STATE OF WISCONSIN

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

DISTRICT I

Case No. 2019AP1770-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRIAN ANTHONY TAYLOR,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION
ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE JEFFREY A. WAGNER PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Defendant-Appellant Brian Anthony Taylor moved for presentencing plea withdrawal. He asserted his innocence and claimed the plea was entered hastily and in confusion; he argued that a "fair and just reason" therefore existed, requiring plea withdrawal. Did the circuit court erroneously exercise its discretion when it determined that Taylor's reason was not credible?

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are unnecessary because the issues presented are fully briefed and may be resolved by applying well-established legal principles.

INTRODUCTION

Taylor was initially charged with repeated sexual assault of a child, a Class B felony with a maximum penalty of 60 years. In exchange for a no contest plea, the State offered to amend the charge to a Class D felony with a maximum penalty of 25 years. As part of the plea offer, the State agreed to recommend a sentence of six years' initial confinement and nine years' extended supervision. Taylor did not accept the plea offer until, at his request, the State also agreed to recommend that the sentence be served concurrent with the seven-year revocation sentence he was serving at the time. The circuit court accepted Taylor's plea.

Taylor moved to withdraw the plea. The circuit court denied the motion after a hearing at which it found Taylor "understood all of the proceedings" and had made no "showing that could be considered credible" that a fair and just reason existed for plea withdrawal. Taylor was convicted and sentenced, and now appeals.

On appeal, Taylor argues that the circuit court's denial of his motion was an erroneous exercise of its discretion for two reasons: 1) prior to ruling on the motion the circuit court referenced inapplicable legal standards and 2) Taylor's reason was credible because Taylor's trial counsel corroborated Taylor's account of the plea process. He also argues that the circuit court wrongly considered repeated changes of defense counsel (Taylor's fourth attorney represented him at the plea hearing) and omitted relevant considerations such as his assertion of innocence and the fact that his decision to seek plea withdrawal occurred seven days after his plea.

This court should affirm the circuit court's discretionary ruling. The circuit court's ruling stated and applied the correct legal standard when it concluded "there was no really just reason to withdraw the plea when you consider the entire record in this case." Its findings are supported by the record, including the colloquy transcript and the motion hearing at which Taylor and his trial counsel both testified about Taylor's focus on what he wanted from the plea negotiation with the State. Contrary to Taylor's assertion that he entered the plea "in confusion," the evidence shows that Taylor negotiated skillfully and successfully for the plea agreement he wanted. Trial counsel told the circuit court during the plea colloquy and later at the motion hearing that Taylor understood what he was doing when he entered the plea. The circuit court's credibility determination is therefore not clearly erroneous.

Alternatively, if this Court concludes that the transcript of the ruling provides an inadequate account of the circuit court's analysis, this Court should sustain the circuit court's decision based on an independent review of the record. The record shows that on the day of his scheduled jury trial, Taylor changed his mind about going to trial when he learned that the witnesses against him were present in the courtroom. Taylor's own testimony showed that, later, as soon as he

learned from trial counsel that the victim and her family could attend his sentencing, he wanted to avoid sentencing and decided to withdraw his plea. In light of those facts, Taylor's responses to the plea colloquy, his trial counsel's affirmations that Taylor understood the change of plea, and the evidence that Taylor actively participated in negotiating a favorable plea agreement for himself, this Court should conclude that he has not shown a fair and just reason to withdraw his plea.

STATEMENT OF THE CASE

Charges.

Taylor was charged with repeated sexual assault of a child. (R. 2:1.) The charges were based on a forensic interview of A.B., the six-year-old daughter of Taylor's live-in girlfriend. (R. 2:1.) The forensic interview was conducted after A.B. "made a disclosure at her after-school program" about Taylor sexually assaulting her. (R. 2:1.) A.B. recounted multiple incidents in which Taylor touched her genitals and forced her to perform oral sex on him, then threatened to hurt her if she told anyone. (R. 2:1–2.)

The charge carries a maximum penalty of 60 years' imprisonment. (R. 2:1.)

Taylor's history with appointed counsel on this case.

Taylor asked that his first appointed counsel be permitted to withdraw. (R. 76:3.) Trial counsel told the circuit court that he had completed his investigation, was prepared to go to trial, and was willing to work with Taylor but that Taylor refused. (R. 76:3.) The circuit court then had an exchange with Taylor, emphasizing that Taylor would not likely be granted another request for a new lawyer:

> The Court: So what happens if you don't like the next lawyer the Court gets appointed to you? Then what?

> The Defendant: Then I'm going to fire that lawyer too.
>
> . . . .
>
> The Court: . . . Since the state needs another date, the Court will allow for such - - after him, the Court's not going - - if you don't like your next lawyer, the Court's not going to be reappointing - - sending it back to the P.D.'s office again. Just so you understand that.
>
> The Defendant: I'm saying if they ineffective, yes, I am going to fire - -
>
> The Court: Just so you understand that, sir. I'm not going to do that.
>
> The Defendant: Well, I don't have no problem forcing the law either if they not representing me right.

(R. 76:3–5.)

Before granting the withdrawal, the circuit court noted, "You've got a very excellent lawyer now. . . . That's my opinion based upon the thousands of cases that I've heard." (R. 76:5.)

Taylor asked that his second appointed counsel be permitted to withdraw. (R. 78:2–4.) Trial counsel told the court that Taylor "knows the law completely and is set on his views on how to proceed" and "disagrees" with trial counsel's view of the case. (R. 78:2.) Taylor told the circuit court that trial counsel "got to cussing . . . and yelling" at him, and that Taylor couldn't "work with him." (R. 78:3–4.) When the prosecutor said she "worr[ied] that this is going to happen again," the circuit court told Taylor that "the next lawyer you get will be the lawyer that's going to be doing this case." (R. 78:3.) The circuit court also noted that it was "too bad" that there would be a new appointment because the second appointed counsel was "a very, very good lawyer." (R. 78:4.)

Taylor filed an OLR complaint against his third appointed counsel, who then asked the court if he could

withdraw. (R. 84:2.) Counsel represented to the circuit court that "Mr. Taylor apparently is extremely unhappy with my representation" and had filed a complaint against him with the Office of Lawyer Regulation, creating concerns about a conflict of interest. (R. 84:2.) Counsel also explained that Taylor erroneously believed he had a meritorious speedy trial violation argument, erroneously believed there was discovery that he had not received, and had an unrealistic expectation about how often counsel should be visiting him in jail:

> [Counsel]: I don't believe that [more discovery] exists; therefore, . . . I can't give it to him. . . . *I have no problem representing Mr. Taylor*. My concern though is we're going to be here again in a month because Mr. Taylor seems to think that visiting him at the jail is the only way to prepare his case.

(R. 84:3–5 (emphasis added).) Taylor complained that he had not heard from counsel and that counsel "still fail[ed] to get everything that have to do with [his] case." (R. 84:5.) The circuit court noted the pattern of conflict: "Sir, I mean, you can't get along with your lawyers. . . . The lawyers I have heard, including this lawyer, are excellent lawyers." (R. 84:3.) The circuit court told Taylor that it was appointing his "last lawyer." (R. 84:6.)

Taylor enters a plea.

Taylor proceeded with his fourth appointed counsel, and a trial date was set. (R. 85; 86.) On the morning of trial, the parties informed the circuit court that the State had filed an amended information, amending the charge to child enticement, a Class D felony, with a maximum penalty of 25 years. (R. 29; 87:2.) The prosecutor told the court that in exchange for a no contest plea to the amended charge, she would recommend six years' initial confinement and nine years' extended supervision, and would recommend that it run concurrent to the revocation sentence Taylor was then serving. (R. 87:2.) The circuit court proceeded to the colloquy

with Taylor, pausing to double-check when Taylor mentioned that he had missed a dose of his prescribed medication:

> 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?
>
> The Defendant: Yes, sir.
>
> The Court: And that you'd have to file as a sex offender. You're 34 years old, right?
>
> The Defendant: Yes.
>
> The Court: And are you currently receiving treatment for a mental illness?
>
> The Defendant: Yes, I am.
>
> The Court: And you're receiving medication?
>
> The Defendant: Yes, I am.
>
> The Court: That does not impair your ability to understand what we're doing here, does it?
>
> The Defendant: I mean - -
>
> The Court: You understand everything?
>
> The Defendant: In a way I do because I haven't took my meds in, like, two days[1] so - -
>
> The Court: Pardon? But you understand - - you understand what we're doing though, right?
>
> The Defendant: Yes.
>
> The Court: You understand that you're pleading no contest to the amended charge?
>
> The Defendant: Yes. She broke it down to me.
>
> The Court: And you understand that, right?

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[1] Taylor later testified, consistent with trial counsel's testimony, that he missed only one day's dose. (R. 92:11.)

> The Defendant: Yes, sir.

(R. 87:3–4.)

The circuit court then addressed counsel, who explained that Taylor had missed a morning dose of Prozac and had assured her that he understood the plea terms and was "asking appropriate questions" about the case:

> The Court: Okay. And counsel, you're satisfied the defendant's intelligently, voluntarily and knowingly waiving those constitutional rights?
>
> [Trial 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?
>
> [Trial counsel]: I do.

(R. 87:5–6 (emphasis added).)

Taylor attempts to withdraw his plea.

Taylor moved to withdraw his plea. (R. 35.) He alleged that he had "entered his plea hastily and in confusion, and without adequate consultation with Counsel," and that "[t]he offer changed significantly as the jury panel was brought in after approximately ten . . . minutes to make a decision" (R. 35:1–3.) He alleged that at the plea hearing, he indicated to the judge "that he [was] supposed to be on medication but was not given it by jail staff that day." (R. 35:2.) He alleged that during a phone call with counsel seven days after entering his no contest plea he stated that he wanted to

withdraw his plea because he "realized he made a mistake while off his medication." (R. 35:3.) He argued that this constituted a "swift change of heart," which this Court has held "*is itself* strong indication that the plea was entered in haste and confusion." *State v. Shanks*, 152 Wis. 2d 284, 290, 448 N.W.2d 264 (Ct. App. 1989) (quoting *United States v. Barker*, 514 F.2d 208, 222 (D.C. Cir. 1975) (emphasis added in *Shanks*)).

The State opposed the motion. It argued that the record contradicted Taylor's characterization of the plea negotiations and that the reasons Taylor offered were not credible. (R. 36:3.) It also argued that even if Taylor were to offer a fair and just reason, plea withdrawal was not warranted because the State had presented evidence of substantial prejudice that would result, namely 1) the psychological damage to the young victim by reversing the closure the victim had achieved by the plea and 2) the victim's memory would have faded over the 18-month delay, much of which was attributable to Taylor's repeated changes of attorney. (R. 36:3.)

At the plea hearing, Taylor's trial counsel testified and described how the plea agreement was reached and which penalties were of particular concern to Taylor.

Discussions the day before trial. Trial counsel testified that, on the day before trial, she met with Taylor at the jail for an "hour and a half, two hours maybe." (R. 92:31.) During that time she "spoke with him at length about the possibility of" a modified plea offer from the State that she had learned of when she encountered the prosecutor on the street earlier that day. (R. 92:31.)

Discussions the day of trial. Trial counsel testified that, on the morning of trial, she informed Taylor that the State's witnesses were present. (R. 92:32.) She informed him that the State was willing to amend the charge to a lesser felony and recommend a sentence of six years' initial confinement and

nine years' extended supervision. (R. 92:33.) She testified that he sent her back to the prosecutor with a specific request that the State also recommend that the sentence be concurrent rather than consecutive to the revocation sentence he was then serving. (R. 92:34.) After she spoke with the prosecutor again, trial counsel told Taylor that the State agreed to his request. Next, she reviewed the plea questionnaire with him, and answered his questions, including those about the victim's likely testimony and how the jury would react to it:

> Q: Do you remember anything in particular, anything that sticks out in your memory about any questions he asked?
>
> A: Yes, I do.
>
> . . .
>
> Q: What do you recall those questions to be?
>
> A: He asked me a lot of questions. He was very concerned that I wasn't able to predict what the victim was going to say. And that was something that was up in the air for I think everybody.
>
> . . .
>
> Q: Did you feel like you had enough time to answer those questions?
>
> A: I had enough time to answer the questions to the extent that I was able. But there were a lot of questions that I didn't have the answers to.
>
> Q: . . . [Y]ou mean what the victim might say on the stand, is that what you mean?
>
> A: Right. How she was going to react.
>
> . . .
>
> A: In any situation where you're in trial, clients want to know how the jury is going to respond. And obviously, I can't predict that.

(R. 92:35–37.) Trial counsel testified that Taylor was "very uncomfortable with his position, having to make the decision"

and that "[h]e didn't like that - - that [trial counsel] didn't know what the victim was going to say." (R. 92:39.)

Additional details about the plea process were revealed in testimony at a postconviction motion hearing,[2] at which trial counsel testified that, on the morning of the plea, "there was a lot of back and forth about offer discussions" and there was a meeting in the court's chambers, all of which took place "over the course of . . . about two hours." (R. 95:5.) Counsel testified that her pre-plea conversation with Taylor was "much more focused on the amount of time that was being recommended," and whether she thought the judge would follow that recommendation. (R. 95:8.) "There was a very specific conversation about concurrent time." (R. 95:8.) The other issue Taylor discussed with her prior to his change of plea was the sex offender registration requirement: "[I]t was a factor that was very important to Mr. Taylor." (R. 95:8.)

Taylor testified at the plea withdrawal hearing, giving a couple of explanations for what caused him to seek plea withdrawal. He testified that he was not thinking clearly on the morning of the plea hearing because he had not had his medication. (R. 92:12.) He was asked why he did not tell the court at that time that he was not thinking clearly, and he answered, "Honestly, I don't know why I didn't tell him." (R. 92:12.)

He testified that trial counsel contacted him by phone February 1 to prepare for sentencing, and at that point, "I told her, like, right then and there I wanted to withdraw this plea *because she - - she was telling me that - - about the people that was there for my sentencing and all that*." (R. 92:16 (emphasis

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[2] In a postconviction motion, Taylor sought plea withdrawal on the grounds that trial counsel incorrectly told him he would not be required to register as a sex offender. (R. 62:4.) The circuit court denied the motion after a hearing at which Taylor's counsel testified. (R. 95:8.) Taylor does not pursue that claim on appeal.

added).) He testified that he had previously heard from family members that "wasn't nobody" going to be present at the sentencing hearing. (R. 92:16.) Upon learning that there would be sentencing witnesses, Taylor told counsel that he wanted to withdraw the plea because she had pressured him to take it and had not given him "time to actually think about it or to even discuss it with [his] family." (R. 92:17.)

The circuit court gave the parties a chance "to say something other than what's been submitted," and the State responded, "*I'll rely on my brief* and . . . our position is there might be a fair and just reason, but . . . it would be substantially prejudicial to the state . . . ." (R. 92:42 (emphasis added).) Prejudice to the State would result because the case had "been dragging on for almost two years" and the child victim had been "drug . . . through the system preparing her for trial" each time a trial date was set. (R. 92:42.) The State's circuit court brief argued that Taylor's proffered reason was "contrary to the actual events that occurred in court," and was "not a credible fair and just reason." (R. 36:3.) The brief further stated that the second prong of the analysis provided an alternative basis for denying the motion,

> Even if the Defendant could somehow establish a credible fair and just reason to withdraw his plea, he has still failed to rebut the State's evidence of substantial prejudice. . . . The Defendant has failed to set forth a credible fair and just reason for withdrawing his plea, and allowing his plea withdrawal would result in substantial prejudice to the State.

(R. 36:3, 4.)

At the motion hearing, the State also referenced a letter that the child's case manager had submitted to the court. (R. 39:1.) That letter stated that, if necessary, A.B. would "try to remember as much as possible if she has to testify" but that the lack of resolution "is adding a tremendous amount of

stress to this little girl's already complicated and difficult life." (R. 39:2.)

The circuit court finds Taylor's reason not "credible."

The circuit court denied the plea withdrawal motion. (R. 92:45.) It concluded that there was no "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." (R. 92:44–45.) It added that even if a fair and just reason existed, the State "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." (R. 92:45.) The circuit court based its ruling on Taylor's answers to the court during the plea colloquy, the case's long history, and Taylor's repeated changes of counsel. (R. 92:44–45.)

The circuit court follows the joint sentencing recommendation.

The parties made a joint recommendation for sentence consistent with the plea agreement. The State referenced the existence of a victim impact statement[3] that had been filed with the circuit court four months before. (R. 93:2.) When the circuit court asked for information on Tayor's criminal record, the State acknowledged that Taylor had a "substantial" record, with five prior convictions. (R. 93:3.)

The circuit court said the sexual contact alleged in the complaint was "certainly horrific" and, consistent with the joint recommendation, sentenced Taylor to six years' initial confinement and nine years' extended supervision, to be

[3] In the victim impact statement, filed January 24, 2018, A.B. wrote that the assaults made her feel "mad," "scared," and "worried" and that if she were the judge, she would send Taylor to jail and make him stay away from kids "[h]is [w]hole life." (R. 30:2–3.)

served concurrent with the revocation sentence Taylor was serving at the time of sentencing. (R. 93:8–9.)

Taylor now appeals. (R. 69:1.)

ARGUMENT

I. The circuit court did not erroneously exercise its discretion when it found that Taylor had not presented a credible reason to withdraw his plea.

A. Standard of review and legal principles.

In *State v. Jenkins*, 2007 WI 96, ¶ 43, 303 Wis. 2d 157, 736 N.W.2d 24, the Wisconsin Supreme Court reviewed pre-sentence plea withdrawal cases and re-stated what a defendant must show in order to be permitted to withdraw a plea. A defendant must proffer a fair and just reason that the circuit court finds credible and then must "rebut evidence of substantial prejudice to the State." *Id.* ¶ 43.

Jenkins also emphasized that "the defendant's burden to reverse the circuit court on appeal becomes relatively high" because of the deferential standard of appellate review and because of the "extensive plea colloquy required of circuit courts." *Id.* ¶ 44.

"On review of the circuit court's decision, [the appellate court] appl[ies] a deferential, clearly erroneous standard to the court's findings of evidentiary or historical fact." *Jenkins*, 303 Wis. 2d 157, ¶ 33. "The standard also applies to credibility determinations." *Id.* "In reviewing factual determinations as part of a review of discretion, [the appellate court] look[s] to whether the court has examined the relevant facts and whether the court's examination is supported by the record." *Id.*

"*When there are no issues of fact or credibility in play*, the question whether the defendant has offered a fair and just

reason becomes a question of law . . . ." *Id.* ¶ 34 (emphasis added).

When the defendant alleges misunderstanding as a basis for plea withdrawal, the question of "whether . . . a misunderstanding actually exists is a question of fact, and the circuit court's determination depends heavily on whether the court finds the defendant's testimony or other evidence credible and persuasive." *Jenkins*, 303 Wis. 2d 157, ¶ 34. If "the circuit court does not believe the defendant's asserted reasons for withdrawal of the plea, there is no fair and just reason to allow withdrawal of the plea." *Id.* (citation omitted).

B. The circuit court properly exercised its discretion when it declined to find Taylor's asserted reason credible and found that no misunderstanding actually existed.

As a preliminary matter, the State disagrees with Taylor's assertion that "[i]n addition to all of [Taylor's plea] evidence, the State also conceded that [he] presented a fair and just reason for plea withdrawal." (Taylor's Br. 31.) The transcript language Taylor cites as the State's "concession" is simply an articulation of the State's argument in the alternative, as set forth in its circuit court brief, which the State directly referenced and incorporated during argument. (R. 36; 92:42.) That brief is in the record and specifically argues that Taylor fails on *both* the fair and just reason and prejudice to the state prongs. (R. 36:3.) It is unfair to read the prosecutor's comment to the circuit court that "there might be a fair and just reason, but . . . it would be substantially prejudicial to the state" as anything other than an alternative legal analysis, especially given her use of the word "might" and the prosecutor's explicit statement that she was "rely[ing] on [her] brief," which challenged Taylor's argument on both grounds. (R. 92:42.)

The circuit court examined the relevant facts and its examination is supported by the record. The circuit court stated that it had "listen[ed] to the testimony of the witnesses." (R. 92:42.) The court first referenced the colloquy: "The Court went into a colloquy with the defendant as to the competency or whether or not anything impaired his ability to understand the proceedings. And he said no." (R. 92:44.) The circuit court then found, "It would appear that he understood all of the proceedings . . . ." (R. 92:44.)

The circuit court's reliance on the colloquy is consistent with the Wisconsin Supreme Court's acknowledgment that where the record contains a thorough colloquy "defendants will ordinarily have difficulty showing a fair and just reason for plea withdrawal if the reason is based on grounds that were adequately addressed in the plea colloquy":

> The effect of more elaborate and comprehensive plea colloquies is to ensure that pleas are knowing, intelligent, and voluntary. *The corresponding impact, however, is to make it more difficult for defendants to withdraw their pleas.* Unlike circuit courts at the time of *Strickland*, circuit courts today are expected to develop an extensive record related to the defendant's personal understanding of the plea. This undertaking has changed the notion that guilty pleas are merely tentative until after sentence. As long as circuit courts follow the court mandated and statutory requirements during plea colloquies, defendants will ordinarily have difficulty showing a fair and just reason for plea withdrawal if the reason is based on grounds that were adequately addressed in the plea colloquy.

Jenkins, 303 Wis. 2d 157, ¶ 60 (emphasis added) (footnotes omitted) (citation omitted).

The circuit court also cited the fact that the case had been set for trial several times, and that Taylor had gone through four lawyers. (R. 92:44.) He rejected appointed trial counsel three times, even though his first counsel told the

court he was prepared for trial and would work with Taylor (R. 76:3; 77:2), and his second counsel immediately requested a pretrial and trial date upon appointment (R. 77:2). Taylor's third counsel told the circuit court he had "no problem" representing Taylor but anticipated that his continued representation would probably delay the case further as Taylor had filed an OLR complaint against him and would likely return to court seeking new counsel. (R. 84:3–5.) When finally ready for trial with his fourth counsel, Taylor pulled the plug when he discovered that witnesses were present. (R. 92:34, 36.) Taylor became upset because his counsel could not tell him how the victim would testify. (R. 92:34, 36.) He decided to avoid trial by accepting a plea deal that met his own very specific terms. (R. 92:34, 36.) He assured the circuit court during his plea hearing that he understood what he was doing. (R. 87:3–4.) Later, Taylor said he "[didn't] know why" he didn't tell the judge he was confused due to the lack of his medication even though he was. (R. 92:12.)

The circuit court did not erroneously exercise its discretion in finding that Taylor's reason for plea withdrawal was not credible.

C. The circuit court also properly exercised its discretion when it found that permitting plea withdrawal would result in substantial prejudice to the State.

The circuit court's conclusion that the State had shown that substantial prejudice would result from plea withdrawal was a proper exercise of its discretion. The finding is supported by evidence in the record and is therefore not clearly erroneous. Taylor faced a charge involving a young child. (R. 2:1.) The case never went to trial over the course of two years despite Taylor's appointed counsel's readiness for trial on multiple occasions. (R. 76:3; 84:3, 92:31–32.) The State provided a letter detailing the toll the delays had taken

on the child victim and the likely impact they would have on her memory and ability to testify. (R. 39:1–2.)

Taylor argues that the State's assertion in its trial court briefing that "the child's memory undoubtedly fades" is a conclusory allegation, but the Wisconsin Supreme Court has noted "the recognition of the effects of protracted criminal proceedings on the victim's memory," and upheld a finding of substantial prejudice to the State in part on that basis:

> In light of the facts of the record, as well as the recognition of *the effects of protracted criminal proceedings on the victim's memory*, we determine that the circuit court properly concluded the State would suffer substantial prejudice as a result of Bollig's plea withdrawal. *It was reasonable to consider the impact a plea withdrawal would have on the child victim, the State's key witness.* Since the circuit court did not improperly rely upon personal assumptions or other irrelevant factors, it did not erroneously exercise its discretion in denying Bollig's motion to withdraw his plea.

State v. Bollig, 2000 WI 6, ¶ 46, 232 Wis. 2d 561, 605 N.W.2d 199 (emphasis added).

Bollig bears striking similarity to this case. In recounting the relevant facts, the Wisconsin Supreme Court noted that at the circuit court level the State had expressed concern that the defendant's "numerous dilatory tactics would adversely affect the child victim's ability to recall her testimony and the events underlying the offense." *Bollig*, 232 Wis. 2d 561, ¶ 42. As in this case, the circuit court "was familiar with the facts of this case and was aware of the record" when it denied the plea withdrawal motion. *Id.* ¶ 43. The record in that case reflected the circuit court's concern with "the numerous delays and noted that nearly two years had passed since the offense, which would adversely affect the child victim's memory." *Id.* ¶ 45. This case similarly remained pending for two years while the child victim was repeatedly prepared for trial and Taylor repeatedly created delays. The

Wisconsin Supreme Court relied on these facts to affirm the circuit court's discretionary denial of Bollig's plea withdrawal motion. *Id.* ¶¶ 42–46.

In all material respects, this case mirrors the facts in *Bollig*, and the same reasoning should apply to affirm the circuit court's exercise of discretion here.

Taylor also argues that the circuit court wrongly based its ruling on a perception that Taylor's changes of counsel caused undue delays. He points out that the State requested three adjournments in the case (R. 76:3; 81:2; 82:2), and that two other adjournments were not attributable to Taylor's attempts to change appointed counsel.

Taylor's credibility problem, however, stemmed as much from the appearance that he was unreasonably rejecting the assistance of able counsel as from the time delays caused by the withdrawals. When the circuit court asked, the first time, what Taylor would do if he did not "like the next lawyer the Court gets appointed to [him]," he promptly answered, "Then I'm going to fire that lawyer too." (R. 76:3–4.) The circuit court commented on the experience and qualifications of the three previously appointed attorneys and Taylor's inability to get along with any of them. (R. 76:5; 78:4; 84:3.) The delays specifically attributable to Taylor are therefore relevant to his credibility because the circuit court knew the circumstances and unreasonableness of each delay.

Finally, Taylor asserts that the record is "in tension" with the circuit court's factual findings because one "contributing factor"—that he did not receive his daily dose of Prozac on the morning that he made the decision to enter the plea—is undisputed. (Taylor's Br. 31, 34.) The State agrees that the missed dose is a factor to be considered but disagrees that it leads to the conclusion that Taylor was confused when he entered the plea. Further, aside from Taylor's self-serving assertion, there is no evidence in the record that a single

missed dose renders a person so confused that the person's own assurances that he is *not* confused are not reliable and plea withdrawal is warranted.

The question is whether Taylor entered the plea "in confusion," and there was evidence that he did not: 1) the contemporaneous representation by his counsel that Taylor was "asking appropriate questions" before making the choice to enter the no contest plea; 2) the circuit court's question to Taylor about whether the lack of medication affected his understanding and Taylor's assurance that it did not; and 3) Taylor's active role in negotiating a more favorable plea agreement. The circuit court's factual findings are therefore congruent with the evidence in the record.

II. If the circuit court's application of the law to these facts is not adequate, this Court should sustain the circuit court's decision based on an independent review of the record, which supports the conclusion that Taylor did not offer a fair and just reason for plea withdrawal.

A. Legal principles.

"Where the circuit court provides an inadequate account to show an application of the facts to the proper legal standard," the reviewing court "independently review[s] the record to determine whether the trial court's decision can be sustained when the facts are applied to the applicable law." *Jenkins*, 303 Wis. 2d 157, ¶ 35 (citation omitted). "This review is evidence of an appellate court's desire to uphold a circuit court's discretionary decision if there is good justification for the decision present in the record." *Id.* Even if the circuit court applies the wrong legal standard, the appellate court "must still 'independently review the record to determine whether the [circuit] court's decision can be sustained when the facts are applied to the applicable law.'" *Id.* ¶ 75 (citation omitted).

B. An independent review of the record provides support for the circuit court's decision.

The record refutes Taylor's portrayal of the plea negotiations as being "hasty." (Taylor's Br. 28.) Although he repeatedly references a claim that he had only "ten minutes," the testimony from the hearings provides a clearer picture: "there was a lot of back and forth about offer discussions" and there was a meeting in the court's chambers, all of which took place "over the course of . . . about two hours." (R. 95:5.) The record shows that Taylor decided to change his plea on the morning of trial after learning that the witnesses against him were present in the courtroom. (R. 92:32.) The record shows that Taylor did not immediately accept the significant plea offer that reduced his sentencing exposure from 60 to 25 years and included a sentencing recommendation of six years' initial confinement. (R. 92:33.) Instead, he sought and obtained an agreement from the State to recommend concurrent time, erasing any further prison time as a consequence of this conviction. (R. 92:34.) Counsel testified that the concurrent time recommendation was Taylor's idea. (R. 92:34–35.) Only after the State agreed to this did Taylor agree to the deal.

The record also lacks support for Taylor's assertion that his trial counsel admitted "coaxing" him to enter the plea and pressured him, "resort[ing] to [the] trope" that a no-contest plea indicated lesser culpability than a guilty plea. (Taylor's Br. 27–28.) Taylor testified at the plea withdrawal motion hearing that trial counsel accurately explained to him that the effect of a no contest plea was exactly the same as a guilty plea:

> Q: [M]y question is why did you not just plead guilty rather than no contest?
>
> A: I mean, because she told me if I plead no contest, it's still - - the *state still had to find me guilty*

> *of the charges* that I - - you know what I'm saying - - I was pleading no contest to. And I told her, like, I'm not going to plead guilty to something that I didn't do. And she, like, well, then you plead no contest, *they still - - you know what I'm saying - - still find you guilty to the charges of what you was being charged with.*

(R. 92:7–8 (emphasis added).)

Taylor references the testimony of trial counsel that she was not able to answer all of his questions (Taylor's Br. 27) without providing the follow-up question and her answer: that the questions she could not answer were what the victim would testify and how the jury would react. (R. 92:37.)

Taylor correctly notes that the circuit court mentioned the "manifest injustice" legal standard prior to making its ruling. (Taylor's Br. 32.) The circuit court stated, "Let me start out by saying that a defendant does not have an absolute right to withdraw the plea before sentencing. That it's in the sound discretion of the Court." (R. 92:43.) The circuit court stated, "And that the withdrawal of the plea is necessary to prevent manifest injustice. The Court doesn't find manifest injustice in this case even though the state believes that there might be a reason to concede the fair and just reason." (R. 92:43–44.)

Despite misspeaking by referencing the manifest injustice standard, the circuit court applied the correct "fair and just reason" standard in its ruling. (R. 92:44.)

Even if this Court concludes that the circuit court applied the wrong law, it should sustain the ruling because that is the correct result from applying the correct legal standard to the facts. *See Jenkins*, 303 Wis. 2d 157, ¶ 75 (appellate court "must still 'independently review the record to determine whether the [circuit] court's decision can be sustained when the facts are applied to the applicable law'" (citation omitted)).

Finally, the fact that Taylor's testimony and trial counsel's testimony about the plea process was largely compatible does not make Taylor's reason for plea withdrawal fair and just. Both testified about the back and forth of the plea negotiations and Taylor's active role in them, both testified that he was worried about the victim's testimony, and both testified that Taylor announced to counsel that he wanted to withdraw his plea when she contacted him to prepare for the sentencing hearing. Nothing about that testimony undermines the circuit court's finding. Where their testimony diverged, e.g., on Taylor's alleged confusion at the time of the plea, the circuit court implicitly found trial counsel's testimony more credible and corroborated by other evidence.

Based on this evidence in the record, this Court should affirm the circuit court's decision even if it concludes that the circuit court erred in some way on the fact-finding or the law.

CONCLUSION

This Court should affirm the circuit court's discretionary ruling denying Taylor's plea withdrawal motion.

Dated this 29th day of January 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,449 words.

Dated this 29th day of January 2020.

_____
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 29th day of January 2020.

_____
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