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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

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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TABLE OF CONTENTS

Page

ARGUMENT 1

I. ANDERSON WAS NOT ENTITLED TO AN INSTRUCTION THAT WOULD HAVE ALLOWED THE JURY TO FIND HE HAD A MENTAL DEFECT THAT WAS BROUGHT INTO EXISTENCE BY THE TAKING OF A PRESCRIPTION DRUG IN COMBINATION WITH THE VOLUNTARY CONSUMPTION OF ALCOHOL. 1

II. ANDERSON DID NOT PRESERVE IN THE TRIAL COURT THE OBJECTIONS TO THE JURY INSTRUCTION THAT HE RAISES ON APPEAL. 6

III. THE ERROR IN THE JURY INSTRUCTION WAS HARMLESS BECAUSE IT IS CLEAR BEYOND A REASONABLE DOUBT THAT A PROPERLY INSTRUCTED, RATIONAL JURY WOULD HAVE FOUND ANDERSON DID NOT MEET HIS BURDEN OF PROVING HIS INSANITY DEFENSE. 7

IV. ANDERSON IS NOT ENTITLED TO A NEW TRIAL IN THE INTEREST OF JUSTICE BECAUSE THE HARMLESS ERROR IN THE JURY INSTRUCTION DID NOT PREVENT THE REAL CONTROVERSY FROM BEING FULLY TRIED..... 8

Page

V. 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..... 10

CONCLUSION..... 11

Page

CASES

Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.,
90 Wis. 2d 97,
279 N.W.2d 493 (Ct. App. 1979) 9

Gibson v. State,
55 Wis. 2d 110,
197 N.W.2d 813 (1972).....1

In re Commitment of Treadway,
2002 WI App 195, 257 Wis. 2d 467,
651 N.W.2d 334.....9

Neder v. United States,
527 U.S. 1 (1999).....7

State v. Avery,
2013 WI 13, 345 Wis. 2d 407,
826 N.W.2d 60.....10

State v. Gardner,
230 Wis. 2d 32,
601 N.W.2d 670 (Ct. App. 1999) 1, 4

State v. Holt,
128 Wis. 2d 110,
382 N.W.2d 679 (Ct. App. 1985) 7

State v. Kolisnitschenko,
84 Wis. 2d 492,
267 N.W.2d 321 (1978).....1

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ARGUMENT

I. ANDERSON WAS NOT ENTITLED TO AN INSTRUCTION THAT WOULD HAVE ALLOWED THE JURY TO FIND HE HAD A MENTAL DEFECT THAT WAS BROUGHT INTO EXISTENCE BY THE TAKING OF A PRESCRIPTION DRUG IN COMBINATION WITH THE VOLUNTARY CONSUMPTION OF ALCOHOL.

Based on *Gardner*, *Kolisnitschenko*, and *Gibson*,[1] a temporary mental state which is brought into existence by the taking of a prescription medicine as directed can

[1] *State v. Gardner*, 230 Wis. 2d 32, 601 N.W.2d 670 (Ct. App. 1999), *State v. Kolisnitschenko*, 84 Wis. 2d 492, 267 N.W.2d 321 (1978), and *Gibson v. State*, 55 Wis. 2d 110, 197 N.W.2d 813 (1972).

qualify as a mental defect for purposes of the insanity defense. However, if the defendant voluntarily consumed alcohol in combination with the prescribed medicine, and the alcohol contributed to that temporary mental state, then that mental state does not constitute a mental defect for purposes of the insanity defense.

Anderson contends that his jury should have been given an instruction that allowed them to find a mental defect in his case because the prescribed medicine (Strattera) that he took was not an illegal drug. Although Anderson's drug was prescribed for him, he was not entitled to claim a mental defect because he made the choice to also ingest alcohol while he was taking the drug.

Anderson suggests that he was entitled to claim a mental defect because even though he voluntarily consumed alcohol, his mental defect arose primarily from the prescription drug. The record does not support that claim. The only evidence that supported Anderson's claim that he suffered a mental defect was the testimony of his expert witness, Johnston. Johnston specifically testified that at the time of the crimes, Anderson suffered a mental defect caused by changes in his brain that were "produced by Strattera, alcohol, and major depressive disorder, piled on top of his long-standing vulnerability" (92:164). Johnston further opined that this complex of factors were "[a]ll at work simultaneously" (92:165).

Regarding the second prong of the insanity defense, the lack of ability to control conduct, Johnston opined:

> It is my opinion that if you have the entire episode play out as it has, the only difference being no Strattera was ever part of the picture, I think it highly unlikely that Ms. Hosey would have been killed. So in that sense, Strattera has a very important role. I, again, I think it highly unlikely. I think it would have been, you know, an intense, there may have been, there would almost certainly have been forceful word and perhaps blows, but I do not think she would have been killed.

> . . . [O]ne way to understand this is to consider what would have happened, in the absence of Strattera. And I was assuming, as I believe I said, all of the things being the same, including the alcohol, and if you imagine the incident taking place exactly as it had, only without the Strattera, I think it's highly unlikely that Ms. Hosey would have been killed. I do think it would have been intense and perhaps even violent, but that is my opinion.

(92:165, 227).

These opinions addressed the second prong of the insanity test, the degree of Anderson's loss of control and lack of capacity to conform his conduct to the requirements of law. These opinions did not address the first prong: the existence of a mental defect itself, which is a prerequisite to an insanity defense. Regarding the existence of a mental defect, Johnston never wavered from his position that the mental defect was a product of all four of the factors he had identified: Anderson's emotional personality, major depressive disorder, Strattera, and alcohol. Although Johnston viewed the consumption of alcohol as playing a smaller part in the homicide, he never retreated from the fact that his diagnosis that Anderson was suffering a mental defect was based partially upon the fact that Anderson had consumed alcohol (92:227).

Based on Johnston's testimony, which provided the sole support for the contention that Anderson suffered a mental defect, it would not have been appropriate to instruct the jury that a temporary mental state brought into existence by the taking of a prescription medicine as directed constitutes a mental defect. Rather, if the jury relied on Johnston's diagnosis at all, it could only have found that the temporary mental state was brought into existence by the taking of the prescription medication *and* the voluntary consumption of alcohol.

As a matter of law, a temporary mental state brought into existence by the taking of prescription medication as directed and the voluntary consumption of alcohol does not constitute a mental defect within the

meaning of the insanity defense, if the alcohol contributed to the defendant's mental state.

Here, as the court of appeals held, there was "undisputed evidence that alcohol contributed to" Anderson's temporary mental state. *State v. Anderson*, No. 2011AP1467-CR, slip op. ¶ 20 (Ct. App. Aug. 15, 2013) (Pet-Ap. 109-10). Anderson does not take issue with this holding. Under the facts of this case, there is no valid basis upon which the jury could have found Anderson suffered a mental defect. *Gardner* excludes a defense where the individual mixes a prescription medication with alcohol. *State v. Gardner*, 230 Wis. 2d 32, 42, 601 N.W.2d 670 (Ct. App. 1999). *Gardner* does not distinguish between which ingredient is primary and which is lesser. As long as the voluntarily consumed alcohol contributed to the defendant's temporary mental state, that mental state does not qualify as a mental defect for purposes of an insanity defense.

Logically, if the amount of alcohol consumed is so minimal that it does not contribute to the temporary mental state that the defendant claims caused him to commit the crime, then the alcohol should not operate to exclude the insanity defense. Thus, Anderson's suggested worst case scenario of the individual who merely takes a sip of communion wine, would most likely not be barred from presenting an insanity defense because it is unlikely the sip of wine contributed to the temporary mental state that the defendant claims caused him to commit the crime. But, if the alcohol consumed was sufficient to contribute to the temporary mental state, then the defendant should not be entitled to an insanity defense.

Anderson argues that a rule excluding a temporary mental state that is brought into existence by the taking of a prescription drug as directed and the voluntary consumption of alcohol should apply only where the consumption of alcohol is not lawful (*e.g.*, where the individual is a minor) or the consumption of alcohol is excessive. He contends that the rule should not apply where the consumption of alcohol is lawful (*e.g.*, the

individual is of legal age) and the individual consumes a moderate amount of alcohol.

Anderson does not suggest any definition of "moderate" and "excessive," much less a workable definition. It would not be fair to parties, jurors or courts to have a rule that distinguishes between "moderate" and "excessive" consumption of alcohol with no guidance whatsoever as to what those terms mean.

Moreover, a moderate amount of alcohol as opposed to an excessive amount of alcohol is not a useful concept in this context. The critical factor is whether the alcohol contributed to the temporary mental state that the defendant is relying on to avoid responsibility for his crimes. Here, the evidence was undisputed that Anderson's consumption of alcohol contributed to the temporary mental state he sought to use to excuse his crime. Consumption of enough alcohol to contribute to the creation of the temporary mental state, whatever that amount might, is sufficient to exclude the mental state from qualifying as a mental defect for purposes of the insanity defense. An individual has no absolute right to consume alcohol. A person who chooses to do so while taking prescription medication must assume the risk of adverse consequences.

Moreover, the record does not support Anderson's claim that he consumed only a moderate amount of alcohol. 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 percent" (92:220). It appears that either the prosecutor misspoke in asking the question, or the number was 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. Another test showed Anderson's blood alcohol concentration was "0.150 percent" (93:25-26). During closing argument, the prosecutor stated that Anderson's

blood tests showed ".15" and ".17," and argued that a level of alcohol so far over the legal limit would surely have some impact on him (93:172). Anderson did not object to this argument. If Anderson believed that the correct amount of the test reported by Johnston was ".0176 percent," and was the equivalent of only one alcoholic beverage, he surely would have objected or responded to the prosecutor's argument, but he did not.

For all of these reasons, Anderson was not entitled to an instruction that would have allowed the jury to find he had a mental defect that was brought into existence by his taking of a prescription drug in combination with the voluntary consumption of alcohol.

II. ANDERSON DID NOT PRESERVE IN THE TRIAL COURT THE OBJECTIONS TO THE JURY INSTRUCTION THAT HE RAISES ON APPEAL.

Anderson did not preserve in the trial court the objections to the jury instruction that he raises on appeal. *Anderson*, slip op. ¶¶ 11, 38 (Pet-Ap. 105, 116). In the trial court, it appears he wanted the trial court to insert the word "street" in front of the word drugs in the instruction, and he never made any objection related to the alcohol portion of the instruction (93:116-28). His trial court objection was not sufficient to preserve his appellate argument that the jury should have been informed it could find a mental defect if it found he had a temporary mental state brought into existence by the taking of a prescribed drug as directed and the lawful consumption of a moderate amount of alcohol.

In any event, if Anderson is correct that he preserved his objections, his conviction and sentences must be affirmed because the error in the jury instruction was harmless error. If Anderson forfeited his appellate objections, this court has authority to review the merits and to consider whether he is entitled to a new trial in the interest of justice.

III. THE ERROR IN THE JURY INSTRUCTION WAS HARMLESS BECAUSE IT IS CLEAR BEYOND A REASONABLE DOUBT THAT A PROPERLY INSTRUCTED, RATIONAL JURY WOULD HAVE FOUND ANDERSON DID NOT MEET HIS BURDEN OF PROVING HIS INSANITY DEFENSE.

This court must reject Anderson's assertion that the State forfeited its harmless error argument because it did not raise that claim in lower courts. In its order accepting the petition for review in this case, this court specifically ordered the parties to address harmless error. The State cannot be fairly criticized for obeying this court's order. In addition, a determination that the error was harmless would result in affirmance of the judgment of conviction and sentenced from which Anderson appeals. As respondent, the State can argue any ground that would uphold the judgment Anderson seeks to overturn, even if the State did not present that argument below. *See State v. Holt*, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985).

Anderson asserts this court cannot find harmless error because to do so would be a usurpation of the jury's role to determine the weight and credibility of the trial evidence. Anderson's assertion must be rejected. An appellate court does not usurp the role of the jury by determining that an erroneous jury instruction was harmless error. *Neder v. United States*, 527 U.S. 1, 18-19 (1999).

If Anderson is correct that a finding of harmless error by an appellate court constitutes usurpation of the jury's role, then neither this court nor the court of appeals could ever find a trial error harmless. That would be mean every trial error requires automatic reversal. That is not the law.

The State provided a detailed harmless error argument in its brief-in-chief and will not duplicate that argument here. Anderson does not take issue with any of the specific points made in the state's harmless error argument. His simple argument that the jury could have believed his expert does not rebut the State's developed argument that it is clear beyond a reasonable doubt that a properly instructed, rational jury would have found Anderson did not meet his burden of proving his insanity defense by a preponderance of the evidence.

IV. ANDERSON IS NOT ENTITLED TO A NEW TRIAL IN THE INTEREST OF JUSTICE BECAUSE THE HARMLESS ERROR IN THE JURY INSTRUCTION DID NOT PREVENT THE REAL CONTROVERSY FROM BEING FULLY TRIED.

Anderson agrees that the authority of both the court of appeals and this court to grant a new trial in the interest of justice must be exercised with great caution, and may be invoked only in exceptional cases. He fails to demonstrate, however, that his case is the rare case that warrants this exceptional remedy.

Anderson does not take issue with the State's argument that harmless error is relevant to the determination of whether a new trial is justified on the ground that the real controversy was not fully tried. He does not argue that justice would be served by granting a new insanity trial based on an erroneous jury instruction that was harmless error. He does not argue that justice requires a new trial even if the error did not contribute to the verdict because it is clear beyond a reasonable doubt that a properly instructed, rational jury would have found that Anderson did not carry his burden of proving his insanity defense by a preponderance of the evidence.

Anderson does not take issue with the conclusion of the court of appeals that "It seems highly unlikely that this jury or a new jury would accept the [defense] expert's

assumption about what occurred just before Anderson killed his ex-girlfriend and attempted to kill the new boyfriend." *Anderson*, slip op. ¶ 42 n.5 (Pet-Ap. 118). Anderson does not take issue with the State's argument that because the defense expert's conclusion that Anderson could not control his conduct was based 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 the expert's opinion that Anderson lacked substantial capacity to conform his conduct to the requirements of law at the time of the crimes. By failing to contest these arguments, Anderson must be deemed to have conceded that if the error here was harmless, then he is not entitled to a new trial in the interest of justice. *See In re Commitment of Treadway*, 2002 WI App 195, ¶ 34, 257 Wis. 2d 467, 651 N.W.2d 334; *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

Anderson claims that his case is exactly like other cases where Wisconsin appellate courts have granted a new trial in the interest of justice on the ground the real controversy was not fully tried based on a faulty jury instruction or failure to give a defense requested instruction. The cases Anderson cites are distinguishable. Anderson's brief at 35. None of those cases involved an insanity trial, where the criminal defendant bore the burden of proving his insanity defense by a preponderance of the evidence. Anderson is in a different situation than a defendant at a guilt phase trial, where the defendant must be acquitted if his defense does nothing more than raise a reasonable doubt about guilt, and where the State must prove all the elements of the offense beyond a reasonable doubt.

Anderson was not entitled to have the court of appeals grant him a new trial in the interest of justice, and he is not entitled to have this court grant him a new trial in the interest of justice.

V. 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.

Anderson does not attempt to rebut the State's claim that the court of appeals erroneously exercised its discretion because it did not properly analyze why this case is so exceptional as to warrant a new trial in the interest of justice, as mandated by this court in *State v. Avery*, 2013 WI 13, ¶¶ 3, 55, 345 Wis. 2d 407, 826 N.W.2d 60. Accordingly, Anderson should be deemed to have conceded this point.

CONCLUSION

Based on the record, legal theories, authorities and arguments presented in its brief-in-chief and this brief, the State asks this court to reverse the order of the court of appeals granting a new insanity trial, and to reinstate and affirm the judgment of conviction and sentences imposed below.

Dated this 12th day of March, 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 2,841 words.

Dated this 12th day of March, 2014.

_____

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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 March, 2014.

_____

SALLY L. WELLMAN
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