STATE OF WISCONSIN

IN SUPREME COURT

No. 2011AP1467-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

DONYIL LEEITON ANDERSON, SR.,

Defendant-Appellant.

ON PETITION FOR REVIEW OF THE DECISION OF THE COURT OF APPEALS, REVERSING THE JUDGMENT OF THE CIRCUIT COURT AND REMANDING FOR A NEW INSANITY PHASE TRIAL IN THE INTEREST OF JUSTICE

BRIEF AND APPENDIX OF THE PLAINTIFF-RESPONDENT-PETITIONER

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication and oral argument are appropriate in this case and customary in this court.

ISSUES PRESENTED FOR REVIEW

1. Was the jury instruction at issue legally correct?

The court of appeals held the appellate challenge to the jury instruction was forfeited because Anderson did not make a sufficient objection in the trial court. The court of appeals did not directly address whether the instruction was legally correct. The court of appeals, however, concluded the instruction warranted a new trial in the

interest of justice on the ground the real controversy was not fully tried. This court ordered the parties to address whether the instruction was legally correct.

2. If the jury instruction was not legally correct, was it harmless error?

The court of appeals did not directly address whether any error in the instruction was harmless. The court of appeals stated that whether an error was harmless is irrelevant to a determination of whether a new trial should be granted in the interest of justice on the ground the real controversy was not fully tried. The court of appeals then went to point out the weaknesses of Anderson's defense. This court ordered the parties to address whether any error in the instruction was harmless error.

3. As a matter of law can the court of appeals order a new trial in the interest of justice on the ground the real controversy was not fully tried based on a forfeited challenge to a jury instruction where the erroneous instruction was harmless error?

The court of appeals specifically acknowledged that Anderson's insanity defense was weak and that it was highly unlikely that his jury or a new jury would accept the defense expert's view of the facts of the crimes, which was the basis for his opinion that at the time of the crimes Anderson was unable to control himself. Nonetheless, the court of appeals granted a new insanity phase trial on the ground an unpreserved jury instruction error prevented the real controversy from being fully tried.

4. Did the court of appeals erroneously exercise its discretion by granting a new trial in the interest of justice without analyzing whether this is an exceptional case that warrants the extraordinary remedy of discretionary reversal?

The court of appeals granted a new trial in the interest of justice without acknowledging that the authority to do so is to be exercised only in exceptional cases and without analyzing whether this is an exceptional case that warrants such extraordinary remedy.

STATEMENT OF THE CASE AND FACTS

By criminal complaint filed on August 12, 2008, Anderson was charged with intentional first-degree homicide for stabbing to death Stacey Hosey and attempted first-degree intentional homicide for attempting to stab to death Brandon Beavers-Jackson, in the early morning hours of August 9, 2008 (1). Anderson entered pleas of not guilty and not guilty by reason of mental disease or defect.[1]

At the guilt phase of Anderson's jury trial, the State presented uncontradicted evidence of the facts of the crimes. The guilt phase evidence established that shortly before 3:00 a.m. on August 9, 2008, Anderson arrived at the residence he had previously shared with Stacey Hosey, a woman with whom he had had a long-term on-again-off-again relationship and with whom he had a one-year-old son. He saw the car of her new boyfriend, Brandon Beavers-Jackson, parked outside. Anderson went to his own car and got his car stereo and then broke the windows of Brandon's car with it. A neighbor saw Anderson kick in the back door of the house and enter. The neighbor called 911. She heard Stacey immediately yell "get out," then heard screaming; she heard Stacey say, "I love you," and Anderson respond, "you lying bitch." Anderson stabbed Stacey repeatedly, inflicting both mortal and non-mortal wounds. He then fought with and stabbed Brandon. Anderson, who had cut his wrists, was subdued at the

[1] The affirmative defense set forth in Wis. Stat. § 971.15 is referred to as not responsible by reason of mental disease or defect, not guilty by reason of mental disease or defect and not guilty by reason of insanity. There is no substantive difference between the terms. The State will use the terms interchangeably.

scene by police, after refusing orders to put down his knife. Stacey died as a result of multiple knife wounds; Brandon survived his injuries. Later in the hospital, Anderson told police he had been drinking before the incident, but was not intoxicated. He said that Stacey and Brandon were taunting him, and he was in a jealous rage and just snapped. He also said that he had been taking a prescription drug, Strattera, that made him "real edgy." (89:23-42, 49-52, 66, 81-89; 90:50-64, 66-77; 74:Exhibits 28, 30). *State v. Anderson*, No. 2011AP1467-CR, slip op. ¶¶ 39-42 (Ct. App. Aug. 15, 2013) (Pet-Ap. 116-18).

After the State presented its case-in-chief, Anderson entered *Alford*[2] pleas to both charges (90:106-16), and the insanity phase trial was tried to the jury. At the insanity phase of trial, the jury heard evidence that shortly before Anderson broke into Stacey's home and stabbed her to death and attempted to kill her new boyfriend, Anderson had been drinking at a bar (90:71; 74:Exhibit 30:12; 93:58). The evidence showed that about 2:15 a.m. on August 9, 2008, Anderson had been arrested for battery as a result of a bar fight where he had been drinking. He was released because the police did not think he appeared to be sufficiently intoxicated to be a danger to the public or to be held for detoxification (93:42-43). Shortly after 3:00 a.m. that same morning, the police were dispatched to the homicide and attempted homicide scene where Anderson was arrested and was taken to the hospital for his own self-inflicted injuries (89:40). Based on a blood sample taken by hospital staff, Anderson's blood alcohol concentration was 0.176 percent (92:220).[3]

[2] By entering an *Alford* plea, a defendant pleads guilty, acknowledging the State can meet its burden of proof on all elements, but does not admit he committed the crime. The term comes from the United States Supreme Court decision upholding such a plea in *North Carolina v. Alford*, 400 U.S. 25 (1970).

[3] The written report of the defense expert (Johnston) states: "the blood alcohol concentration was 0.176%" (74:Exhibit 40:4). The prosecutor asked Johnston about this on cross-examination, and the transcript recites the number as .0176 (92:220). It appears that either the prosecutor misspoke in asking the question, or the number was

Another blood sample subsequently tested yielded a blood alcohol result of 0.150. Both tests were well over the legal limit of 0.08 for driving (93:25-26).

Anderson presented evidence that two months before the homicide and attempted homicide, he was prescribed a drug, Strattera, to treat his attention deficit disorder (92:28). Defense expert witness Johnston opined that Anderson suffered a temporary mental defect caused by four factors: Anderson's own preexisting mildly impaired ability to exert self control in emotionally provocative situations; a major depressive disorder that had not been appropriately treated; a side effect of taking the prescription medication Strattera; and Anderson's ingestion of alcohol. Johnston opined that as a result of that mental defect, Anderson was unable to control himself and thus unable to conform his behaviors to the requirements of law (92:161-62).

Johnston opined that Anderson suffered a mental defect rather than a mental disease (92:225-26). He also testified that at the time of the crimes, it was not likely that Anderson's ability to know right from wrong or his ability to appreciate the wrongfulness of his conduct was impaired (92:160-61).

At the close of Anderson's evidence, the State made a motion for directed verdict which was denied (93:15-16). The State then presented its case.

The State presented evidence that no Strattera was detectable in Anderson's blood in a post-crimes blood test, although Anderson's expert opined that did not mean that the effect of the drug was absent (93:25; 92:167). The State also presented evidence that Anderson had an angry and volatile encounter with his work supervisor in

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mistyped in the transcript. The State assumes the number in Johnston's report is correct because at trial Anderson never challenged the statements that Anderson was over the legal limit.

May 2008, prior to the time the Strattera was prescribed (93:29-32).

The State presented the testimony of an expert, Tyre, who testified that Anderson told him that on the evening of the offense he had worked and then gone out and was drinking and had gotten into a fight at the bar (93:58). Tyre opined that at the time of the evaluation, Anderson suffered a depressive disorder related to his legal situation and the gravity of what had occurred (93:64). He also concluded that Anderson had an antisocial personality disorder, based on Anderson's previous involvement in the criminal justice system,[4] and previous life style (93:65-67). He based this on information Anderson provided that by the age of twenty-seven he was living the bum's life in Madison: he was living off fast money, receiving welfare benefits and selling drugs on the side to supplement his income; he was going to bars and chasing women and had already been involved in the criminal justice system (93:66).

Tyre opined that at the time of the crimes, Anderson did not suffer a mental disease or defect. He opined that Anderson's antisocial personality disorder, by statute, did not qualify as a mental disease or defect. Tyre stated that he did not disagree with the report of the defense expert which stated that at the time of the crimes, Anderson had been prescribed Strattera, had been taking it for a month and a half and that he was under the influence of alcohol (93:95-96). Tyre disagreed with the defense expert that at the time of the crimes, Anderson suffered a major depressive disorder and he disagreed that if Anderson was impaired by the ingestion of Strattera and

[4] Although the jury did not hear the details of Anderson's involvement in the criminal justice system, the transcript of the sentencing hearing reveals Anderson had nine prior criminal convictions pre-dating his taking of Strattera, including aggravated battery to a peace officer, obstructing and disorderly conduct, criminal trespass, criminal damage to property and drug offenses (94:7-9).

alcohol, that would form the basis of a mental disease or defect (93:95). Tyre's understanding was that voluntary intoxication, ingestion of alcohol or Strattera would not constitute a mental disease or defect within the meaning of the insanity law (93:95).

Tyre also opined to a reasonable degree of professional certainty that at the time of the offense Anderson was able to both appreciate the wrongfulness of his conduct and could conform his conduct to the requirements of the law (93:67-68).

A jury instructions conference was held at which there was discussion about the extent to which a mental state caused by taking a prescription medication or a mental state caused by the voluntary taking of a prescription drug and alcohol constitutes a mental defect within the meaning of the insanity defense law (93:115-28; Pet-Ap. 122-36). Anderson wanted the trial court to insert the word "street" before the word drugs in the instruction. Anderson also wanted the jury to be told that it was up to them to decide whether Anderson's taking of the prescription medication was voluntary. The trial court declined those requests. The trial court granted the State's request to give the pattern instruction excluding a temporary condition caused by voluntary taking of drugs or alcohol (93:115-28; Pet-Ap. 122-36). Because the defense expert testified that Anderson suffered a mental defect, not a mental disease, and that Anderson did appreciate the wrongfulness of his conduct, the trial court instructed the jury only on whether at the time of the crimes, as a result of a mental defect, Anderson lacked substantial capacity to conform his conduct to the requirements of the law (93:16, 138; Pet Ap. 138).

The trial court instructed the jury as follows:

> The first question is at the time the crime was committed, did the defendant have a mental defect? Mental defect is an abnormal condition of the mind which substantially affects mental or emotional processes. The term "mental defect" identifies a

> legal standard that may not exactly match the medical terms used by mental health professionals. You are not bound by medical labels, definitions, or conclusions as to what is or is not a mental defect to which the witnesses may have referred.
>
> You should not find that a person is suffering from a mental defect merely because the person committed an act, committed a criminal act or because of the unnaturalness or enormity of the act or because a motive for the act may be lacking. Temporary passion or frenzy prompted by revenge, hatred, jealousy, envy, or the like does not constitute a mental defect, does not constitute a mental defect [sic]. An abnormally, an abnormality manifested only by repeated criminal or otherwise antisocial conduct does not constitute a mental defect. *A temporary mental state which is brought into existence by the voluntary taking of drugs or alcohol does not constitute a mental defect*.

(93:138-39; Pet-Ap. 138-39) (emphasis added).

The jury found Anderson did not meet his burden of proving he had a mental defect, and therefore did not reach the question of whether as a result of a mental defect he lacked substantial capacity to conform his conduct to the requirements of law (93:219).

On appeal, Anderson challenged the part of the jury instruction that is italicized above. The court of appeals concluded the instruction was flawed in the context of this case, but that Anderson had forfeited his challenge because he did not make a sufficient particularized objection in the trial court. *Anderson*, slip op. ¶¶ 2-11 (Pet-Ap. 102-05).

The court of appeals, however, granted Anderson a new insanity phase trial in the interest of justice on the ground the erroneous instruction prevented the real controversy from being fully tried. *Anderson*, slip op. ¶¶ 1, 12, 37, 43 (Pet-Ap. 102, 106, 115-16, 118).

This court granted the State's petition for review. In its order granting review, this court ordered that "in addition to the issues set forth in the petition for review the parties shall address whether the jury instruction at issue was legally correct and, if not, whether it was harmless error" (Pet-Ap. 120).

In the following sections of this brief, the State will first address the specific questions asked by the court and then address issues raised in the petition.

ARGUMENT

I. THE JURY INSTRUCTION GIVEN AT ANDERSON'S TRIAL WAS NOT LEGALLY CORRECT BECAUSE IT USED THE PREPOSITION "OR" WHERE IT SHOULD HAVE USED THE PREPOSITION "AND."

The basis for Anderson's insanity defense was the testimony of his expert witness, Johnston, who opined that at the time of the crimes, Anderson suffered a mental defect brought into existence by a combination of factors: his life-long mildly impaired ability to exert self-control in emotionally provocative settings; he was undergoing an episode of major depressive disorder; the impact of the prescription drug Strattera on his brain functioning; and his ingestion of alcohol (92:161-62). Johnston opined that Anderson had a mental defect because his inhibitory brain system was impaired or damaged by the combination of these four factors (92:162). The brain changes that constituted his mental defect were produced by Strattera, alcohol, major depressive disorder and Anderson's lifelong difficulty controlling his emotions, anger and impulsive temperament (92:164, 158, 140).

Johnston opined that the brain changes produced by these factors collectively created a profound mental defect (92:164). Although Johnston saw the Strattera as having a

very important role, and Anderson's consumption of alcohol as having a small role, nonetheless, his opinion was that all of the factors were at work simultaneously (92:165, 227).

The State's expert (Tyre) did not agree with Johnston that Anderson suffered a mental defect at the time of the crimes. However, he did not disagree with the statement in Johnston's report that at the time of the crimes, Anderson had been prescribed Strattera, had been taking it for a month and a half, and that he was under the influence of alcohol (93:95-96).

The trial court should exercise its discretion to provide the jury with an accurate statement of the law applicable to the facts of a given case. *State v. Hemphill*, 2006 WI App 185, ¶ 8, 296 Wis. 2d 198, 722 N.W.2d 393. A criminal defendant is entitled to a jury instruction on a theory of defense, but to be entitled to a jury instruction setting forth a defense, sufficient evidence must exist in the record to support that theory of defense. *Id.* Whether the instructions given or requested are an accurate statement of the law applicable to the facts of a given case is a question of law the appellate court determines independently. *Id*.

Anderson claims the instruction was erroneous because the instruction failed to tell the jury that if it found Anderson had a temporary mental state which was brought into existence by taking the prescription drug Strattera as directed, that would constitute a mental defect. Anderson was not entitled to such an instruction, however, because there was no evidence that Anderson suffered a mental defect caused by the use of the prescription drug Strattera taken as directed. Rather, the only evidence that he suffered a mental defect was provided by his expert, Johnston. Johnston never opined that Anderson suffered a mental defect caused by the prescription drug Strattera. Johnston testified only that Anderson suffered a mental defect caused by Strattera in combination with alcohol and Anderson's pre-existing personality and depression.

This was not a proper case for a jury to be instructed that a temporary mental state, which is brought into existence by the defendant's lawful use of a prescription medicine taken as directed, constitutes a mental defect within the meaning of Wisconsin's mental responsibility law. The record did not provide a factual basis for that instruction. Based on the record in this case, the only basis upon which the jury could possibly have found that Anderson suffered a mental defect at all, was that he suffered a mental defect caused by taking Strattera in combination with voluntarily ingesting alcohol, and his pre-existing temperament and major depressive disorder.

Thus, it would have been error for the trial court to instruct the jury that if it found Anderson had a temporary mental state which was brought into existence by taking the prescription drug Strattera as directed, that would constitute a mental defect.

Based on the record in this case and the only expert opinion testimony Anderson presented in support of his defense, the trial court should have instructed the jury that a temporary mental state which is brought into existence by the voluntary taking of drugs *and* alcohol does not constitute a mental defect. That would have been a proper instruction. Unfortunately, the instruction given used the phrase "brought into existence by the voluntary taking of drugs *or* alcohol" rather than "brought into existence by the voluntary taking of drugs *and* alcohol."

Accordingly, the jury instruction given in this case was not legally correct because it used the preposition "or" where it should have used the preposition "and."

The State will argue below that the error in the instruction was harmless error. However, the State will first demonstrate that under Wisconsin law, a temporary state brought into existence by the voluntary taking of a prescription drug and alcohol does not constitute a mental disease or defect within the meaning of Wisconsin's insanity law.

In *State v. Gardner*, 230 Wis. 2d 32, 35, 41-42, 601 N.W.2d 670 (Ct. App. 1999), the court held that the involuntary intoxication defense is available when the intoxication was due to prescription medication taken as directed, but would not be available if the defendant mixed the prescription medication with alcohol.[5]

Gardner is relevant even though it involves an involuntary defense to the underlying crime rather than a lack of mental responsibility defense because the two are closely related. *Id.* at 38-39. In *Gardner*, the court was asked to determine whether the involuntary intoxication defense is available when the intoxication is due to prescription medication taken as directed. *Id.* at 35. In order to answer that question, it was necessary for the court to set forth the limits or boundaries of that defense. Therefore, the court's statement that the defense does not apply if the defendant mixes prescription medication with alcohol was not mere dicta.

By logical extension, that limitation also applies to the insanity defense. *Gardner* is consistent with this court's decision in *State v. Kolisnitschenko*, 84 Wis. 2d 492, 501-03, 267 N.W.2d 321 (1978). In *Kolisnitschenko*, this court held that an insanity defense cannot be based on a temporary mental condition that results from the interaction of an underlying "stormy personality" and the voluntary use of drugs and alcohol. This court explained:

> The insanity defense prevents imposition of punishment on an individual who lacks the mental capacity to obey the law. The law recognizes that it is inappropriate to hold one criminally accountable for behavior not within one's control.

[5] The court held the expert's testimony was properly excluded, however, because the expert never stated that whatever intoxication may have existed affected Gardner's ability to tell right from wrong, which is a prerequisite of an involuntary intoxication defense. *State v. Gardner*, 230 Wis. 2d 32, 35, 601 N.W.2d 670 (Ct. App. 1999).

> The rule that a defendant who is legally insane will be relieved of criminal liability must be reconciled with the generally accepted rule that a defendant who is voluntarily under the influence of intoxicants (alcohol and other drugs) at the time of the crime will not be relieved of criminal responsibility. The voluntary intoxication rule has been justified on both doctrinal and policy grounds. One who intentionally consumes drugs should be held to have intended all the consequences of the resulting intoxicated condition. Accepting intoxication as a defense would allow criminals to feign intoxication or to resort deliberately to intoxication as a shield against liability. Challenges to the doctrinal and policy bases for the rule have been raised, but no other viable approach to the problem has yet emerged.
>
> . . . .
>
> . . . The possibility of a psychosis being triggered by an event not within Kolisnitschenko's control does not alter the fact that he had control over the drug consumption which in fact triggered the psychotic episode during which the crime was committed. Kolisnitschenko may fairly be held responsible for his actions while he was intoxicated and temporarily psychotic because individual volition played a major part in producing that condition. Accordingly, we are not willing to hold in this case that a temporary psychotic state which lasts only for the period of intoxication and which is brought into existence by the interaction of a stormy personality and voluntary intoxication constitutes a mental disease which is a defense to the crime charged.

Kolisnitschenko, 84 Wis. 2d at 498, 503 (citations omitted) (footnotes omitted). *See also Gibson v. State*, 55 Wis. 2d 110, 197 N.W.2d 813 (1972).

Although *Kolisnitschenko* involved amphetamines and alcohol rather than a prescription medicine and alcohol, the policy underlying the rule set forth in *Kolisnitschenko* is equally applicable.

An individual who takes prescription medication and makes a volitional choice to consume alcohol must be held responsible for all of the consequences of that choice. It is common knowledge that many prescription medicines, and even many over-the-counter medicines, should not be mixed with alcohol. It is not necessary to show that the individual had actual, specific warning about the potential synergistic effect of the substances.

In the instant case, the court of appeals rejected what it perceived to be an argument by the State that the insanity defense should not have been submitted to the jury at all. The court of appeals did not reject the proposition that it would have been proper to instruct Anderson's jury that a temporary mental state which is brought into existence by the voluntary taking of a prescription drug and alcohol does not constitute a mental defect. *See Anderson*, slip op. ¶¶ 14-15, 22, 28 (Pet-Ap. 106-07, 110, 112).

In the court of appeals, Anderson tried to distance himself from *Kolisnitschenko* and *Gardner* by asserting that under a reasonable view of the evidence, his mental defect did not exist only during the time period corresponding to his voluntary consumption of alcohol while taking the prescription medication. He asserted that hours before he consumed alcohol and then stabbed his girlfriend to death and attempted to kill the man she was with, he sent her text messages that "displayed a high degree of aggressiveness and hostility." Anderson pointed to text messages in which he told the victim he was with someone else now, bragged about the other women he had been having sex with, and compared them to the victim who he called "a dead fuck." Anderson's court of appeals brief at 27.

Anderson and the victim, the mother of his one-year-old son, had broken up because she became involved with another man (whom Anderson tried to kill when he killed the victim). Anderson was trying to reconcile with her during the time period before he murdered her

(92:141-42). The content of Anderson's text messages to the woman who had rejected him for another man is not necessarily unusually aggressive or hostile. Moreover, Anderson provided no evidence that he only sent the victim this type of "aggressive and hostile" text messages after he began taking Strattera.

Anderson also relies on the fact that he was combative with police and at the hospital where he was taken immediately after the homicide and attempted homicide. There is no evidence, however, that at that point in time (immediately after the crimes) he was no longer experiencing any effects from the alcohol he had consumed.

In the court of appeals, Anderson claimed that the rule barring an insanity defense when a temporary mental state is brought into existence by the taking of a prescribed drug in combination with alcohol should be limited to cases in which the defendant engaged in "excessive," as opposed to "reasonable" or "moderate," consumption of alcohol. Anderson does not attempt to define these terms. He provides no case law in support of the rule he advocates. His broad policy argument that excessive consumption of alcohol is morally blameworthy, whereas reasonable or moderate consumption is not, is unconvincing.

Moreover, the record would not support a characterization that he consumed only a moderate or reasonable amount of alcohol. Anderson relies on his police statement that he had a few beers, and the fact that the officer who arrested him for a bar fight did not believe he was visibly under the influence such that he should be detained. Anderson conveniently ignores the fact that his blood samples taken at the hospital after the crimes revealed blood alcohol levels of 0.176 and 0.150, both of which are well over the legal limit of 0.08 for operating a motor vehicle (92:220; 93:25-26). The record in this case does not demonstrate that Anderson combined his

prescribed medicine with only moderate or reasonable consumption of alcohol.

Based on *Kolisnitschenko* and *Gardner*, this court should hold that a temporary mental state brought into existence by the voluntary taking of prescribed medicine as directed in combination with alcohol does not constitute a mental disease or defect for purposes of an insanity defense.

Anderson believes a different policy view should prevail: that an individual who suffers a temporary mental state brought into existence by the voluntary taking of a prescription medicine as directed and the consumption of alcohol should not be held morally blameworthy for his crimes, and should be entitled to an insanity defense. In light of the existing case law, his policy argument should be addressed to the legislature, not this court. If the legislature wishes to create a statute defining mental defect to include a temporary mental state brought into existence by the voluntary taking of a prescription medicine combined with the consumption of alcohol, it is free to change the law. This court, however, should not change the law.

For all of these reasons, this court should conclude that it would have been proper for Anderson's jury to be instructed that "a temporary mental state which is brought into existence by the voluntary taking of drugs and alcohol does not constitute a mental defect." This court should further conclude, however, that the jury instruction given in this case was not legally correct because it used the preposition "or" where it should have used the preposition "and."

II. THE ERROR IN THE JURY INSTRUCTION WAS HARMLESS ERROR.

In a criminal case, instructional error is harmless if it is "'clear beyond a reasonable doubt that a properly

instructed, rational jury would have'" reached the same verdict. *State v. Smith*, 2012 WI 91, ¶ 69, 342 Wis. 2d 710, 817 N.W.2d 410 (citing *State v. Harvey*, 2002 WI 93, ¶ 48, 254 Wis. 2d 442, 647 N.W.2d 189). If so, the error cannot have contributed to the verdict and, consequently, it was harmless. *Smith*, 342 Wis. 2d 710, ¶ 70; *Neder v. United States*, 527 U.S. 1 (1999).

At his insanity phase trial, Anderson bore the burden of proving to a reasonable certainty by the greater weight of the credible evidence that he had a mental defect at the time the crime was committed and that as a result of that mental defect, he lacked substantial capacity to conform his conduct to the requirements of the law. *See* Wis. Stat. § 971.15; Wis. JI-Criminal 605 (2003); *State v. Leach*, 124 Wis. 2d 648, 658-59, 370 N.W.2d 240 (1985); *Schultz v. State*, 87 Wis. 2d 167, 173-74, 274 N.W.2d 614 (1979).

It is clear beyond a reasonable doubt that a rational jury, properly instructed that a temporary mental state brought into existence by the voluntary taking of drugs and alcohol does not constitute a mental defect, would have found that Anderson failed to prove his insanity defense.

A. It is clear beyond a reasonable doubt that a properly instructed, rational jury would have found Anderson did not meet his burden of proving that at the time of the crimes he suffered a mental defect within the meaning of the insanity law.

It is clear beyond a reasonable doubt that a rational jury, properly instructed that a temporary mental state brought into existence by the voluntary taking of drugs *and* alcohol does not constitute a mental defect, would

have found that Anderson failed to prove that he suffered a mental defect at the time of the crimes.

As demonstrated in the preceding argument section of this brief, Anderson's own expert witness, consistently and repeatedly testified that Anderson had a mental defect caused by the combination of Anderson's voluntary taking of the prescription drug and ingesting alcohol, and his pre-existing conditions. Based on the opinion of Anderson's own expert witness, under a proper instruction that a temporary mental condition brought into existence by the voluntary taking of drugs and alcohol is not a mental defect, a rational jury would have had no choice but to conclude that Anderson did not meet his burden of proving he suffered a mental defect at the time of the offense.

The only witness who provided the jury with any basis for finding that Anderson suffered a mental defect was Anderson's expert, Johnston. Johnston repeatedly and consistently opined that Anderson had a mental defect that was caused by four factors: Anderson's pre-existing personality, major depressive disorder, Strattera and alcohol, working in combination, simultaneously (92:162-64). It was undisputed that Anderson consumed alcohol. He told the police and both experts that he had been drinking at a bar before the crimes (90:71; 74:Exhibit 30:12; 92:158; 93:58). Blood samples taken at the hospital after the crimes revealed blood alcohol levels of 0.176 and 0.150, both of which are well over the legal limit of 0.08 for operating a motor vehicle (92:220; 93:25-26). What the defense expert labeled a mental defect was not a mental defect under law.

Therefore a rational, properly instructed jury could only have concluded that Anderson did not meet his burden of proving he suffered a mental defect within the meaning of the insanity law.

B. It is clear beyond a reasonable doubt that a rational jury would have found Anderson did not prove that he took the Strattera as directed or that Strattera can cause a mental defect that causes a person to commit homicide.

For this section of the argument, the State assumes for the sake of argument that Wisconsin law permits an insanity defense to be based on a temporary mental state brought into existence by taking a prescription drug as directed, even if the defendant also voluntarily consumed alcohol. It is clear beyond a reasonable doubt that a rational jury, so instructed, would have found Anderson did not prove his insanity defense. Anderson failed to prove by a preponderance of the evidence that he took the prescribed medication as directed. Anderson also failed to prove by a preponderance of the evidence that the prescribed medication, Strattera, can create a mental defect that causes a person to commit homicide.

Anderson chose not to testify, so there was no testimony from him that he took the Strattera as directed and only as directed. The State's expert, Tyre, testified that Anderson told him he was prescribed 80 milligrams of Strattera and had taken it earlier on the day of the crime. Tyre did not testify that Anderson told him he took only the prescribed dosage that day, or that he had been consistently taking it as directed (93:75). Defense expert Johnston testified Anderson said he last took Strattera on August 7, 2008 (92:231). The crime occurred on August 9, 2008 (1). A friend, with whom Anderson stayed for a short period of time after he was released from jail for an altercation with the victim prior to the charged crimes, testified he saw Anderson take medication around 5:30 or 6:30 a.m. "three times a week" (92:116-18). The friend did not identify the medication he saw Anderson take.

Records that Anderson's expert reviewed indicated that Anderson initially received a thirty-day sample pack of Strattera from Crossroads Counseling Center and subsequent prescriptions for 80 milligram pills and 100 milligram pills; Anderson's prescription for thirty pills, 80 milligrams each, was filled on July 19, 2008. His prescription for 100 milligram pills was never filled (92:209-10).

Anderson's expert had no idea what dosage of Strattera Anderson actually took or whether he took the medication as prescribed. The expert testified:

> Q. And so if he takes the prescription as prescribed by Dr. Hann starting in the middle of June to about the middle of July, he would be out and need the 80 milligram prescription, correct?
>
> A. Perhaps.
>
> Q. Logically, yes?
>
> A. Well, not really. If you practice medicine, we have a saying that a fourth of the people take a fourth of the medicine a fourth of the time. And one of the issues I don't know is whether he was scrupulous about those. Or many patients will take what you recommend and then skip a few days *and then take extra*, and they have, people are amazingly haphazard. So in, you know, to conclude a whole lot on the basis of whether he got a prescription filled, it's only a loose relationship between what people take and when they take it and the prescriptions they get filled in many, many cases. It's a problem.

(93:211-12) (emphasis added). Defense expert Johnston even testified Anderson may have had a stash of Strattera, so that he could actually have been taking higher doses at the time of the crimes (92:211).

Based on this evidence, a rational jury would have found that Anderson did not meet his burden of proving

that he took the prescription drug Strattera as directed and only as directed.

Moreover, a rational jury would have found that Anderson did not meet his burden of proving that Strattera can create a mental defect that causes a person to commit homicide. Johnston characterized Anderson as suffering a mental defect, rather than a mental disease, because his brain was defective at the time of the crimes (92:225). At the time Johnston testified, he admitted he was not aware of the legal definition of mental defect (92:226). He later stated that he knew it and incorporated it in his opinion when he did his report, but had not reviewed it the day of trial (92:243).

Johnston testified that norepinephrine is one of the chemicals in the brain that makes the sub units in the brain work; Strattera modifies the way the brain uses norepinephrine and if taken over time as directed, the brain changes so that a person with attention deficit disorder then has an increased ability to pay attention to things (92:150). Johnston testified that in a small but regularly occurring percentage of people who take Strattera, what emerges is a propensity toward intense emotionality and part of that is loss of impulse control (92:152). Johnston stated that in a small percentage, Strattera has been "associated with homicidal behavior and actual homicide" (92:152). It is a rarely occurring but statistically significant association (92:153). He stated there are five known cases of Strattera associated with homicide (92:152). Johnston analogized it to the chance of a person being struck by lightning on the golf course. It is a rare event, but it does happen (92:154).

However, Johnston did not explain what it means that Strattera has been "associated with" homicide. He did not testify that any research shows that Strattera causes homicidal behavior or has caused any individual to commit a homicide. Johnston did analogize to alcohol, stating that some people who drink alcohol become more relaxed, some become enormously sentimental, and some

people who drink alcohol become violent and go out and look for a fight (92:151).

Furthermore, as the court of appeals noted:

> there are problems with Anderson's various assertions of fact relating to Strattera. For example, Anderson told his expert that he complained strenuously to his prescribing doctor about side effects he was experiencing from taking Strattera, but Anderson's doctor noted in Anderson's medical records that Anderson reported no side effects.

Anderson, slip op. ¶ 39 (Pet-Ap. 116).

In addition, Johnston suggested family and friends confirmed that while Anderson was taking Strattera he became increasingly more volatile and more angry (92:156). However, at trial Anderson called various family and friends who testified that during the relevant time period, Anderson was more quiet or distant, or moody and less interactive. None of them testified that he was more volatile or more angry or that he had more trouble controlling his emotions or impulses (92:108-13, 119-24, 125-27).

Based on this record, it is clear beyond a reasonable doubt that a rational, properly instructed jury would have found that Anderson did not prove to a reasonable certainty by the greater weight of the credible evidence that he suffered a mental defect at the time of the crimes.

C. Even if Anderson had a mental defect, it is clear beyond a reasonable doubt that a properly instructed rational jury would have found Anderson did not meet his burden of proving that as a result of that mental defect, at the time of the crimes, Anderson lacked substantial capacity to conform his conduct to the requirements of the law.

Even if Anderson had a qualifying mental defect, in order to prove his insanity defense, he also had to prove that as a result of that mental defect he lacked substantial capacity to conform his conduct to the requirements of law. Anderson was not entitled to be found not guilty by reason of insanity unless he proved both components of the insanity defense: a mental defect *and* resulting lack of substantial capacity to conform his conduct to the requirements of law.

Based on the record in this case, it is clear beyond a reasonable doubt that a rational jury considering the second prong would have found that Anderson did not prove to a reasonable certainty by the greater weight of the credible evidence that at the time of the crimes, as a result of his mental defect, Anderson lacked substantial capacity to conform his conduct to the requirements of law.

As the court of appeals aptly explained:

> from Anderson's perspective, there are problems with the testimony of his expert witness. For instance, Anderson's expert based his opinion that Anderson could not control his behavior in significant part on Anderson's account of the events prior to and during the homicide and attempted homicide, but Anderson's assertions in that regard are inconsistent with what appear to be more reliable

sources. An example is the expert's reliance on Anderson's assertion that, when he entered the home, Anderson found his ex-girlfriend and her boyfriend naked or near naked and "in or near a sexual liaison" and that his ex-girlfriend "taunted, ridiculed, and humiliated" him.

More specifically, Anderson asserted that his ex-girlfriend and her boyfriend laughed at Anderson. She taunted him by saying that the boyfriend would be Anderson's son's daddy. Anderson said the ex-girlfriend "was just ranting and raving and down on me. Called me a fucking nigger." Anderson said something in response about them "fucking" with him, them knowing "this moment was going to be here," and Anderson putting his ex-girlfriend through college. Anderson said the boyfriend pushed the ex-girlfriend toward Anderson and then "that little bitch [the boyfriend] ran and hid in the bathroom."

According to Anderson's expert, this would have been an "intensely provocative situation" that, in combination with Anderson's preexisting problem with self-control, his Strattera-altered brain, and his alcohol intoxication, prevented Anderson from being able to control his anger. Anderson's account of his entry into the house, however, is at odds with a neighbor's testimony that, "[a]lmost immediately" after Anderson kicked in the back door, the neighbor heard the ex-girlfriend say "get out, get out" and, a few seconds after that, the ex-girlfriend started screaming. Anderson's account is also at odds with the boyfriend's testimony that the boyfriend was not with the ex-girlfriend when Anderson entered the house, but rather he heard her screaming, came out of a bedroom, and saw Anderson kicking and punching her. This discrepancy is important because Anderson's expert's opinion was plainly based on the proposition that Anderson's homicidal rage was a response to an antagonizing event that Anderson experienced after entering the residence.

. . . .

Peppered in the expert's testimony are what appear to us to be transparent examples of spin and bias. For example, it was clear from the evidence

> that Anderson approached the residence shortly after 3:00 a.m. uninvited, knowing that his ex-girlfriend and her boyfriend were inside. Anderson parked his car a block away, vandalized the boyfriend's car, knocked on the front door, and then kicked in the rear door to gain entry. Yet, when Anderson's expert described this situation, he told the jury that Anderson "*accidentally stumbled upon* a situation that required an extraordinary measure of self-control" (emphasis added). As the expert described the situation, Anderson inadvertently walked in on his recent ex-girlfriend during a sexual encounter with her new boyfriend, and what these two people did then would have caused "just about any of us [to] . . . experience an impulse to do all sorts of things." It seems highly unlikely that this jury or a new jury would accept the expert's assumption about what occurred just before Anderson killed his ex-girlfriend and attempted to kill the new boyfriend.

Anderson, slip op. ¶¶ 40-42 & n.5 (Pet-Ap. 116-18).

The sole evidence that Anderson lacked substantial capacity to conform his conduct to the requirements of the law was the opinion of Anderson's expert, Johnston. Johnston's opinion was based entirely on his view that Anderson was unexpectedly and suddenly confronted with an intensely emotionally provocative, humiliating and taunting scene of his ex-girlfriend in the throes of a romantic encounter with another man. As the court of appeals correctly perceived, Anderson's expert's view of the facts that immediately preceded the homicide and attempted homicide was contradicted by the facts testified to by independent witnesses. Because the defense expert's conclusion that Anderson could not control his conduct was based entirely on a factual scenario that a rational jury would have rejected, it is clear beyond a reasonable doubt that a rational jury would also have rejected Anderson's expert's opinion that Anderson lacked substantial capacity to conform his conduct to the requirements of law at the time of the crimes.

Based on the record, it is clear beyond a reasonable doubt that a rational, properly instructed jury would have found Anderson did not prove he suffered a mental defect that caused him to lack substantial capacity to conform his conduct to the requirements of law.

For all of these reasons, any error in the jury instruction in this case was harmless and Anderson's request for a new insanity phase trial must be denied.

III. A NEW TRIAL SHOULD NOT BE GRANTED IN THE INTEREST OF JUSTICE BECAUSE THE HARMLESS ERROR IN THE JURY INSTRUCTION GIVEN AT TRIAL DID NOT RESULT IN THE REAL CONTROVERSY NOT BEING FULLY TRIED.

Wisconsin Stat. § 752.35 gives the court of appeals authority to reverse a judgment or order appealed from and grant a new trial if it "appears from the record that the real controversy has not been fully tried" and it is "necessary to accomplish the ends of justice." The court of appeals has the same power in this regard as the supreme court has under its comparable statute. *Vollmer v. Luety*, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990). The appellate courts may reverse and grant relief on this ground without first finding there is a substantial probability of a different result at a new trial. *Id.* The power to grant a new trial because the real controversy was not fully tried, however, "is formidable, and should be exercised sparingly and with great caution." *State v. Williams*, 2006 WI App 212, ¶ 36, 296 Wis. 2d 834, 723 N.W.2d 719.

The court of appeals erred as a matter of law in granting a new trial in the interest of justice because the unpreserved instructional error was harmless beyond a reasonable doubt.

The court of appeals correctly perceived that Anderson's insanity defense was weak and that it is highly unlikely this jury or a new jury would have believed Anderson's expert's opinion that Anderson lacked substantial capacity to conform his conduct to the requirements of law. In other words, the court of appeals implicitly found it is clear beyond a reasonable doubt that the jury would have rejected the insanity defense absent the error. *See Neder*, 527 U.S. at 18; *Harvey*, 254 Wis. 2d 442, ¶ 48. The court of appeals implicitly found beyond a reasonable doubt that the erroneous instruction on mental defect did not contribute to the convictions because even if properly instructed on mental defect, Anderson's insanity defense would have failed. *See Chapman v. California*, 386 U.S. 18, 24 (1967).

Inexplicably, however, the court of appeals viewed it as wholly irrelevant that based on the evidence he presented, a properly instructed jury would have rejected Anderson's insanity defense. The court of appeals' decision utterly fails to explain how it can be said that the real controversy - whether Anderson was not guilty by reason of insanity - was not fully tried when the evidence demonstrated beyond a reasonable doubt that a properly instructed jury would have concluded that Anderson did not meet his burden of proving his insanity defense. The court of appeals' decision utterly fails to explain how justice is served by reversing Anderson's convictions based on an erroneous instruction on the mental defect prong of the insanity defense, even though the error did not contribute to the verdict because Anderson would not have prevailed on his insanity defense in any event.

As a matter of law, it is not appropriate to grant a new trial in the interest of justice on the ground the real controversy was not fully tried based on an erroneous jury instruction when the instruction was harmless error.

The court of appeals correctly held that Anderson forfeited his right to challenge the jury instruction on mental defect given at his insanity phase trial by failing to

properly preserve that objection in the trial court. *Anderson*, slip op. ¶ 11 (Pet-Ap. 105).

The court of appeals erred, however, in granting a new trial on the ground the flawed jury instruction prevented the real controversy from being fully tried.

The court of appeals held the real controversy was not fully tried because the instruction may have led the jury "to bypass the central controversy in this case, namely, whether Anderson took Strattera pursuant to his doctor's advice and whether such prescribed consumption of Strattera caused Anderson to have a qualifying mental defect, as advanced by Anderson's expert witness." *Anderson*, slip op. ¶ 37 (Pet-Ap. 115-16).

The court of appeals erred in conceptualizing the real controversy as whether Anderson took Strattera as prescribed and whether it caused him to have a mental defect for purposes of the insanity defense. The real controversy in this insanity phase trial was not simply whether Anderson had a qualifying mental defect based on taking the prescription drug Strattera. The real controversy was whether at the time of the crimes Anderson had a qualifying mental defect and *as a result of that mental defect he lacked substantial capacity to conform his conduct to the requirements of law.* Wis. Stat. § 971.15(1).

Anderson was not entitled to be found not guilty by reason of insanity unless he proved both components of the insanity defense: a mental defect *and* resulting lack of substantial capacity to conform his conduct to the requirements of law. The real controversy in Anderson's insanity phase trial was whether the legal defense - which consists of both components - had been proven. As a matter of law, the court of appeals erred by mischaracterizing the real controversy in this case.

The court of appeals erred in granting a new trial in the interest of justice on the ground the real controversy

was not fully tried, even though it recognized that it was highly unlikely the jury that heard the case, or any other jury, would have concluded that Anderson lacked substantial capacity to conform his conduct to the requirements of law, as required by the insanity defense. In essence, the court of appeals recognized that the erroneous jury instruction was harmless error, but then wrongly concluded that somehow the interest of justice mandated a new trial anyway.

It is fundamentally wrong for the court of appeals to conclude that it is in the interest of justice to reverse Anderson's criminal convictions and grant him a new insanity phase trial even though "[i]t seems highly unlikely that this jury or a new jury would accept the expert's assumption about what occurred just before Anderson killed his ex-girlfriend and attempted to kill the new boyfriend" and the expert's resultant opinion on Anderson's inability to control his conduct. *Anderson*, slip op. ¶ 42 n.5 (Pet-Ap. 118).

The court of appeals believed that it must ignore the harmlessness of the instruction because a court can grant a new trial in the interest of justice on the ground the real controversy was not fully tried without finding that a different result would probably occur on retrial. *Anderson*, slip op. ¶¶ 12, 16 n.3, 43 (Pet-Ap. 106, 108, 118).

The court of appeals is wrong. The fact that the court can grant a new trial on the ground the real controversy was not fully tried without finding a different result would probably occur on retrial does not mean the court can grant a new trial on the ground the real controversy was not fully tried where the error was harmless beyond a reasonable doubt. If the error was harmless because it is clear beyond a reasonable doubt that the jury would have found Anderson did not prove his insanity defense, it cannot be said that justice requires a new insanity trial.

The State anticipates that Anderson may argue that it is obvious that the real controversy of whether Anderson lacked substantial capacity to conform his conduct to the requirements of law was not fully tried because the jury never answered that question, and thus it was not tried at all. Although superficially appealing, that argument should not prevail. Here, the record is fully developed. The jury was presented with all of the evidence and arguments regarding whether Anderson lacked substantial capacity to conform his conduct to the requirements of the law. Anderson had the burden of proving his insanity defense to the jury by the greater weight of the credible evidence. The record is sufficient to allow this court to conclude Anderson is not entitled to another opportunity to try to prove that he should not be held accountable for the homicide and attempted homicide he admittedly committed.

Where the real controversy was not fully tried, the party requesting a new trial cannot be expected to show that a new trial would probably yield a different result. Nor can the party seeking to uphold the judgment show that the unpreserved error was harmless. Rather, where the real controversy was not fully tried, a new trial is warranted because an error occurred that was so pervasive, that so colored and potentially impacted the entire case, or that so misdirected the entire trial that it is impossible to determine how the trial strategy and evidence would have been different but for the error, or how that would have affected the outcome of the trial. *See First Nat'l Bank & Trust Co. of Racine v. Notte*, 97 Wis. 2d 207, 225, 293 N.W.2d 530 (1980).

In Anderson's case, however, it is not impossible to determine how the error affected the outcome of the trial. The record reveals that the unpreserved instructional error did not contribute to the conviction because it is clear beyond a reasonable doubt that a rational jury would have rejected Anderson's insanity defense absent the error.

A reviewing court does not substitute its judgment for that of the jury when it determines that instructional error was harmless. *See Neder*, 527 U.S. at 18-19. A reviewing court does not substitute its judgment for that of the jury when it determines that the particular wording of an instruction given at trial did not prevent the real controversy from being fully tried.

The court of appeals' approach leads to a result that is contrary to the administration of justice. If Anderson had preserved his objection to the jury instruction by making a proper objection in the trial court, the State would have prevailed on appeal because the error was harmless. Under the court of appeals view, however, the fact that the error was harmless is totally irrelevant. The court of appeals' decision puts the State in a worse position than it would have been if Anderson had made an adequate objection below. Under the court of appeals' approach, a criminal defendant is better off not to object to an error at trial. This discourages criminal defendants from making proper contemporaneous objections at trial. This cannot be a proper use of the authority to grant a new trial in the interest of justice.

The State is aware of no prior case in which this court or the court of appeals has granted a new trial in the interest of justice on the ground an unpreserved error prevented the real controversy from being fully tried, while simultaneously recognizing that the record demonstrated the error was harmless.

As a matter of law, the court of appeals erred here by granting a new trial on the ground the unpreserved jury instruction error prevented the real controversy from being fully tried, even though the record clearly showed the error was harmless beyond a reasonable doubt.

The State asks this court to hold that the fact that the court does not need to find a reasonable probability of a different result at a new trial to grant a new trial in the interest of justice on the ground the real controversy was

not fully tried does not mean that a court can grant a new trial where the unpreserved error was harmless. This court should hold that where the forfeited instructional error was harmless, it cannot be said that the instruction prevented the real controversy from being fully tried.

This court and the court of appeals have the power of discretionary reversal to grant a new trial in the interest of justice in order to achieve justice in the individual case. Justice is not achieved in an individual case by granting a new trial based on unpreserved trial error that was harmless beyond a reasonable doubt.

For all of these reasons, the State respectfully asks this court to vacate the court of appeals' decision which reversed Anderson's convictions and granted him a new insanity phase trial in the interest of justice. The State respectfully asks this court to affirm Anderson's convictions of first-degree intentional homicide and attempted first-degree intentional homicide.

IV. THE COURT OF APPEALS ERRONEOUSLY EXERCISED ITS DISCRETION WHEN IT FAILED TO PROPERLY ANALYZE WHETHER THIS IS AN EXCEPTIONAL CASE THAT ENTITLED ANDERSON TO A NEW TRIAL IN THE INTEREST OF JUSTICE.

Although the court of appeals and this court both have the authority to grant a new trial in the interest of justice on the ground that an unpreserved trial error prevented the real controversy from being fully tried, that power is to be used judiciously and infrequently; it is a formidable power that should be exercised only in exceptional cases. *Vollmer*, 156 Wis. 2d at 11; *State v. Avery*, 2013 WI 13, ¶ 38, 345 Wis. 2d 407, 826 N.W.2d 60.

In *Avery*, this court held that the court of appeals erroneously exercised its discretion when it granted a new trial in the interest of justice on the ground the real controversy was not fully tried without undertaking any analysis to determine whether the case was an exceptional case that warranted this exceptional remedy. *Avery*, 345 Wis. 2d 407, ¶¶ 3, 55. Although the court of appeals need not use the magic word "exceptional" before granting a new trial in the interest of justice, the court of appeals "does have an obligation to analyze why a case is so exceptional to warrant a new trial in the interest of justice." *Id.* ¶ 55 n.19.

In the instant case, the court of appeals granted Anderson a new insanity phase trial in the interest of justice on the ground a forfeited objection to the jury instruction on mental defect prevented the real controversy from being fully tried. The court of appeals, however, did so without ever undertaking any analysis whatsoever as to why this case fell within that rare, exceptional and limited class of cases that warrants this extraordinary remedy. Indeed, the court of appeals decision never even mentioned the restriction that the authority to grant a new trial in the interest of justice is to be exercised only in exceptional cases.

The requirement that the discretionary reversal power is to be exercised infrequently, judiciously and only in exceptional cases is not just window dressing. It is a limitation on the court of appeals' authority to grant a new trial in the interest of justice. By wholly ignoring this requirement, the court of appeals misused its authority and erroneously exercised its discretion by granting Anderson a new trial in the interest of justice.

This court should hold that the court of appeals erroneously exercised its discretion by granting Anderson a new insanity phase trial without undertaking the requisite analysis to determine that this was an exceptional case warranting an exceptional remedy. Moreover, this case is not an exceptional case warranting an exceptional

remedy. For all of the reasons set forth in the prior sections of this brief, this court should decline to exercise its own authority to grant Anderson a new insanity phase trial.

CONCLUSION

Based on the record and the legal authorities and arguments presented herein, the State asks this court to reverse the order of the court of appeals, and to reinstate and affirm the judgment of conviction entered and sentences imposed below.

Dated this 12th day of February, 2014.

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 10,032 words.

Dated this 12th day of February, 2014.

_____
SALLY L. WELLMAN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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 12th day of February, 2014.

_____
SALLY L. WELLMAN
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