STATE OF WISCONSIN

SUPREME COURT

Case No. 2011AP001467-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, District 4, Entered on August 15, 2013, Granting a Discretionary Reversal of the Judgment of Conviction and Remanding for a New Trial Under Wis. Stat. § 752.35

BRIEF OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Whether the circuit court erred in instructing the jury that "[a] temporary mental state which is brought into existence by the voluntary taking of drugs or alcohol does not constitute a mental defect," for purposes of the mental responsibility defense under Wis. Stat. § 971.15, because the trial evidence supported reasonable factual findings that Anderson had a mental defect which arose primarily from his lawful use of prescribed medicine, together with his lawful consumption of a moderate amount of alcohol and other secondary factors?

The court of appeals concluded that Anderson's claims of jury instruction error had been forfeited in the circuit court.

2. If the jury instruction was error, then was it harmless?

The court of appeals concluded that ostensible credibility issues relating to the testimony of Anderson's expert witness were matters for the jury to resolve, not the court.

3. Whether the court of appeals erroneously exercised its discretion in granting a new trial in the interests of justice, under Wis. Stat. § 752.35, because the jury instruction was materially misleading with respect to the critical effect of Anderson's lawful use of prescribed medicine or alcohol upon the availability of the mental responsibility defense?

The court of appeals explained why it granted a new trial in the interests of justice, but it did not purport to review its own exercise of discretion.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Defendant-Appellant Donyil Leeiton Anderson, Sr., requests oral argument because this brief raises a novel issue of Wisconsin law which is of statewide importance, and is capable of recurring, concerning the availability of the mental responsibility defense, Wis. Stat. § 971.15, when it is asserted that a mental defect arose primarily from the lawful use of prescribed medicine, together with the moderate consumption of alcohol and other factors.

Publication of the Supreme Court's decision is warranted for the same reasons.

STATEMENT OF THE CASE

Defendant-Appellant Donyil Leeiton Anderson, Sr., respectfully exercises his privilege, as the respondent, not to provide a statement of the case. Wis. Stat. Rule § 809.19(3)(a)2.

SUMMARY OF THE FACTS[1]

At the trial, evidence was presented in support of the following facts.

On June 9, 2008, Donyil Anderson was a 34-year-old graduate of Beloit High School and an unmarried father of two children, who was employed at the Hormel Foods plant. (74:Exhibit 34:5-6; Exhibit 36:3-4). Anderson went to the

[1] Some of the documentary trial exhibits are not paginated. Anderson's citations to those documents follow the simple protocol of attaching page numbers such that the first page is 1, the second page is 2, etc.

Crossroads Counseling Center ("Crossroads") in Janesville on that day for the purpose of obtaining medical services to address problems with his mental concentration, including possible attention deficit hyperactivity disorder ("ADHD"), which problems were affecting him at home and at work. (*id.*). During the intake process, Crossroads was informed that Anderson had previously attempted suicide in 1999. (74:Exhibit 34:7; Exhibit 36:5).

Two days later, Crossroads administered a psychological test to Anderson, and the psychologist's findings were consistent with attention deficit disorder ("ADD"). (74: Exhibit 36:7-18).

On June 25, 2008, Crossroads physician Dr. Marek Hann, M.D., issued a prescription to Anderson for a medicine known as Strattera. (74:Exhibit 34:11; Exhibit 36:19, 22; 92:28, 54). The dosage was intended to begin at 18 milligrams, and then to increase to 36 milligrams, to 50 milligrams, and to 80 milligrams (*id.*),[2] and the medicine was prescribed to be taken once per day. (92:56). Dr. Hann also gave Anderson a 30-day sample package of Strattera at that time. (74:Exhibit 37; 92:66).

Anderson's patient records at Crossroads display a blank line where Dr. Hann was supposed to acknowledge that he had warned Anderson about the possible side effects of the Strattera medicine on June 25, 2008. (74:Exhibit 34:11;

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[2] The written prescription dated June 25, 2008, actually shows a dosage of 80 milligrams. (74:Exhibit 36:19; Exhibit 37).

Dr. Hann was unable to testify as a defense witness at the trial by virtue of his own hospitalization, and the parties stipulated that the Crossroads medical records could be admitted through the testimony of Crossroads' contractual psychologist, Mr. Michael Kaye, Ph.D. (92:6-8, 17-18).

Exhibit 36:22). The records do not contain any specific information about the potential side effects of Strattera.

On July 9, 2008, approximately two weeks after Anderson began using the Strattera medicine, he battered his live-in girlfriend, Stacey Hosey ("Stacey"), for the first time. (92:80). Stacey told the police that she had been arguing with Anderson when he began to strike her with an open hand. (22:2; 74:Exhibit 40:2).

Anderson and Stacey had previously lived together as an unmarried couple for almost five years with their infant son, "DJ," and Stacey's daughter by another father, Skylar. (92:78). Anderson and Stacey had been engaged to be married in the fall of 2007, but they separated after Stacey began dating other men, including Brandon Beavers-Jackson ("Brandon"). (22:2; 74:Exhibit 40:2; 92:79). Anderson and Stacey later reconciled for several months until the battery incident on July 9, 2008, after which Anderson moved out of their home in Beloit and went to stay at the residence of a friend. (22:2; 74:Exhibit 40:2; 89:23-24; 92:79-80, 115-17). The friend observed that Anderson took his medicine once per day, three times per week. (92:117-18).

Anderson's second appointment with Dr. Hann occurred on July 23, 2008, and the dosage of the prescribed Strattera medicine was increased to 100 milligrams at that time. (74:Exhibit 34:5; Exhibit 36:3, 19; Exhibit 37; 92:30-31; 92:38-39). Anderson's prescription had recently been filled on July 19, 2008, at a dosage of 80 milligrams. (74:Exhibit 35:2; 92:51, 53). Anderson was not scheduled to return to Crossroads again until October, 2008, three months later. (74:Exhibit 34:5; Exhibit 36:3; 92:39-40).

ShopKo pharmacy records associated with the filling of Anderson's prescription on July 19, 2008, warned that "[t]his medicine may increase the risk of suicidal thoughts or actions in children and teenagers" with ADHD. (74:Exhibit 35:4). The records also cautioned that such risks may affect adults, especially persons who have a history of suicidal thoughts or actions. (74:Exhibit 35:5). The pharmacy records advised Anderson to "contact your doctor immediately" if you experience "mental or mood changes" or "new and worsening behavior changes (eg, aggression, hostility, restlessness)." (*id*.).

On August 7th and the morning of August 8, 2008, Anderson and Stacey engaged in a series of telephone calls and text messages with each other. (74:Exhibit 31; Exhibit 32; 90:67-68, 76-77). Anderson's text messages to Stacey reflected aggressiveness and hostility, including a statement that "Im with someone and I don't need ur shit" [*sic*], and statements advising her that Anderson had been having sexual relations with other women and that he hadn't touched Stacey for two months because she was "a dead fuck" [*sic*]. (74:Exhibit 32; 90:80-86). One of Stacey's text messages to Anderson responded that "throwing another female in my face is whateva, just makes me feel better about branden." [*sic*] (id.).

On August, 9, 2008, at approximately 2:15 a.m., Anderson was placed under arrest by a Janesville police officer for alleged battery as the result of a punching incident at a tavern. (93:38-40). Anderson was transported to the police station for booking, and he told the officer that he had a right to defend himself and that he had done nothing wrong. (93:40-41). Anderson was released from custody at approximately 3:00 a.m. with a summons because he

presented himself as coherent and alert and he did not appear to be under the influence of intoxicants. (93:42-43).

During that night, Stacey's next-door neighbor was awakened by a very loud noise of banging on wood, which stopped and re-started again. (89:46-49). The neighbor saw Anderson, whom she recognized as Stacey's former boyfriend, walk down the steps from the front porch and go to the back porch where he kicked in the door. (89:49-51, 58). Stacey's neighbor called "9-1-1." (89:51). She then heard Stacey say "get out, get out," followed by screaming, after which Stacey said "I love you" and Anderson said "you lying bitch." (89:52). When the police arrived at the scene, the neighbor found Stacey sitting in the driveway, bleeding, and Stacey stated that Anderson had done this to her. (89:54-58). The neighbor had never seen Anderson act violently before. (89:59).

At approximately 3:00 a.m., a police officer arrived at the scene and he was initially stopped in the street by Brandon, who was wearing only bloody undershorts and appeared to have suffered abdominal stab wounds. (89:23-25, 43-45). The officer called an ambulance and proceeded to Stacey's house, where he saw Stacey sitting in the driveway in a silky nightgown, covered in blood. (89:26-27, 45). The officer also saw Anderson lying facedown in the driveway and he shouted at Anderson, who then stood up holding a knife overhead. (89:27-30). Anderson refused to comply with the officer's orders to put down the knife, and Anderson stumbled toward the officer while repeatedly asking to be killed. (89:30-32). The officer eventually subdued Anderson by employing an electrical shock device known as a Taser three separate times (89:32-36), after which Anderson was handcuffed. (89:40). The officer observed that both of Anderson's wrists had been cut. (89:40, 43).

Brandon had previously dated Stacey for a few months during the fall of 2007, while she was still living with Anderson, and he resumed his relationship with her only a week before this incident. (89:78-80, 89-90). Brandon had arrived at Stacy's home at approximately 12:00 a.m. on August 9, 2008, and he fell asleep in Stacey's bed. (89:80-81, 91-92). He was awakened to the sounds of Stacey's screaming and a man's voice. (89:81, 92). Brandon went to investigate and it appeared to him that Anderson was striking and kicking at Stacey. (89:82, 92-93).

Brandon pushed Anderson and ran back into the bedroom, where he unsuccessfully tried to call "9-1-1" on his cellular telephone. (89:83, 93). Brandon heard Anderson say "I'm going to kill you," and Anderson began looking for Brandon. (89:84, 94-95, 98-99). To Brandon, Anderson seemed to be acting out of control. (89:95). Brandon then struck Anderson in the head with a glass candleholder, and Brandon was stabbed as the two men fought. (89:85, 96-97; 90:10). Brandon ran outside to look for help just as a police officer was arriving at the scene. (89:86).

After the police secured the area, a search of the premises revealed a horrific story. Outside, Brandon's parked automobile had broken windows on both sides, and a serrated knife and a large amount of spilled blood were visible in Stacey's driveway. (89:104-05, 108, 110-14, 132-35). Inside the house, broken kitchen knives and bloodstains were located almost everywhere, and even the couch showed signs that it had been slashed or stabbed with a knife. (89:115-32; 90:3-11, 16-25).

Stacey was transported to a hospital for medical treatment, but her life could not be saved. (90:50-51). An autopsy examination disclosed numerous "sharp force" or

edged-weapon injuries to Stacey's head and neck, legs, arms and hands, as well as several penetrating wounds to her chest which resulted in death. (90:49-61, 64-65).

Anderson was also transported to a hospital for medical treatment, and he gave two recorded statements to police detectives. (74:Exhibit 27, Exhibit 28, Exhibit 29, Exhibit 30; 90: 68-75).

In his first hospital statement, Anderson said that earlier on August 8, 2008, Stacey had invited him to come over to her house at a later time. (74:Exhibit 28:6). Anderson complied, and when he arrived he was surprised to find that Brandon was also present. (74:Exhibit 28:7). Anderson said that Stacey and Brandon taunted him at that time, whereupon he "just like snapped and like blacked out." (74:Exhibit 28:8-9). Anderson stated that "I didn't go over there to hurt nobody," but Stacey and Brandon "barely had any clothes on" and he didn't think that Brandon was the person that Stacey should have. (74:Exhibit 28:11-12). Anderson concluded that he loved Stacey, and he said "I'd rather have killed nobody, man." (74:Exhibit 28:17-18).

In his second hospital statement, Anderson repeated that "it wasn't my intention to go there and, to hurt nobody." (74:Exhibit 30:1). Anderson said that he was in a "jealous rage" when Stacey and Brandon taunted him, and he "just snapped." (74:Exhibit 30:2-3). According to Anderson, Stacey was "just ranting and raving and down on me." (74:Exhibit 30:6). Anderson stated that his actions with the knives happened "all so fucking fast," "just zoom, zoom, zoom," that he didn't even realize he was still holding a knife while he was punching Brandon. (74:4, 9-10). Anderson asserted that he had not been intoxicated from drinking beer

earlier that night, but that the Strattera medicine that he was taking "made me real edgy." (74:Exhibit 30:12, 17-18).

Dr. Hugh Johnston, M.D., conducted a psychiatric examination of Anderson, and he testified at the trial as an expert witness on behalf of the defense. (92:127-243). Dr. Johnston is a psychiatrist and an associate professor at the University of Wisconsin Hospitals and Clinics who has a sub-specialty in psychopharmacology, which is the study of psychiatric drugs. (74:Exhibit 39; 92:127-30).

By way of background information, Dr. Johnston said that he had found Anderson to be a "substantially average" person of "typical intelligence." (92:139). However, Anderson had had "at least two and probably more episodes of major depression" in his life which "plagued" him. (92:140, 187-89). Dr. Johnston also noted that Anderson had a "conflicted romantic relationship" with Stacey, and Dr. Johnston was informed that Anderson's previous suicide attempt corresponded to a failed romantic relationship with the mother of Anderson's first child when that woman had also begun dating other men. (74:Exhibit 40:2; 92:141-42, 173-74).

In Dr. Johnston's opinion, the Crossroads clinic had erroneously diagnosed Anderson's mental health issue as ADD, rather than depression. (92:142-44, 156). Dr. Johnston also criticized the Crossroads regimen of Strattera medicine as a "third line" course of treatment to be adopted only after safer alternatives had been exhausted. (92:145-46, 156). Dr. Johnston explained that relevant scientific studies showed "in a small but regularly occurring percentage of people who take Strattera, what emerges is a propensity toward intense emotionality, a propensity. And then part of that intense emotionality is also a loss of impulse control. And in a

smaller percentage, it's been associated with homicidal behavior and actual homicide, and to a larger extent, suicidal behavior and suicide." (74:Exhibit 40:8; 92:152).

Applying these considerations to the known facts, Dr. Johnston concluded that Anderson had likely been able to appreciate the wrongfulness of his acts at the time of the incident with Stacey and Brandon on August 9, 2008. (74:Exhibit 40:6; 92:160-61).

However, in Dr. Johnston's opinion, Anderson was unable to conform his conduct to the requirements of the law as "a direct result of a mental disease or defect caused by a combination of factors." (74:Exhibit 40:6; 92:161). Those factors were: first, that "Anderson's ability to exert self-control in emotionally provocative settings has been mildly impaired throughout his adult life"; second, that Anderson "was suffering from his second episode of major depressive disorder which was not appropriately treated"; third, that Anderson's self-control was additionally impaired by the impact of Strattera on his brain functioning"; and fourth, these factors "were all further compounded by his ingestion of alcohol." (74:Exhibit 40:6; 92:161-62).[3]

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[3] Anderson told the detectives that he only drank "a few beers" at the tavern in Janesville because he had to go to work that morning. (74:Exhibit 30:12-13). Anderson's hospital records were not received into evidence, but toxicology tests of Anderson's blood specimens were reported to show a blood alcohol concentration of 0.0176% (92:220) and 0.15%. (93:25). The evidentiary record does not explain this discrepancy.

A toxicologist testified that Anderson's blood specimen was "negative" for the presence of Strattera, by which he meant that it was less than the limit of his ability to detect that medication, namely 10 nanograms per milliliter. (93:23-28). He conceded that a blood specimen that had been taken at an earlier time might produce a different result, however. (93:27).

Dr. Johnston emphasized that Anderson had a "profound mental defect" by virtue of changes in his brain which had lasted longer in time than the homicidal acts, themselves. (74:Exhibit 40:6-7; 92:162-64, 217).[4] Dr. Johnston further opined that the Strattera medicine played "a very important role" in those brain changes, and that it was "highly unlikely" that Stacey would have been killed if the Strattera medicine had not been involved. (92:165-66).

Mr. Christopher Tyre, Ph.D., is a psychologist in private practice who works for the state Department of Corrections, and he testified as an expert witness on behalf of the prosecution. (93:44-101). Mr. Tyre's evaluation was based largely upon his review of written records and a "clinical interview" of Anderson at the jail. (74:Exhibit 49:1-2; 93:51-63).

Mr. Tyre concluded that Anderson had been able to appreciate the wrongfulness of his behavior and to conform his conduct to the requirements of the law. (74:Exhibit 49:5; 93:67). Mr. Tyre reported that he had consulted with a psychiatrist and a pharmacist about Strattera medicine, specifically, and he "could find no information" suggesting that Anderson's use of Strattera had rendered him unable to

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Dr. Johnston testified that the "duration of action" of a drug, or its clinical effect on a person, is a different concept than the physical presence of the drug in the blood stream. (92:166). He explained that he "would expect that at the time it became possible to draw blood and measure Strattera blood levels in [Anderson's] body, that they would be zero or very close to it. But it's important to understand that that does not mean the drug effect would be absent. . . ." (92:167).

[4] Hospital records that Dr. Johnston had reviewed indicated that Anderson had been "combative" at the first hospital he was taken to, and that several police officers were required to physically control him. (74:Exhibit 40:4).

conform his behavior to the requirements of the law. (74:Exhibit 49:4-5; 93:71, 74, 80-82, 85-88).

Mr. Tyre conceded, however, that his conversations with the psychiatrist and the pharmacist had not been "about what the potential side effects of Strattera were." (93:87). He also said that he understands Wisconsin law to dictate that "voluntary intoxication, which can include a psychiatric medication, does not qualify as a mental disease or defect." (93:95, 99).

Such additional facts as may be relevant to this appeal will be set forth, and cited to the trial court record, in the Argument below.

ARGUMENT

I. The Circuit Court Erred in Instructing the Jury that "[a] Temporary Mental State Which Is Brought Into Existence by the Voluntary Taking of Drugs or Alcohol Does Not Constitute a Mental Defect," for Purposes of the Mental Responsibility Defense Under Wis. Stat. § 971.15, Because the Trial Evidence Supported Reasonable Factual Findings that Anderson Had a Mental Defect Which Arose Primarily from His Lawful Use of Prescribed Medicine, Together with His Lawful Consumption of a Moderate Amount of Alcohol and Other Secondary Factors.

A. The relevant statute, the applicable general principles of law and the standards of appellate review.

Wisconsin Statute § 971.15 provides[5] as follows:

> **971.15 Mental responsibility of defendant. (1)** A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect the person lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of law.
>
> **(2)** As used in this chapter, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

[5] All statutory citations refer to the 2009-2010 edition unless noted differently.

> **(3)** Mental disease or defect excluding responsibility is an affirmative defense which the defendant must establish to a reasonable certainty by the greater weight of the credible evidence.

The correct interpretation and application of a statute such as Wis. Stat. § 971.15 is a question of law, which is reviewed independently on appeal. ***State v. Duychak***, 133 Wis. 2d 307, 316, 395 N.W.2d 795 (Ct. App. 1986).

The term "mental disease or defect" is not defined in Wis. Stat. § 971.15 or in the American Law Institute's *Model Penal Code* provision from which Section 971.15 was adopted. ***Sprague v. State***, 52 Wis. 2d 89, 100, 187 N.W.2d 784 (1971); ***Wis. J.I. – Criminal: No. 605***, Comment 6. Instead, only a negative exception to the term is given: "the terms 'mental disease or defect' [*sic*] does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct." Wis. Stat. § 971.15(2); ***Simpson v. State***, 62 Wis. 2d 605, 612, 215 N.W.2d 435 (1974).

Consequently, the Jury Instructions Committee created a definition that is "intentionally broad." ***Wis. J.I. – Criminal: No. 605***, Comment 6. The basic definition, without any of the additional optional statements, reads as follows:

> Mental disease or defect is an abnormal condition of the mind which substantially affects mental or emotional processes.
>
> The term "mental disease or 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 disease or defect to which the witnesses may have referred.

> You should not find that a person is suffering from a mental disease or defect merely because the person committed a criminal act, or because of the unnaturalness or enormity of the act, or because a motive for the act may be lacking.

Wis. J.I. – Criminal: No. 605, at 2.

Historically, the supreme court has previously stated that the question is "not a definition of mental illness or medical insanity." ***State v. Esser***, 16 Wis. 2d 567, 586, 115 N.W.2d 505 (1962). Accord, ***State v. Werlein***, 136 Wis. 2d 445, 453-54, 401 N.W.2d 848 (Ct. App. 1987). Cf. also ***Simecek v. State***, 243 Wis. 439, 447, 10 N.W.2d 161 (1943) ("One may be medically insane and yet be criminally responsible for his acts.").

Instead, the matter is a "policy question," ***Gibson v. State***, 55 Wis. 2d 110, 116, 197 N.W.2d 813 (1972), or a "moral issue," ***Brook v. State***, 21 Wis. 2d 32, 47, 123 N.W.2d 535 (1963), as to whether "society cannot, in good conscience, hold [the accused] responsible for the conduct as a crime." ***State v. Shoffner***, 31 Wis. 2d 413, 419, 143 N.W.2d 458 (1966); ***State v. Esser***, *supra*, at 585.

Thus, even a mental condition which may be medically considered to be physical in origin, rather than mental, can be legally classified as a "mental disease or defect" for purposes of determining criminal responsibility if it "affects the mental processes of the person afflicted." ***Sprague v. State***, 52 Wis. 2d 89, 100, 187 N.W.2d 784 (1971) (psycho-motor epilepsy).

Further, the supreme court has said that the jury will be best able to perform its function in dealing with this perplexing question if it is given all of the available information, "even if such information does not fit nicely into

the definition which the law has codified." ***State v. Esser***, *supra*, at 593. Conflicts between medical disorders and legal requirements are to be reconciled by the citizens selected for jury duty, ***State v. Werlein***, 136 Wis. 2d 445, 454, 401 N.W.2d 848 (Ct. App. 1987), and juries should have "some latitude" in doing so. ***Brook v. State***, 21 Wis. 2d 32, 47, 123 N.W.2d 535 (1963).

In general, the circuit court is granted wide discretion to instruct the jury based on the facts of a case. ***State v. Ferguson***, 2009 WI 50, ¶ 9, 317 Wis. 2d 586, 598, 767 N.W.2d 187; ***State v. Hubbard***, 2008 WI 92, ¶¶ 22, 29, 313 Wis. 2d 1, 12, 14-15, 752 N.W.2d 839.

The court must exercise its discretion so as to fully and fairly inform the jury of the applicable rules of law. ***State v. Ferguson***, 2009 WI 50, ¶ 9, 317 Wis. 2d 586, 598, 767 N.W.2d 187; ***State v. Hubbard***, 2008 WI 92, ¶ 26, 313 Wis. 2d 1, 13, 752 N.W.2d 839. Proper jury instruction is a crucial component of the fact-finding process. ***State v. Perkins***, 2001 WI 46, ¶ 40, 243 Wis. 2d 141, 164, 626 N.W.2d 762; ***State v. Howard***, 211 Wis. 2d 269, 290, 564 N.W.2d 763 (1997). The validity of the jury's verdict depends on the correctness and completeness of the instructions. ***State v. Fonte***, 2005 WI 77, ¶ 15, 281 Wis. 2d 654, 666, 698 N.W.2d 594; ***State v. Perkins***, *supra*.

A court errs if it gives an instruction that is not an accurate statement of the applicable law, ***State v. Ferguson***, 2009 WI 50, ¶ 9, 317 Wis. 2d 586, 598, 767 N.W.2d 187, or if it fails to give an instruction on an issue that is properly raised by the evidence. ***State v. Head***, 2002 WI 99, ¶ 44, 255 Wis. 2d 194, 219, 648 N.W.2d 413.

An instructional error is prejudicial unless it is clear beyond a reasonable doubt that a rational jury would have

found the defendant guilty absent the error. ***State v. Harvey***, 2002 WI 93, ¶ 46, 254 Wis. 2d 442, 465-66, 647 N.W.2d 189.

On appeal, the question whether the jury instructions fully and correctly informed the jury of the applicable law, including the meaning of any statutory terms, is a question of law that is reviewed independently. ***State v. Ferguson***, 2009 WI 50, ¶ 9, 317 Wis. 2d 586, 598, 767 N.W.2d 187; ***State v. Hubbard***, 2008 WI 92, ¶ 22, 313 Wis. 2d 1, 12, 752 N.W.2d 839; ***State v. Lesik***, 2010 WI App 12, ¶ 6, 322 Wis. 2d 753, 759-60, 780 N.W.2d 210. The question whether there are sufficient facts in evidence to allow the giving of a jury instruction is reviewed independently. ***State v. Head***, 2002 WI 99, ¶ 44, 255 Wis. 2d 194, 219, 648 N.W.2d 413; ***State v. Gomaz***, 141 Wis. 2d 302, 307, 414 N.W.2d 626 (1987). The question whether a jury instruction error is prejudicial and requires a new trial is also reviewed independently. ***State v. Ferguson***, 2009 WI 50, ¶ 9, 317 Wis. 2d 586, 598, 767 N.W.2d 187.

The reviewing court may affirm the lower court's decision on alternative grounds than were presented to, or relied upon, by that court. E.g., ***State v. Scheidell***, 227 Wis. 2d 285, n.14 at 311, 595 N.W.2d 661 (1999).

B. The jury instruction was erroneous because it failed to distinguish between Anderson's lawful use of prescribed medicine and the use of illegal drugs.

At the threshold, it appears that the trial evidence in this case could potentially be debated as an issue of "intoxication" by the use of prescribed medicine.[6] *Cf.* Robinson, ***Criminal Law Defenses***, § 176(d) (West Publishing Co., 1984) ("Intoxication may be defined broadly as 'a disturbance of mental or physical capacities resulting from introduction of substances into the body.' It is not limited to instances of alcohol ingestion. The substances may range from alcohol or narcotics to prescribed medicine."); ***Loveday v. State***, 74 Wis. 2d 503, 509, 247 N.W.2d 116 (1976) (". . .the defense of intoxication is equated with the defense of drugged condition.").

However, the question presented in this case actually relates to the unable-to-conform-conduct prong of the "mental responsibility" defense under Wis. Stat. § 971.15, rather than the "intoxication" defense under Wis. Stat. § 939.42. The two defenses share certain legal similarities and might, sometimes, be proven by similar facts, but the defenses are not co-terminous. ***People v. Garcia***, 113 P. 3d 775, 777, 782-

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[6] Wis. Stat. § 939.42 provides as follows:

"**939.42 Intoxication.** An intoxicated or a drugged condition of the actor is a defense only if such condition:

(1) Is involuntarily produced and renders the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time that the act is committed; or

(2) Negatives the existence of a state of mind essential to the crime, except as provided in s. 939.24(3)."

83 (Colo. Sup. Ct. 2005); ***Barrett v. State***, 2 So. 3d 370, 371 (Fla. Ct. App. 2008).

Anderson contends that the circuit court's decision to incorporate the optional statement from ***Wis. J.I. – Criminal: No. 605***, "[a] temporary mental state which is brought into existence by the voluntary taking of drugs or alcohol does not constitute a mental defect" (49:14; 93:139), was fundamentally erroneous under the particular facts at bar.

This is so notwithstanding the fact that a jury instruction which utilized similar language has previously been affirmed as "not erroneous" in a case that presented different circumstances. ***State v. Kolisnitschenko***, 84 Wis. 2d 492, 495, 503, 267 N.W.2d 321 (1978) (the instruction provided, in relevant part, that "[a] mental disease which is the product of a voluntarily induced state of intoxication by drugs or alcohol or both does not constitute a mental disease which is recognized as a defense by the law."). See also ***Gibson v. State***, 55 Wis. 2d 110, 116, 197 N.W.2d 813 (1972) ("We do not consider that a voluntarily drugged condition is a form or insanity which under the American Law Institute test of insanity can constitute a mental defect or disease.").

There are two reasons why the optional jury instruction was erroneous in this case.

First, the supreme court's prior decision in ***Kolisnitschenko*** did not establish a bright-line rule to be applied in every case involving some use of any drugs by the accused. Instead, the court expressed its approval of a legal course that did not "adopt [a] broad rule applicable to all cases," but instead favors a "case-by-case" determination. ***State v. Kolisnitschenko***, 84 Wis. 2d 492, 500, 267 N.W.2d 321 (1978). The high court further announced that its ultimate ruling rested on "the facts of this case." ***Id***., at 503.

This interpretation of Wisconsin mental responsibility law has been approved at least twice, thereafter. ***State v. Repp***, 122 Wis. 2d 246, 260, 362 N.W.2d 415 (1985) ("the court found that under the circumstances of *Kolisnitschenko*, ..."); ***State v. Werlein***, 136 Wis. 2d 445, 453, 401 N.W.2d 848 (Ct. App. 1987) ("In enacting sec. 971.15, the legislature . . .permitted a case-by-case determination to be made as to whether a specific disorder rose to the level of a mental disease or defect.").

Second, the lawful use of prescribed medicine is qualitatively different than the use of illegal drugs. Compare ***City of Minneapolis v. Altimus***, 238 N.W.2d 851, 854, 856-58 (Minn. 1976) (accepting a mental responsibility defense founded on the lawful use of prescribed medicine Valium), and ***Sluyter v. State***, 941 So. 2d 1178, 1180-81 (Fla. Ct. App. 2006) (accepting a mental responsibility defense founded on the lawful use of prescribed medicine Halotestin), with ***State v. Kolisnitschenko***, 84 Wis. 2d 492, 494, 267 N.W.2d 321 (1973) (rejecting a mental responsibility defense founded on the use of illegal amphetamine tablets and marijuana), and ***Gibson v. State***, 55 Wis. 2d 110, 112, 197 N.W.2d 813 (1972) (rejecting a mental responsibility defense founded on the use of illegal amphetamine capsules).

One of the basic differences between prescribed medicine and illegal drugs is that the lawful use of prescribed medicine does not raise any moral objection which could tilt the good conscience of society against an individual. ***Brook v. State***, 21 Wis. 2d 32, 47, 123 N.W.2d 535 (1963) ("the insanity defense presents a moral issue to juries"); ***State v. Esser***, 16 Wis. 2d 567, 585, 115 N.W.2d 505 (1962) ("When a mentally ill person engages in offensive conduct made punishable by law, society is faced with the question whether

. . .[it] cannot, in good conscience, hold him responsible for the conduct as a crime, *i.e*. punish him.").

More importantly, the lawful use of prescribed medicine is simply not "voluntary" in the same sense as the use of illegal drugs. *See* ***State v. Gardner***, 230 Wis. 2d 32, 41, 601 N.W.2d 670 (Ct. App. 1999)(addressing the intoxication defense). When faced with a medical condition requiring drug treatment, the patient hardly has a choice but to follow the doctor's orders. ***Id.*** Indeed, intoxication or unfavorable side effects resulting from a patient's compliance with a physician's prescription should not be deemed voluntary even if the patient was aware of potential adverse side effects. ***Id.***

Therefore, the optional jury instruction language was erroneous because it told the jury that Anderson's lawful use of prescribed Strattera medicine was equivalent to "the voluntary taking of drugs," which could never constitute a mental defect.

C. The jury instruction was erroneous because it failed to distinguish between Anderson's lawful consumption of a moderate amount of alcohol and the illegal or excessive consumption of alcohol.

The jury instruction was also erroneous because a person's mere voluntary consumption of some alcohol, even in conjunction with the use of prescribed medicine, is not necessarily morally blameworthy. After all, it is not unlawful for a person who is 21 years or more of age to consume a moderate amount of alcoholic beverages. Wis. Stat. § 125.02(8m), (20m).

Instead, only illegal or excessive drinking should result in the unavailability of an otherwise-meritorious mental

responsibility defense. See ***State v. Kolisnitschenko***, 84 Wis. 2d 492, 494, 498-99 at n. 4, 267 N.W.2d 321 (1978) (Kolisnitschenko had consumed beer, Champale and 10 mixed drinks in addition to illegal drugs); ***Loveday v. State***, 74 Wis. 2d 503, 506, 247 N.W.2d 116 (1976) (Loveday told that police that he had consumed a large amount of beer and wine in addition to illegal drugs).

For example, if a person voluntarily drank only a small amount of wine during religious communion ceremonies at his or her church and then committed a criminal act pursuant to a pre-existing mental disease or defect, our society could not justifiably say in good conscience that the mental responsibility defense should not be available to that person.

In this case, one reasonable (but disputed) interpretation of the trial evidence was that Anderson had drunk only "a few" beers (74:Exhibit 30:12-13), and did not appear to be under the influence of intoxicants to an experienced police officer shortly before the fatal episode. (93:42-43). Consistent with that view of the evidence, Anderson's blood alcohol concentration was reported to have been only 0.0176% (92:220), or the result of slightly more than one standard alcoholic beverage. Cf. ***State v. Hinz***, 121 Wis. 2d 282, 284-85 at n.2, 360 N.W.2d 56 (Ct. App. 1984)(addressing the state department of transportation's training chart for breath examiner specialists).

Under this factual view, Anderson's voluntary consumption of some alcohol contributed, in part, to his mental defect, as Dr. Johnston concluded (74:Exhibit 40:6; 92:161-62), but the moderate amount that Anderson consumed could not reasonably be described as immoral or excessive.

Therefore, the optional jury instruction language that "the voluntary taking of. . .alcohol does not constitute a mental defect" was erroneous because it told the jury that Anderson's lawful use of any alcohol, at all, was sufficient to defeat his mental responsibility defense.

Further, even if a person's voluntary use of alcohol in combination with prescribed medicine might produce enhanced after-effects, as compared against either of the two substances alone, a moral objection is not reasonably raised in good conscience against the person's lack of mental responsibility unless he or she knew or had reason to know about such a synergistic effect. E.g., ***People v. Hari***, 843 N.E.2d 349, 359-60 (Ill. Sup. Ct. 2006).

In this case, Anderson's patient records at the Crossroads Counseling Center support a reasonable inference that Dr. Hann had not warned him about any potential side effects of the Strattera medication, either alone or in combination with alcohol. (74:Exhibit 34:11; Exhibit 36:22). The ShopKo pharmacy records that were associated with the filling of Anderson's prescription on July 19, 2008, cautioned only that the use of alcohol with Strattera medicine could increase possible aftereffects of "dizziness, drowsiness, lightheadedness or fainting." (74:Exhibit 35:5). [7]

Consequently, the jury had no rational basis in the evidence to find that Anderson's use of alcohol with Strattera

[7] The ShopKo pharmacy records were admitted pursuant to a stipulation between the parties that their contents were "true and accurate" (92:17), but there was no evidence that Anderson had been on actual notice about the warning of dizziness, drowsiness, lightheadedness or fainting.

medicine could intensify his emotions toward suicidal or homicidal acts, or that he knew of such a risk.[8]

Moreover, Anderson's statement to police detectives at the hospital that his Strattera medicine "made me real edgy" (74:Exhibit 30:12, 17-18) related only to the medicine, itself, and made no reference to alcohol. Such limited awareness about a prescription medicine's adverse side effects should not affect Anderson's legal defense. ***State v. Gardner***, 230 Wis. 2d 32, 41, 601 N.W.2d 670 (Ct. App. 1999)(addressing the intoxication defense).

Additionally, under one reasonable (but disputed) view of the trial evidence, the primary factor that contributed to Anderson's mental defect at the time of the incident was the prescribed Strattera medicine, not his voluntary ingestion of alcohol. Compare ***State v. Kolisnitschenko***, 84 Wis. 2d 492, 502, 267 N.W.2d 321 (1978) ("the evidence clearly demonstrates that intoxication [by use of illegal drugs and excessive alcohol] was a significant precipitating factor, thus distinguishing the situation from that. . .where the testimony was that intoxication was one possible precipitating factor among various possibilities."), with ***State v. Maik***, 287 A. 2d 715, 722 (N.J. Sup. Ct. 1972), *overruled in part on other grounds in* ***State v. Krol***, 344 A. 2d 305 (N.J. 1975), ***Sluyter v. State***, 941 So. 2d 1178, 1181 (Fla. Ct. App. 2006) ("because the drugs ingested here were prescription drugs prescribed by a physician and because Halotestin, not alcohol, caused the intoxication, Sluyter's intoxication must be considered involuntary."), and ***People v. Caulley***, 494 N.W.2d 853, 860 (Mich. Ct. App. 1992) ("it is for the

[8] The circuit court erroneously speculated that Anderson's voluntary consumption of alcohol "might exacerbate" the effects of the Strattera medicine. (93:123).

jury to decide, based upon the evidence. . . what effect, if any, the intoxication [by use of prescription medicine Halcion] had upon defendant's mental condition.").

Thus, Dr. Johnston testified that the Strattera medicine played "a very important role" in changing Anderson's brain, and that it was "highly unlikely" that Stacey would have been killed if the Strattera medicine had not been involved. (92:165-66). On the other hand, Dr. Johnston referred to Anderson's ingestion of alcohol as but one of three secondary factors in the result, together with Anderson's impaired "ability to exert self-control. . .throughout his adult life" and his "second episode of major depressive disorder which was not appropriately treated." (74:Exhibit 40:6; 92:161-62).

Finally, under one reasonable (but disputed) view of the trial evidence, Anderson's mental defect did not exist only during the immediate time period corresponding to his voluntary consumption of alcohol. Compare ***State v. Kolisnitschenko***, 84 Wis. 2d 492, 501, 503, 267 N.W.2d 321 (1978) ("Kolisnitschenko was psychotic only during the period of intoxication. There was no evidence that Kolisnitschenko's mental disease existed before consuming the intoxicants or persisted after the effects of the intoxicants had worn off. * * * Under these circumstances, 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.").

On the morning of August 8, 2008, more than 12 hours before Anderson drank a few beers at a tavern and then committed the criminal acts, his text messages to Stacey displayed a high degree of aggressiveness and hostility. One

message said that "Im with someone and I don't need ur shit [*sic*]," and other messages told her that he had been engaging in sexual intercourse with other women because Stacey was "a dead fuck." (74:Exhibit 32; 90:80-86).

Further, after the incident, Anderson was so combative at the first hospital he was transported to that several police officers were required to control him. (74:Exhibit 40:4).

In the end, the critical point is that a person's consumption of alcohol might, or might not, bear any moral relevance to the existence of a mental defect. Conceivably, alcohol could trigger or aggravate a pre-existing mental defect. Alternatively, the use of alcohol could be a result of the mental defect, such as the afflicted person's attempt to self-medicate the underlying problem. Finally, the use of alcohol could be entirely irrelevant to the mental defect, such as the hypothetical religious communion wine drinker described earlier.

As a matter of social conscience, therefore, it would be fundamentally unfair for the law to irrebuttably presume that any consumption of alcohol is necessarily immoral and controlling over a mental defect. The optional jury instruction was erroneous because it told the jury that one of the secondary factors that contributed to Anderson's mental defect, namely his lawful consumption of a moderate amount of alcohol, necessarily outweighed the major causal factor, the prescribed Strattera medicine.

D. Anderson's objection to the legal correctness of the jury instruction was preserved in the circuit court.

Anderson believes that his trial counsel adequately objected to the submission of the optional jury instruction

with respect to Anderson's use of prescribed medicine, even though counsel's oral comments were not as well-developed as Anderson's written arguments about that objection on appeal. Cf. ***State v. Weber***, 164 Wis. 2d 788, 789, 476 N.W.2d 867 (1991) (the legal issue under adjudication is narrower than the various arguments that may be made, pro and con, in the disposition of that issue).

However, even if Anderson's trial objection was not sufficient, then Anderson's appellate arguments were effectively preserved by agreement of the circuit court and the district attorney at the post-conviction motion hearing, when a full record of the jury instructions conference could not be retrospectively reconstructed.

At the outset of the jury instructions conference at trial, Judge Daley observed that he had prepared a packet of draft instructions for each of the attorneys in order to facilitate their discussion together. (93:108).

When the discussion turned to the jury instruction on the definition of mental responsibility, ***Wis. J.I. – Criminal: No. 605***, in particular, the prosecutor requested that "the two stock instructions of [*sic*] a voluntary induced state of intoxication by drugs or alcohol or both" be added to the proposed instruction. (93:116).

The trial court replied, "[y]ou noticed I took out struck [*sic*] on that." (93:116).

Anderson's counsel then stated as follows: "I think the Court's modification is accordance [*sic*] with the law, and the prime law on that basically is definitely talking about drugs, or medication, or I mean alcohol, and I believe it would be drugs in the context of street drugs. In the case that is cited, that's what they're talking about. Is that somebody went out

and got drunk and then he basically then got into, he then tried to say, well, I was psychotic because I went out and got drunk. It's not at all talking in a case like this where we're talking about medication that was prescribed. So I think the Court's modification is definitely accurate." (93:116-17).

Later, counsel repeated his objection: "It is my, I guess, reading of the law is that when they included that, that's what, when they said drug, that's what they meant. They didn't mean prescribed medications. . . .This is a totally different situation." (93:122).

Anderson respectfully believes that counsel's comments, although inelegantly framed, constituted a minimally adequate objection that Wisconsin law does not authorize a mental responsibility defense to be rejected merely by virtue of the accused's lawful use of prescribed medicine. No further argument was necessary. ***State v. Gomaz***, 141 Wis. 2d 302, 323, 414 N.W.2d 626 (1987)("If due regard is given to the purpose of sec. 805.13, it is apparent that the requisite degree of particularity cannot be interpreted to require that objections be accompanied by legal argument. . . .").

Ultimately, the trial court decided to submit one of the two requested optional statements to the final jury instruction. (93:124-28). However, the circuit court also expressly told Anderson's trial counsel that his objection was not waived. (93:128).

In short, the circuit court understood Anderson's basic position, in the firsthand context that the trial participants shared with each other. See ***State v. Neudorff***, 170 Wis. 2d 608, 616, 489 N.W.2d 689 (Ct. App. 1992) (the appellate courts "have in the past explained that they will not elevate form over substance when addressing waiver arguments. The

keystone of any waiver argument is whether a party has registered an objection with sufficient prominence such that the court understands what it is asked to rule upon.").

In any event, after the trial, Anderson filed post-conviction motions to supplement the record with the trial court's draft packet of jury instructions, alleging that it was necessary for a fair understanding of the parties' instruction requests and objections. (67; 69). In support, Anderson's motion cited ***State v. Perry***, 136 Wis. 2d 92, 100-02, 401 N.W.2d 748 (1987) (a new trial must be granted if a missing portion of the record cannot be accurately reconstructed). (*id*.).

At the post-conviction motion hearing, Judge Daley advised the parties that the packet of draft jury instructions was no longer in existence. (95:7-10). The court concluded that it was not possible to reconstruct the record of the jury instruction conference because he could not recall the specific language of his original draft instruction on mental responsibility. (95:25).

The prosecutor and the court further both agreed that the parties' requests for, and objections to, the jury instructions were preserved for the record. (95:17). For that reason, the district attorney concurred with the court that the only material issue now is "what did we instruct the jury and did it [*sic*] appropriately instruct them on the law." (95:21-25). The court approved the prosecutor's view, and Anderson's counsel accepted their understanding that a waiver of objection had not occurred in lieu of demanding a new trial under ***State v. Perry***. (95:24).

Therefore, the Attorney General's present claim of forfeiture is in conflict with the district attorney's action and the trial court's decision at the post-conviction hearing. The

facts were the same at both times and the district attorney successfully persuaded the trial court to adopt his position. Finally, the district attorney's action induced Anderson to rely on that understanding to his detriment.

Under these circumstances, the state should be estopped from raising a forfeiture issue by virtue of the prosecutor's own conduct, and the trial court's decision, at the post-conviction motion hearing. See ***State v. Petty***, 201 Wis. 2d 337, 347-48, 548 N.W.2d 817 (1996) ("The equitable doctrine of judicial estoppel, . . .precludes a party from asserting a position in a legal proceeding and then subsequently asserting an inconsistent position."); ***State v. Dziuba***, 148 Wis. 2d 108, 115, 435 N.W.2d 258 (1989) (the doctrine of equitable estoppel bars a claim which is inconsistent with the same party's previous action or inaction which had induced reliance by another to the other party's detriment).

E. The jury instruction was not a harmless error.

The state's argument that the jury instruction at issue represents a harmless error must be rejected for two different reasons.

First, the state's claim of harmless error, itself, was forfeited because it was never raised in the lower courts. Instead, the state argued in the circuit court, both at the trial and at the post-conviction hearing, that the jury instruction was legally correct. (93:108-28; 95). The state also argued in the court of appeals that Anderson had waived or forfeited his objection to the jury instruction and that the instruction was legally correct. (respondent's brief, generally).

Consequently, the state forfeited any claim of harmless error on review in the supreme court. See ***State ex rel.***

Thorson v. Schwarz, 2004 WI 96, ¶ 30 at n.5, 274 Wis. 2d 1, 12 at n.5, 681 N.W.2d 914; ***Neely v. State***, 97 Wis. 2d 38, 55, 292 N.W.2d 859 (1980); ***State v. Holt***, 128 Wis. 2d 110, 125, 382 N.W.2d 679 (Ct. App. 1985). Accord, ***Corley v. United States***, 556 U.S. 303, 129 S. Ct. 1558, 1570, 173 L. Ed. 2d 443 (2009)("The Government never raised this argument in the Third Circuit of the District Court, which would justify refusing to consider it here, ….").

Second, and more fundamentally, even if the state's forfeiture argument was not itself forfeited in the lower courts a harmless error cannot be found on appeal by judicial usurpation of the jury's role to determine the weight and credibility of the trial evidence.

It is settled Wisconsin law that the question of whether a defendant has met the burden of proving mental disease or defect, generally, is one of fact for the jury rather than one of law for the court. ***State v. Leach***, 124 Wis. 2d 648, 660, 370 N.W.2d 240 (1985), *cert. den*. 498 U.S. 972 (1990); ***State v. Sarinske***, 91 Wis. 2d 14, 48, 280 N.W.2d 725 (1979); ***Schultz v. State***, 87 Wis. 2d 167, 173, 274 N.W.2d 614 (1979).

In particular, it is the responsibility of the trier of fact to determine the weight and credibility of the expert testimony on the issue of insanity. ***State v. Sarinske***, supra; ***Schultz v. State***, supra; ***Beavers v. State***, 63 Wis. 2d 597, 609, 217 N.W.2d 307 (1974).

Here, the defense expert witness, Dr. Hugh Johnston, M.D., testified that in his opinion Anderson had had a mental defect which prevented him from conforming his behavior to the requirements of the law. (74:Exhibit 40:6-7; 92:161-64). Dr. Johnston is a UW Hospitals psychiatrist who has a sub-specialty in psychopharmacology, which is the study of psychiatric drugs. (74:Exhibit 39; 92:127-30). He believed that

it was "highly unlikely" that Anderson would have killed anyone but for the "very important role" that was played by Anderson's prescription medicine in causing changes in Anderson's brain. (74:Exhibit 40:6-7; 92:162-66).

The jury certainly could have accepted and believed Dr. Johnston's opinions, notwithstanding the court of appeals' own reservations about the weight and credibility of his testimony. Accordingly, the court of appeals properly recognized that "although we regard Anderson's mental defect as weak, it was for the jury, not this court, to make that call." *State v. Anderson*, slip opinion, at ¶ 43. Accord, ***Neder v. United States***, 527 U.S. 1, 19 (1999)("Of course, safeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error – for example, *where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding – it should not find the error harmless*.")(*emphasis added*); ***Kotteakos v. United States***, 328 U.S. 750, 763 (1946)("Thus, it is not the appellate court's function to determine guilt or innocence. [citations omitted.] Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out. * * * Those judgments are exclusively for the jury, . . .").

Finally, Anderson respectfully observes that the arguments of counsel in summation cannot render an erroneous jury instruction into a harmless error, in any event.

The arguments of the attorneys or other aspects of the trial cannot substitute for correct legal instructions by the court. ***Carter v. Kentucky***, 450 U.S. 288, 304 (1981); ***Taylor v. Kentucky***, 436 U.S. 478, 489 (1978); ***State v.***

Perkins, 2001 WI 46, ¶ 40, 243 Wis. 2d 141, 164, 626 N.W.2d 762. This is so because arguments by counsel are likely to be viewed as the statements of the advocates, whereas jury instructions are definitive and binding statements of law. ***Boyde v. California***, 494 U.S. 370, 384 (1990).

For all of these reasons, the jury instruction was prejudicially erroneous as a matter of law, and a new trial should be granted on the issue of mental responsibility. ***State v. Koput***, 142 Wis. 2d 370, 374, 398, 418 N.W.2d 894 (1988) (a reversible error in the mental responsibility phase of trial requires a retrial only on the responsibility issue).

II. The Court of Appeals Did Not Erroneously Exercise Its Discretion in Granting a New Trial Under Wis. Stat. § 752.35 Because the Jury Instruction Was Materially Misleading with Respect to the Critical Effect of Anderson's Lawful Use of Prescribed Medicine or Alcohol Upon the Availability of the Mental Responsibility Defense.

A. The applicable general principles of law, and the standard of review.

The court of appeals is vested with the same, broad discretion to grant a new trial in order to achieve justice in individual cases under Wis. Stat. § 752.35 that is possessed by the supreme court under Wis. Stat. § 751.06. ***Vollmer v. Luety***, 156 Wis. 2d 1, 19-21, 456 N.W.2d 797 (1990). The power of discretionary reversal may be exercised where it appears from the record that the real controversy has not been fully tried, or if it is probable that justice has miscarried for any reason. ***Id***. If the real controversy was not fully tried, then the court may grant a new trial without finding that a different result would probably occur on re-trial. ***Id.***

This authority should be invoked only in exceptional cases, and with great caution. ***State v. Avery***, 2013 WI 13, ¶ 38, 345 Wis. 2d 407, 432, 826 N.W.2d 60; ***Vollmer v. Luety***, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990). Yet, it is also recognized that the court of appeals' primary institutional function is to achieve justice in individual cases, and that the court of appeals is no less capable of doing so than the supreme court. ***State v. Betterley***, 191 Wis. 2d 406, 425, 529 N.W.2d 216 (1995); ***State v. McConnohie***, 113 Wis. 2d 362, 368, 371, 334 N.W.2d 903 (1983); ***Vollmer v. Luety***, supra, at 14.

The court of appeals' discretionary power is subject to the same deferential review as any other exercise of judicial discretion. ***State v. Avery***, 2013 WI 13, ¶23, 345 Wis. 2d 407, 423-24, 826 N.W.2d 60; ***State v. Betterley***, supra, at 425; ***State v. McConnohie***, supra, at 368. The court of appeals erroneously exercises its discretion when it applies the wrong legal standard or makes a decision not reasonably supported by the facts of record. ***State v. Avery***, supra; ***State v. McConnohie,*** supra, at 371.

B. The court of appeals' decision followed well established Wisconsin precedents.

In this case, the Attorney General makes a conclusory argument, almost as an afterthought, that the court of appeals failed to undertake "any analysis whatsoever" why the admittedly erroneous jury instruction was so exceptional as to warrant a discretionary reversal. (state's brief, at 32-34).

The state's claim is without merit.

Here, the court of appeals' opinion initially noted that Anderson entered ***Alford***-type pleas to the charged offenses at the conclusion of the "guilt" phase of the trial. *State v.*

Anderson, slip opinion, at ¶ 2. Thus, the critical question for the jury was whether Anderson was mentally responsible for his conduct.

Next, the court of appeals reasoned that Anderson's lawful use of prescription medicine is not the sort of "voluntary" use of drugs that should preclude a mental responsibility defense. *State v. Anderson*, slip opinion, at ¶¶ 18-19. The court also carefully considered that Anderson's consumption of some alcohol in conjunction with his prescription medicine would not necessarily defeat the mental responsibility defense, especially where the expert testimony described the alcohol as a minor factor. *State v. Anderson*, slip opinion, at ¶¶ 20-28.

Finally, the court of appeals considered that the challenged jury instruction "effectively told the jury that it did not need to concern itself" with Anderson's mental responsibility defense, at all. *State v. Anderson*, slip opinion, at ¶ 43.

Although the court of appeals did not cite any supporting precedents, this is exactly the type of situation in which Wisconsin courts have previously held that discretionary reversals were warranted because the jury instructions obfuscated the real controversy. E.g., ***Barry v. Employers Mutual Casualty Co.***, 2001 WI 101, ¶ 38, 245 Wis. 2d 560, 578, 630 N.W.2d 517; ***State v. Perkins***, 2001 WI 46, ¶¶ 43-46, 49, 243 Wis. 2d 141, 165-67, 626 N.W.2d 762; ***State v. Peters***, 2002 WI App 243, ¶¶ 18-20, 258 Wis. 2d 148, 158-60, 653 N.W.2d 300; ***State v. Ambuehl***, 145 Wis. 2d 343, 373-74, 425 N.W.2d 649 (Ct. App. 1988).

For these reasons, the court of appeals did not abuse its discretion in granting a new trial in the interests of justice.

CONCLUSION

For the reasons set forth above, Anderson requests the Supreme Court to enter an order vacating the judgment of conviction and remanding to the trial court for a new trial on the issue of mental responsibility.

Dated this 27th day of February, 2014.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 9,109 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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

Dated this 27th day of February, 2014.

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