowing if her abuser is going to prison, not knowing if it's ok to feel safe and not being able to move on.

(39:2-3). Ms. Dexter therefore asked the court to "consider these points" in assessing Mr. Taylor's motion. (39:3).

The parties then presented brief arguments. (92:42). First, the State had the following exchange with the Court:

> The State: Judge, the only other things I wanted to comment on -- and I'll rely on my brief and my response -- really, the state's -- our position is there might be a fair and just reason, but the state would result in -- it would be substantially prejudicial to the state if this Court were --

> The Court: And you're basing that on based upon the letter --
>
> The State: Yes.
>
> The Court: -- that was submitted?
>
> The State: I am.
>
> This case has been dragging on for almost two years. The state has been ready for trial on six prior dates. And we've drug this girl through the system preparing her for trial every time.
>
> The Court: And that was Andrea --
>
> The State: Dexter is the case manager.
>
> The Court: Right. Okay. I understand.
>
> The State: Yes. And my brief does cite to two cases which I think are directly on point for that.
>
> And then I'll rest on the record.

(92:42-43).

Counsel for Mr. Taylor responded as follows:

> Judge, it appears the state concedes the fair and just reason. I don't -- I've read Ms. Dexter's letter. I don't know much about the dynamics of this case or its history beyond the paper and what I could gather from Mr. Taylor. But I believe that the fair and just reason here, circumstances of the taking of the plea and the

> time Mr. Taylor had to discuss it, indeed the day of trial and failure of -- to have his medication on that day, I think overcomes any prejudice the state may have.

(92:43).

The court then issued an oral ruling. (92:43); (App. 103). First, the court articulated what it believed to be the legal standard, asserting that plea withdrawal is within "the sound discretion" of the court and that the defendant must present "some adequate reason for a defendant's change of heart other than the desire to have a trial." (92:43); (App. 103). The court also stated that the defendant needed to prove, by clear and convincing evidence, that the plea was "not voluntarily and knowingly entered" and also that "withdrawal of the plea is necessary to prevent manifest injustice." (92:43-44); (App. 103-104).

The court concluded that there was "no manifest injustice in this case even though the state believes that there might be a reason to concede the fair and just reason." (92:44); (App. 104).

The court also found that the plea hearing transcript showed "the state said the plea was voluntary, knowingly, and intelligently made." (92:44); (App. 104). The court also made a finding that a colloquy occurred "as to the competency or whether or not anything impaired his ability to understand the proceedings. And he said no." (92:44); (App. 104). The court found "[i]t would appear that he

understood all of the proceedings and what he was doing was giving up those rights and entering a plea to an amendment to the actual charge." (92:44); (App. 104).

The court also discussed the case history, which involved several different defense lawyers and "seven different" trial dates. (92:44); (App. 104). Accordingly, based on the "totality of the circumstances" the court did not "find that there was a showing that could be considered credible on behalf of the defendant, and there was no really just reason to withdraw the plea when you consider the entire record in this case." (92:44-45); (App. 104-105).

Moreover, the court found that, even if a fair and just reason existed, the "state would have been prejudiced or would be prejudiced given the passage of time and the impact it would have on the victim and the victim's ability to recall facts." (92:45); (App. 105). It would also "be punitive to that child's development." (92:45); (App. 105).

The court also found "there's no ineffective assistance of counsel that's been made." (92:45); (App. 105). The court denied the defense motion and set the matter for sentencing. (92:45); (App. 105).

Sentence

At sentencing, the State followed the plea agreement, recommending a concurrent sentence consisting of six years of initial confinement followed by nine years of extended supervision. (93:2). The

State asserted that this sentence was appropriate in light of the gravity of the offense and Mr. Taylor's prior record. (93:5). Defense counsel joined the State in recommending the concurrent sentence. (93:6).

After giving Mr. Taylor an opportunity to allocute, the court pronounced its sentence. (93:8). The court then followed the joint recommendation, imposing six years of initial confinement and nine years of extended supervision. (93:8-9).

This appeal follows. (69).

## ARGUMENT

### I. The circuit court erred in denying Mr. Taylor's motion for presentence plea withdrawal.

A. Legal principles and standard of review.

In Wisconsin, the presentence standard for plea withdrawal is intended to be relatively permissive and "[a] court will grant a pre-sentencing request to withdraw a guilty plea upon presentation of a fair and just reason to do so." *State v. Cooper*, 2019 WI 73, ¶ 15, 387 Wis. 2d 439, 929 N.W.2d 192; *see also State v. Canedy*, 161 Wis. 2d 565, 582, 469 N.W.2d 163 (1991) ("The appropriate and applicable law in the case before the court, is that a defendant *should* be allowed to withdraw a guilty plea for any fair and just reason, unless the prosecution would be substantially prejudiced.") (Emphasis in original.)

This "liberal rule," *Cooper*, 2019 WI 73, ¶ 15, "contemplates the mere showing of some adequate reason for the defendant's change of heart." *Libke v. State*, 60 Wis. 2d 121, 128, 208 N.W.2d 331 (1973).

Thus, "the circuit court is to look only for a fair and just reason and freely allow the withdrawal" when requested by the defendant. *State v. Kivioja*, 225 Wis. 2d 271, 287, 592 N.W.2d 220 (1999). The defendant bears the burden of proving that a fair and just reason exists by a preponderance of the evidence. *Jenkins*, 2007 WI 96, ¶ 32.

Review of the denial of a presentencing motion to withdraw a plea involves a mixed standard of review. Whether a fact or set of facts constitutes a "fair and just reason," is a question of law which is reviewed de novo. *See Jenkins*, 2007 WI 96, ¶ 34. ("When there are no issues of fact or credibility in play, the question of whether the defendant has offered a fair and just reason becomes a question of law that we review de novo.") Summarizing the available case law, the Wisconsin Supreme Court has identified several such examples:

- A defect in the plea colloquy, coupled with an actual misunderstanding on the defendant's part;

- A misunderstanding about the consequences of the plea, as for example, a lack of understanding about potential sex offender registration;

- "Haste and confusion;"
- Attorney coercion;
- Ineffective assistance of counsel.

*Cooper*, 2019 WI 73, ¶¶ 16-17. This list is non-exhaustive. *Id*. At the very least, the defendant must proffer "something other than a bare desire to have a trial." *Id*., ¶ 16.

However, whether the defendant proves the existence of a fair and just reason in a particular case is a discretionary determination for the circuit court. *Jenkins*, 2007 WI 96, ¶ 30. As the Wisconsin Supreme Court has explained:

> For instance, Wisconsin courts have held that "misunderstanding" a plea is a fair and just reason for withdrawal. However it does not follow that any time that a defendant asserts that he or she misunderstood the plea, he or she is entitled to withdrawal. The misunderstanding must be genuine. Our case law establishes that not all defendants who *state* that they did not understand their plea are *entitled* to withdraw their pleas. Because the reason offered must be genuine, the circuit court must determine whether the defendant's reason is credible or plausible or believable.

*Kivioja*, 225 Wis. 2d at 291-292 (emphasis in original; citations omitted). In determining whether a defendant has satisfactorily proven that a fair and just reason exists, the circuit court can consider other persuasive evidence, such as an accompanying

credible claim of innocence as well as proof that the defendant swiftly moved to withdraw their plea. *Rhodes*, 2008 WI App 32, ¶ 12.

"A circuit court's discretionary decision to grant or deny a motion to withdraw a plea before sentencing is subject to review under the erroneous exercise of discretion standard." *Jenkins,* 2007 WI 96, ¶ 30. In order for the circuit court's determination to pass muster on appeal, the record must demonstrate that the "circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *Loy v. Bunderson*, 107 Wis. 2d 400, 414-415, 320 N.W.2d 175 (1982).

However, "[w]here the circuit court provides an inadequate account to show an application of the facts to the proper legal standard, [this Court must] 'independently review the record to determine whether the trial court's decision can be sustained when the facts are applied to the applicable law.'" *Jenkins*, 2007 WI 96, ¶ 35 (quoting *Libke*, 60 Wis. 2d at 129)); *see also Kivioja*, 225 Wis. 2d at 228-229. (If circuit court uses the wrong plea withdrawal standard, this Court should search the record to determine if "facts of the record [...] support its conclusion.")

B. The circuit court erroneously exercised its discretion in finding that no fair and just reason for plea withdrawal existed.

1. Mr. Taylor adequately established the existence of a "fair and just" reason.

In this case, Mr. Taylor's motion and the testimony from the evidentiary hearing make clear that he primarily alleged that his plea was entered hastily and in confusion. The Wisconsin Supreme Court has already established that, if proven, this is a sufficient basis for plea withdrawal. *Cooper*, 2019 WI 73, ¶ 16. Relevant to this allegation of haste and confusion, Mr. Taylor argued that his decision to plead guilty was also impacted by both his lack of medication, which caused him to have difficulty thinking clearly, as well as "pressure" exerted by Attorney Cleghorn. (92:11; 92:17).

Because these are adequate explanations for Mr. Taylor's later change of heart, *see Libke*, 60 Wis. 2d at 128, this Court must determine whether the circuit court erred in concluding that those explanations were not credibly present in this case. *Kivioja*, 225 Wis. 2d at 291-292.

Here, the record fully supports Mr. Taylor's claim. First, it is undisputed that the plea was entered under "hasty" conditions. The plea occurred on the morning of the scheduled trial and the specific plea offer that Mr. Taylor accepted was not disclosed to him until "immediately before" the actual plea

hearing. (35:2). According to counsel's motion, Mr. Taylor was given scant time to consider the proposed plea—as little as ten minutes to make a decision while the jury panel in his case was being brought into the courtroom. (35:3). The sequence of events was therefore very compressed, with Mr. Taylor signing the plea forms immediately before going on the record. (35:2).

In addition to the averments in counsel's motion, the testimony at the hearing adds other persuasive details to this picture. For example, Mr. Taylor offered uncontradicted testimony that he was first told about the proposed plea offer while changing into his court clothes in a holding cell—a picture which is certainly consistent with a "hastily" entered plea. (92:8; 92:15).

In addition to the testimony of Mr. Taylor, the State's evidentiary presentation via the testimony of Attorney Cleghorn also corroborates Mr. Taylor's allegation that the plea was entered hastily. According to her testimony at the motion hearing, Attorney Cleghorn agreed that the concrete offer was not extended to Mr. Taylor until the morning of trial. (92:33). During that conversation, Attorney Cleghorn recalled telling Mr. Taylor that she "wished" he had more time in which to make a decision. (92:36). She recalled that Mr. Taylor told her he felt stuck "between a rock and a hard place." (92:36-37). She also testified that Mr. Taylor had a "lot of questions" for her in light of the proposed plea agreement.

(92:36). She was able to answer some, but not all, of those questions. (92:36).

In addition to his plea being "hastily entered," Mr. Taylor also alleged that the "hasty" nature of the decision was exacerbated by other pressures, such as his lack of medication and his attorney's conduct. (92:17). Once again, the record supports those claims. As to the lack of medication, Mr. Taylor told the circuit court, during the plea colloquy, that he was not medicated. (87:4). His attorney also confirmed, at the time of the plea, that he was entering his plea without having taken his prescription medication. (87:6).

As to pressures created by Attorney Cleghorn, she testified that Mr. Taylor required some coaxing in order to enter the plea. According to her testimony at the motion hearing, she was able to use the no-contest plea to obtain Mr. Taylor's reluctant cooperation, telling Mr. Taylor a no-contest plea was a "middle" option between guilty and not guilty, thereby responding to his unease about admitting guilt. (92:39). Of course, as Attorney Cleghorn well knew, the no-contest plea is functionally identical to a guilty plea and does constitute an admission of guilt. *Lee v. State Board of Dental Examiners*, 29 Wis.2d 330, 334, 139 N.W.2d 61 (1966).

As the special materials to the Wisconsin Jury Instructions make clear, "some defendants view the no contest plea as an indication of lesser culpability than a plea of guilty." Wis. JI-Criminal SM32A at 5.

Accordingly, the special materials instruct circuit courts to dispel such misconceptions. Attorney Cleghorn's resort to this trope is therefore relevant in assessing Mr. Taylor's allegation of "pressure" by his attorney.

Thus, the record evidence—counsel's motion and the sworn testimony at the hearing—establishes that Mr. Taylor was expected to make one of the most important decisions of his life in the span of only a few minutes, based solely on his attorney's potentially misleading advice. In addition to these pressures, Mr. Taylor was especially vulnerable to poor decision making, as the Milwaukee County Jail had neglected to give him his medication and, as a result, he was having trouble thinking clearly. (92:11). The outcome is that Mr. Taylor does appear to have had some lingering "confusion" at the time of the motion hearing, expressing uncertainty as to why his charge had been amended, how the elements of that amended charge applied to his case, and whether the plea offer had really been in his best interest. (92:13-14).

These are not the only pieces of the record which support the claim. For example, the transcript of the guilty plea hearing is also relevant evidence that the plea was "hastily" entered. *See Rhodes*, 2008 WI App 32, ¶ 12 ("rushed" plea colloquy is relevant to assessment of whether plea was hastily entered). Considering the sequence of events—(1) conveyance of the offer while the jury is actually being brought into court; (2) Mr. Taylor being given ten minutes to

make a decision and fill out the relevant paperwork and then (3) immediately being produced for the actual plea hearing—the rushed nature of the colloquy is a significant and substantial consideration for this Court.

Here, the circuit court did not colloquy Mr. Taylor in detail about much of the required information. For example, the court made no attempt to make detailed findings about Mr. Taylor's educational background or English language comprehension, although it did ask him a single question about his age. (87:3). Throughout the colloquy, the court frequently ran important information together in compound sentences with the apparent goal of speedily covering as many topics as possible via Mr. Taylor's conclusory answers. Consider, for example, the following exchange:

> The Court: So you understand then what the amended information says, what the penalty is, and you understand the Court's not bound by any negotiations or plea bargains? Do you understand that?
>
> Mr. Taylor: Yes, sir.

(87:3). Consider also:

> The Court: Okay. So you're going to be waiving those constitutional rights that are contained in the guilty plea questionnaire and waiver of rights form that you've signed?

> Your rights to a trial by jury, and all twelve jurors must agree unanimously as to a verdict. That means the state must prove you guilty beyond a reasonable doubt as to every single element of the offense.
>
> And your lawyer has gone over the elements of the offense with you that the state would have to prove beyond a reasonable doubt. That you caused the child under the age of 18 to go into a room or secluded place, with an attempt to have sexual contact or sexual intercourse with that child.
>
> You'll be waiving any possible defenses that you may have to the offense charged in the criminal complaint, waiving your right to challenge the sufficiency of the criminal complaint, waiving your right to challenge the constitutionality of any police actions such as any stop, arrest, search and seizure, or any statement that may have been made by yourself.
>
> Do you understand all that?
>
> Mr. Taylor: Yes, sir.

(87:4-5).

The court also rushed through other elements of the plea colloquy, including the inquiry into the effect of the lack of prescription medications on Mr. Taylor, cutting off his explanation in order to quickly obtain another conclusory affirmation of understanding. (87:4). Throughout the plea colloquy, the overriding concern of the circuit court appears to have been speed, despite Mr. Taylor's palpable reluctance to actually enter the plea when asked to make that affirmative statement in open court. (87:6). ("I mean, I just – no contest.") The court also tried to resolve the matter quickly by setting a sentencing for the very next day despite the apparent complexity of the case, another factor demonstrating the "hasty" nature of the proceedings. (87:7).

To be clear, Mr. Taylor does not allege that the plea colloquy was constitutionally defective, thereby rendering his plea not knowing, intelligent or voluntary. Yet, the "rushed" nature of the colloquy—in conjunction with the other facts and circumstances in this case—is further corroborative proof that a fair and just reason for plea withdrawal exists.

2. The circuit court's contrary findings are unsupported by, and in tension with, the record evidence.

In addition to all of this evidence, the State also conceded that Mr. Taylor presented a fair and just reason for plea withdrawal. (92:42). (Telling the court, "our position is there might be a fair and just reason" yet focusing on the "substantial prejudice"

prong of the analysis.) Yet, the circuit court found that Mr. Taylor had failed to satisfy his burden. (92:44); (App. 104). That finding is problematic for several reasons.

First, it is abundantly clear that the circuit court misapplied several different legal standards to this case, asserting for example that the case was governed by the "manifest injustice" standard for post-sentencing plea withdrawal motions. (92:44); (App. 104). The court also claimed that Mr. Taylor was required to "show by clear and convincing evidence a plea is not voluntarily and knowingly entered." (92:43); (App. 103). Troublingly, the court's confusing remarks also suggest at one point that it was finding Mr. Taylor may have satisfied the "fair and just reason" standard but that he still failed to satisfy the more demanding "manifest injustice" test. (92:44); (App. 104).

Second, the court's credibility finding is also flawed both because it is conclusory and unsupported by further findings, but also because it is wholly unsupported by credible record evidence. *See Insurance Co. of N. Am. v. DEC Int'l, Inc.,* 220 Wis. 2d 840, 845, 586 N.W.2d 691 (Ct. App. 1998). Rather, the circuit court's finding is "against the great weight and clear preponderance of the evidence" presented in this case. *State v. Arias*, 2008 WI 84, ¶ 27, 311 Wis. 2d 358, 752 N.W.2d 748. Thus, even if this Court ignores the circuit court's application of contradictory legal standards to assess Mr. Taylor's claim, the ultimate conclusion is still undermined by the lack of

record evidence to support the circuit court's conclusion.

It is worth noting, for example, that the court heard the testimony of both Mr. Taylor (for the defense) and Ms. Cleghorn (for the State), whose testimony was in many ways compatible—both witnesses agree that the plea was entered quickly and that there was obvious reluctance on Mr. Taylor's part. Yet, the circuit court failed to grapple with the specifics of the largely complementary testimony. Instead, the court made only a boilerplate finding Mr. Taylor had failed to make a credible showing in support of his motion—despite the absence of any colorable impeachment evidence or areas of testimony where Mr. Taylor's account was materially contradicted by Attorney Cleghorn's.

In fact, the circuit court appears to have totally ignored the allegation that this plea was entered hastily and in confusion, focusing almost entirely on Mr. Taylor's allegation that his lack of medication caused him to not think clearly at the time he made this important decision. (92:44); (App. 104). The circuit court disagreed, finding, "It would appear that he understood all of the proceedings and what he was doing was giving up those rights and entering a plea to an amendment to the actual charge." (92:44); (App. 104).

Yet, Mr. Taylor has never alleged, as the circuit court appeared to believe, that he was legally incompetent at the time of the plea. (92:44); (App.

104). Instead, Mr. Taylor asserted that his lack of medication was a contributing factor to a "hastily" entered plea, as it deprived him of the ability to think clearly during the ten minutes he was given to make the decision whether or not to enter a plea to an amended charge. Here, there was no dispute that the plea was in fact entered while Mr. Taylor was not medicated.

It is also irrelevant that the court believed the colloquy to have been legally sufficient. (92:44); (App. 104). While a defective plea colloquy may be sufficient to withdraw the plea, it is not a necessary condition. *Jenkins*, 2007 WI 96, ¶ 62.

Moreover, the record-based evidence identified by the court to support its conclusion that plea withdrawal was unwarranted is also problematic. The circuit court found, for example, that Mr. Taylor's repeated changes of counsel were somehow relevant to that legal inquiry. (92:44); (App. 104). Yet, it is difficult to see how this fact supports the conclusion that Mr. Taylor was incredible in his testimony regarding the last-minute entry of his plea. There is simply no logical linkage presented in the circuit court's oral ruling. And, as the record shows, at least one of the changes in counsel was made not at Mr. Taylor's request, but at the unilateral request of Attorney Jones and another was made in light of disagreements about trial strategy.

The same can be said for the court's finding that the matter had been set for trial on seven

different occasions. (92:44); (App. 104). To begin, there were six, not seven, different jury trial dates, including the date on which Mr. Taylor pleaded. More importantly, not all of those adjournments were at Mr. Taylor's request. In fact, three adjournments were requested by the State. One was the result of a scheduling error on Attorney Jones' part. And one resulted when the SPD inadvertently appointed counsel who had a preexisting scheduling conflict. More to the point, Mr. Taylor's continued desire to go to trial is a factor which *supports* his desire to withdraw his last-minute plea, rather than contradicting it, as the court implied.

Finally, the circuit court also omitted relevant considerations which support Mr. Taylor's motion, including his assertions of innocence and the speedy attempt to withdraw the plea. *State v. Shanks*, 152 Wis. 2d 284, 291-292, 448 N.W.2d 264 (Ct. App. 1989). Here, the "sequence of events represents expeditious action, showing a swift recognition that the pleas were too hastily entered rather than a deliberate delay to test the weight of potential punishment." *Id.* Most relevant of all, the court should have considered the obvious fact that Mr. Taylor was actually offering to withdraw a highly favorable plea in order to go to trial on much more serious charges. This is strong prima facie evidence as to the genuine nature of the motion as it establishes he was not merely "test[ing] the weight of potential punishment" before seeking plea withdrawal. *State v. Leitner*, 2001 WI App 172, ¶ 33, 247 Wis. 2d 195, 633 N.W.2d 207.

Accordingly, this Court should find that the circuit court erroneously exercised its discretion in determining that Mr. Taylor failed to prove that a fair and just reason for plea withdrawal existed.

C. The circuit court erroneously concluded that "substantial prejudice" to the State existed which justified denying Mr. Taylor's motion.

1. Substantial prejudice standard defined.

"[O]nce the defendant presents a fair and just reason, the burden shifts to the State to show substantial prejudice so as to defeat plea withdrawal." *State v. Bollig*, 2000 WI 6, ¶ 34, 232 Wis. 2d 561, 605 N.W.2d 199. If the State satisfies its burden, the defendant "must rebut evidence of substantial prejudice to the State." *Jenkins*, 2007 WI 96, ¶ 43. The determination of whether substantial prejudice exists in a particular case is a discretionary determination for the circuit court. *Bollig,* 2000 WI 6, ¶ 41-42.

While substantial prejudice has never been explicitly defined, this Court has identified several situations in which substantial prejudice may exist including:

- "having to once again provide protection for endangered witnesses during trial;"

- "having to assemble witnesses after co-defendant's acquittal when joint trial was possible;"
- "death of a chief government witness;"
- loss of physical evidence;
- "when other defendants with whom defendant had been joined for trial had already been tried in a lengthy trial and defendant's plea was taken mid-trial."

*State v. Nelson*, 2005 WI App 113, ¶ 18, 282 Wis. 2d 502, 701 N.W.2d 32. Substantial prejudice may also exist when the State will lose the opportunity to present the videotaped forensic interview of a child witness, *State v. Lopez*, 2014 WI 11, ¶ 86, 353 Wis. 2d 1, 843 N.W.2d 390, or when the recall of a very young victim is imperiled. *Bollig*, 2000 WI 6, ¶ 43.

Importantly, the substantial prejudice test cannot be satisfied by mere proof of "inconvenience" to the State. *Nelson*, 2005 WI App 113, ¶ 22. In assessing whether substantial prejudice exists, this Court must consider all relevant circumstances, including the strength of the State's case. *Id*., ¶ 21.

2. The State failed to articulate any "substantial prejudice" that Mr. Taylor would have been legally obligated to rebut.

In this case, the State set forth two reasons why substantial prejudice existed. First, the State alleged that prejudice may have existed because Mr. Taylor's plea withdrawal motion would necessitate calling the alleged victim as a witness. (36:3). This concern was echoed by the letter of Ms. Dexter, who opined that plea withdrawal would have a negative therapeutic impact on the alleged victim. (39:2). These allegations, however, do not support a finding of "substantial prejudice." While it may be inconvenient, and even emotionally trying, for the alleged victim in a criminal case to participate in a trial, these concerns simply do not rise to the level of substantial prejudice to the State. Because those considerations would be present in almost every criminal prosecution, the legal standard requires more. Considering the examples listed in *Nelson*, including the death of a witness or the loss of physical evidence, it is clear that speculatively phrased emotional impact for the alleged victim fails to defeat a valid "fair and just" reason for plea withdrawal. That conclusion is especially obvious in a case like this, where the letter of Ms. Dexter otherwise avers that the victim is willing to testify and participate in the court process.

Second, the State made a conclusory allegation that "the child's memory undoubtedly fades." (36:3-4). Yet, they offered no proof that the victim's memory had been impaired by the passage of time and, in fact, the evidence in this case contradicts that assertion. As set forth by the child's case manager, the child was willing to take the stand and would "try

to remember as much as possible if she has to testify." (39:2). In addition, the child was not so young that memory loss was a foregone conclusion. Moreover, the criminal complaint makes clear that the alleged abuse continued until very shortly before this criminal case was initiated and that the alleged victim was able to give a very detailed account of Mr. Taylor's alleged actions. This is not a case with a fragile, somewhat foggily recalled, delayed disclosure.

Thus while the Wisconsin Supreme Court has held that the circuit court may reasonably consider whether further delays "would adversely affect the child victim's memory," *Bollig*, 2000 WI 6, ¶45, this is a fact-dependent finding which must be assessed in light of the available record. *Id*., ¶ 46. There was simply no evidence presented by the State that the child's memory had in fact degraded. While the State took the position in the circuit court that no such showing was necessary (36:4), that reading of the law would create a flat rule forbidding plea withdrawal in any case involving a child witness. Such a rule would effectively eliminate and overrule the "liberal" presentencing plea withdrawal standard for certain crimes due solely to the general characteristics of a victim, e.g., age, thereby carving out a new doctrine where none currently exists. Judicial restraint counsels against such a broad reading of the law.

This Court should also consider that the description of the alleged abuse was captured on video and that this videotaped, more contemporaneous, report would be admissible at Mr.

Taylor's trial. *See* Wis. Stat. 908.08. Thus, the case is not captive to the child's memory; the State presumably would have a persuasive method of proving its case at trial even if the temporal lag causes minor gaps in the victim's recall. This is therefore not a case where plea withdrawal will result in the State being unable to utilize an otherwise favorable forensic interview recording, as in *Lopez*. Because the child victim was under the age of twelve at the time of Mr. Taylor's motion—and will continue to be under that age for the duration of this appeal—the State retains the ability to present this evidence to the jury should Mr. Taylor succeed in withdrawing his plea.

Finally, this Court must consider the relative strength of the State's case. *Nelson*, 2005 WI App 113, ¶ 21. Here, the State would have both a cooperating victim and an admissible videotaped statement. They would also have the assistance of two expert witnesses, one to explain the dynamics of delayed disclosures of sexual assault and the mechanics of a forensic interview and the other to opine that a lack of physical findings during a medical examination is a normal finding for abused children. (17). Mr. Taylor was not submitting a notice of alibi or any exculpatory witnesses. He gains no material advantage by withdrawing his plea.

Accordingly, because the available evidence suggests that the victim was willing to come to court and the State did nothing more than speculate about the impact on her memory, the circuit court

erroneously exercised its discretion in finding that they satisfied their burden of proving substantial prejudice. Instead, the circuit court should have considered the factors set forth herein, including most relevantly availability of the recorded interview, which contains a detailed statement of the conduct which the State needed to prove at trial.

This Court should therefore find that the court erroneously exercised its discretion in finding that substantial prejudice existed.

## CONCLUSION

Mr. Taylor therefore respectfully requests that this Court allow him to withdraw his plea.

Dated this 14th day of November, 2019.

Respectfully submitted,

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## CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,895 words.

## CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 14th day of November, 2019.

Signed:

Christopher P. August
Assistant State Public Defender

## CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 14th day of November, 2019.

Signed:

_____

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Assistant State Public Defender

# APPENDIX

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# APPENDIX