STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2011AP1467-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONYIL LEEITON ANDERSON, SR.,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION AND THE ORDER DENYING POST-CONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR ROCK COUNTY, THE HONORABLE JAMES P. DALEY, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication because this case can be resolved by application of established legal principles to the specific facts presented.

ARGUMENT

I. ANDERSON IS NOT ENTITLED TO REVIEW OF RIGHT OF HIS CLAIM THAT THE JURY INSTRUCTION GIVEN WAS ERRONEOUS BECAUSE HE DID NOT OBJECT TO THE INSTRUCTION OR RAISE THE CLAIM RAISED ON APPEAL AT TRIAL.

A. Summary of Relevant Facts.

The jury[1] heard evidence that shortly before Anderson broke into his girlfriend's home and stabbed her to death and attempted to kill the man who was with her, Anderson had been drinking at a bar (90:71:Exh. 30:12; 93:58). He was arrested at approximately 2:15 a.m. on August 9, 2008 for battery as a result of a fight he had at the bar (93:38-40). Shortly after being processed at the police department he was released and allowed to leave because the arresting officer did not believe that he appeared to be under the influence of alcohol or sufficiently intoxicated to be a danger to the public or to need to be held for detoxification (93:42-43). The police were dispatched to the homicide and attempted homicide scene where Anderson was arrested shortly after 3:00 a.m. that same morning and was taken to the hospital for his own self-inflicted injuries (89:40). Based on a blood sample taken by hospital staff that was sent to the laboratory for toxicology analysis, Anderson's blood alcohol concentration was .0176 percent (92:220). Another blood sample subsequently tested yielded a blood

[1] At a jury trial, by pre-arrangement, the State put in evidence sufficient to prove guilt of the charged crimes of first-degree intentional homicide of Stacey Hosey (Anderson's former girlfriend and mother of his one-year-old son) and attempted first-degree murder of Brandon Beavers-Jackson (a man she was dating). Anderson then entered no-contest pleas to both charges, and the mental responsibility phase continued before the jury (44; 90:110).

alcohol result of 0.150, over the legal limit of 0.08 (93:25-26).

During the mental responsibility phase of trial, the defense expert offered the following opinion:

> A. At the time of the incident, Mr. Anderson was unable to control himself and thus unable to conform his behaviors to the requirements of the law. This inability was a direct result of a mental disease or defect caused by a combination of factors. First, Mr. Anderson's ability to exert self-control in emotionally provocative settings has been mildly impaired throughout his adult life. Secondly, his self-control was further impaired by the fact that he was suffering from his second episode of major depressive disorder which was not appropriately treated. Third, his self-control was additionally impaired by the impact of Strattera on brain functioning. These were all further compounded by his ingestion of alcohol.
>
> . . . .
>
> Human beings experience many more aggressive urges and impulses than they actually act upon. This is because the brain systems involved in inhibiting behavior usually tend to dominate. However, this inhibitory brain system can be damaged or impaired in a variety of ways including, mental illness, traumatic injury—in other words, brain damage—or via chemicals and drugs. When the inhibitory brain system is impaired or damaged, then the individual has a mental defect.
>
> On the night of August 8th, 2008, Mr. Anderson had exactly this mental defect. The brain system that would have enabled him to inhibit his aggressive urges and exert a measure of self-control was significantly impaired. These impairments had been building in Mr. Anderson over the preceding weeks as the dose of Strattera increased and his depression worsened. This was evident to many of Mr. Anderson's family and friends. Trivial provocations such as outbursts, including a sudden episode of domestic violence early in July and in August a bar fight following a trivial provocation. When he walked in on Ms. Hosey and Mr. Beavers-

> Jackson, he accidently stumbled upon a situation that required an extraordinary measure of self-control. This may have been further aggravated by Ms. Hosey's inflammatory remarks. With the brain changes produced by Strattera, alcohol, and major depressive disorder, piled on top of his long-standing vulnerability, self control was an option unavailable to Mr. Anderson. These brain changes collectively produced a profound mental defect, making it impossible for him to control emotion-based urges. This left his aggressive impulse at the moment as Mr. Anderson's only course of action.
>
> . . . .
>
> Q. And in regards to the Strattera aspects, what, of all the aspects of that night, what is the most significant aspect that, that was employed?
>
> A. Well, I'm not exactly sure I understand the question, but the way that I consider this, it's, there's complex factors. All at work simultaneously. 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.

(92:161-65).

At the jury instructions conference on the mental responsibility phase, the prosecutor asked the trial court to give the optional standard instructions contained in Wis. JI-Criminal No. 605 (Rel. No. 41 —4/2003), that provides:

> [A voluntarily induced state of intoxication by drugs or alcohol or both does not constitute a mental disease or defect.]
>
> [A temporary mental state which is brought into existence by the voluntary taking of drugs or

> alcohol does not constitute a mental disease or defect.]

(Wis. JI-CRIMINAL 605 (Rel. No. 41—4/2003); 93:115-16)) (footnotes omitted).

The trial court and parties discussed the matter (93:116-28). During the discussion, Anderson's trial counsel asked the court to modify the optional standard instruction by inserting the word "street" in front of the word "drugs"; the court denied that request (93:116; 95:22-23). As between the two optional standard instructions, Anderson's counsel stated he preferred the second rather than the first, and the trial court agreed to give only the second instruction (93:128). Anderson also asked the trial court to instruct the jury that it was up to them to define voluntary (93:125-27). The trial court declined to give that requested instruction (93:128).

Anderson never objected to the optional standard jury instruction that the trial court ruled it would give and did give (93:116-28). Anderson never argued that it was error to give the optional standard instruction under the facts of this case.

The defense expert testified 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). Based on the testimony of the defense expert, with the parties' approval, 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).

Pursuant to these rulings, 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).

B. Anderson Is Not Entitled To Review Of Right Of The Challenges To The Jury Instruction That He Raises On Appeal Because He Did Not Raise Those Same Challenges In The Trial Court.

On appeal, Anderson does not argue that the trial court erred in denying his request to insert the word "street" in front of the word "drugs" in the optional standard jury instruction. By abandoning that claim on appeal, Anderson implicitly recognizes his request was properly denied. On appeal, Anderson does not argue that the trial court erred in denying his request to instruct the jury that it was up to them to define "voluntary." By

abandoning that claim on appeal, Anderson implicitly recognizes that his request was properly denied.

Rather than arguing the same legal claims that he argued in the trial court, on appeal Anderson raises claims that are new and different from the claims he raised in the trial court. In the trial court, he never objected that it would be error for the trial court to give the optional standard instruction.

On appeal, for the first time, he claims that by giving the optional standard instruction, the trial court "erred at the trial in instructing the jury that a mental responsibility defense, Wis. Stat. § 971.15(1), cannot be sustained by evidence that Anderson's temporary mental state was brought into existence, in part, by his lawful use of prescribed medicine." Anderson's Br. at 15. He further claims it was error to give the optional standard instruction because it "failed to distinguish between the lawful use of prescribed medicine and the use of illegal drugs, and failed to distinguish between the reasonable consumption of alcohol and the excessive consumption of alcohol in combination with prescribed medicine." Anderson's Br. at 19.

Anderson did not raise either of these objections to the optional standard jury instruction at trial. By failing to make a particularized objection to the optional standard jury instruction at trial, Anderson waived the right to review, as a matter of right, of the optional standard jury instruction given at trial. *In the Interest of C.E.W.: Waukesha County Department of Social Services v. C.E.W.*, 124 Wis. 2d 47, 54, 368 N.W.2d 47 (1985); *State v. Cockrell*, 2007 WI App 217, ¶¶ 34-36, 306 Wis. 2d 52, 741 N.W.2d 267.

Anderson may argue that he did preserve the objections he raises on appeal because he proposed alternative/additional instructions when he asked the trial court to insert the word "street" in front of the word "drugs" in the optional standard instruction and when he

asked the court to tell the jury it was their role to define the term "voluntary" which was used in the optional standard instruction. Such an argument is without merit, as the Wisconsin Supreme Court explained:

> A party's mere submission of alternate instructions without a particularized objection on the record to the instructions proposed by the court cannot provide a basis for raising the erroneous instruction on appeal as a matter of right. A party's submission of proposed instructions has the effect of notifying the circuit court of an objection to the instructions, but a submission does not explain the basis for the objection and does not aid the circuit court in correcting the instruction if necessary.
>
> We conclude that the County failed to preserve its objection to the erroneous instructions. Failure to object to an instruction constitutes a waiver of the error.

In the Interest of C.E.W., 124 Wis. 2d at 54.

Even if the alternative/additional language Anderson requested at trial constituted objections to the optional standard jury instruction, those objections are not preserved for appeal because Anderson raises new and different objections to the optional standard instruction on appeal. Neither Anderson's request that the word "street" be added to the optional standard instruction, nor his request that the jury be told it was its role to define "voluntary" was sufficient to raise the objections to the standard instruction that Anderson asserts on appeal. An objection to an instruction at trial on a ground that is different from the ground raised on appeal does not preserve the objection for appeal. *Lampkins v. State*, 51 Wis. 2d 564, 573, 187 N.W.2d 164 (1971). An objection at trial preserves for appeal only the specific grounds stated at trial. *Cf., State v. Wolff*, 171 Wis. 2d 161, 165, 491 N.W.2d 498 (Ct. App. 1992). An objection to a jury instruction at trial that is sufficiently

particularized to bring into focus the nature of the alleged error is a prerequisite to review of the alleged error as a matter of right on appeal. *Vollmer v. Luety*, 156 Wis. 2d 1, 10, 456 N.W.2d 797 (1990).

Anderson will likely assert that he preserved the objections he raises on appeal because the trial court told the parties at the close of the jury instruction conference that they had each put their positions on the record and "you're not waiving it" (93:128). Anderson may have preserved the objections he made at trial. The problem is, he has abandoned those objections on appeal. He is no longer arguing that the word "street" should have been inserted into the optional standard instruction. He is no longer arguing that the jury should have been instructed that its role is to define "voluntary."

Indeed, he is now saying the opposite. He is now saying the optional standard instruction should not have been given at all because the instruction given as a matter of law, does not apply to his use of the prescription drug Strattera, even in combination with the voluntary consumption of alcohol. Anderson's Br. at 20-28.

For all of these reasons, Anderson failed to preserve at trial the challenges to the optional standard jury instruction that he raises on appeal. By failing to raise these same challenges in the trial court, Anderson waived the right to have this court review the challenges he raises on appeal as a matter of right. Indeed, this court does not have the power to review this type of waived error. *Cockrell*, 306 Wis. 2d 52, ¶ 36.

This court does have the authority to review a waived instructional error under the rubric of ineffective assistance of counsel, but Anderson has expressly declined to claim that trial counsel rendered ineffective assistance of counsel. Anderson's Br. at 29.

This court does have discretionary power to reverse a criminal conviction when a waived error regarding a jury instruction results in the real controversy not having been fully tried. *Cockrell*, 306 Wis. 2d 52, ¶ 36 n.12. Anderson asks this court to exercise that discretionary power in this case. Anderson's Br. at 28-30.

In the following section of this brief, the State will demonstrate why this court should decline to reverse Anderson's convictions and grant him a new trial in the interest of justice on the ground the real controversy was not fully tried.

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

Wisconsin Stats. § 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*, 156 Wis. 2d at 19. 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* at 19. 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 may exercise this discretionary power to reverse where an error in the jury instructions occurred, but was waived, and that error resulted in the real controversy not having been fully tried. *Vollmer*, 156 Wis. 2d at 13, 20.

Anderson relies on his arguments on the merits to claim that he is entitled to a new trial in the interest of justice, if this court finds he did not preserve his objections to the jury instruction. Anderson's Br. at 29-30. The State will demonstrate below that Anderson is wrong on the merits of his claim that the jury instruction was erroneous and misleading. Accordingly, his interest of justice claim also necessarily fails.

The optional standard jury instruction given to the jury stated: "A temporary mental state which is brought into existence by the voluntary taking of drugs or alcohol does not constitute a mental defect" (93:139).

It is telling that throughout his entire brief, Anderson never sets forth what he believes the instruction should have said to be correct and accurate. Rather, he makes a disjointed attack on the instruction given, ignoring controlling law.

Anderson claims the jury instruction did not properly inform the jury regarding Anderson's lawful use of the prescribed medicine, Strattera. Anderson does not define what he means by "lawful." Presumably, he means Anderson took the prescribed medicine as directed. There was no evidence in the record, however, that Anderson took the prescription medicine as directed. Anderson chose not to testify. A friend with whom Anderson stayed for a short period of time after he was released from jail for a prior altercation with the victim, 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 eighty milligram prescriptions and one-hundred milligram prescriptions; Anderson's prescription for thirty pills, eighty milligrams each, was filled on July 19, 2008; his prescription for one-hundred 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).

In any event, Anderson claims that based on his expert's testimony, the jury could have concluded that at the time of the crimes, Anderson had a mental defect, a temporary mental state brought into existence by his use of the prescribed medicine, Strattera. He argues that based on the instruction given, however, the jury could have concluded that a temporary mental state caused by

"Anderson's lawful use of prescribed Strattera medicine" could not constitute a mental defect. Anderson's Br. at 22-23.

Anderson argues this interpretation would be wrong, because a temporary mental state brought into existence by lawful use of prescription medicine can constitute a mental defect.

Contrary to Anderson's argument, this case does not present the legal issue of whether a temporary mental state which is brought into existence by the defendant's lawful use of a prescription medicine constitutes a mental defect within the meaning of Wisconsin's mental responsibility law. This case does not raise that legal issue because Anderson's expert never testified that Anderson had a temporary mental state brought into existence by Anderson's use of Strattera alone. The defense expert testified only that Anderson had a mental defect caused by the use of Strattera, in combination with three other factors: Anderson's life-long difficulty controlling his emotions and anger; Anderson's depressive disorder; and Anderson's consumption of alcohol. Anderson's expert testified that at time of the incident, Anderson was unable to conform his behaviors to the requirements of law and

> [t]his inability was a direct result of a mental disease or defect caused by a combination of factors. First, Mr. Anderson's ability to exert self-control in emotionally provocative settings has been mildly impaired throughout his adult life. Secondly, his self-control was further impaired by the fact that he was suffering from his second episode of major depressive disorder which was not appropriately treated. Third, his self-control was additionally impaired by the impact of Strattera on brain functioning. These were all further compounded by his ingestion of alcohol.

(92:161).

Because there was no evidence that Anderson suffered a mental state caused by the use of a prescription drug Strattera — but only evidence that he suffered a mental state caused by the prescription drug Strattera in combination with his pre-existing life-long difficulty exercising self-control in emotionally provocative situations, his pre-existing major depressive disorder, and his use of alcohol — this case does not present the legal issue of whether a temporary mental state which is brought into existence by the defendant's lawful use of a prescription medicine constitutes a mental defect within the meaning of Wisconsin's mental responsibility law.

Anderson seeks to avoid this fatal defect in his argument by relying on the following opinion of his expert:

> Q. And in regards to the Strattera aspects, what, of all the aspects of that night, what is the most significant aspect that, that was employed?
>
> A. Well, I'm not exactly sure I understand the question, but the way that I consider this, it's, there's complex factors. All at work simultaneously. 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.
>
> . . . .
>
> Q. Is a basis of your opinion that the defendant is suffering from a mental defect based partially upon the fact that he had consumed alcohol?
>
> A. In small measure, yes.

> Q. And are you able to separate out the impact of alcohol versus the impact of Strattera on the defendant in reaching your opinion?
>
> A. Yes. As I said earlier, one 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).

The expert's belief that without the Strattera, the victim would not have been killed, however, addresses only the degree of Anderson's lack of control. It does not address the cause of his mental defect.

Because the record does not present the legal issue of whether a temporary mental state brought into existence by lawful use of prescription medicine can constitute a mental defect, this court need not address Anderson's subsidiary arguments that taking a prescription medication as prescribed is not "voluntary" in the same way that taking illegal drugs is voluntary, and that the instruction given was erroneous because it did not distinguish between the lawful use of prescription medicine and the use of illegal drugs.

Under the facts of this case, it was not wrong for the trial court to give the jury the optional standard instruction because a temporary mental state which is brought into existence by the use of a prescription drug in combination with alcohol does not constitutes a mental defect within the meaning of Wisconsin's mental responsibility law.

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

In setting forth the contours of the defense in relation to prescription medicine, this court stated:

> The State acknowledges that the effects of prescription medication may constitute involuntary intoxication, but urges us to add the requirement that the defendant must not know of the intoxicating effect. We acknowledge that ample case law supports this position. The rationale is that if the defendant knows of the intoxicating effect prior to taking the medication, then the intoxication is rendered voluntary. S*ee City of Minneapolis v. Altimus*, 238 N.W.2d 851, 857 (Minn. 1976)(so holding and citing supporting cases). We see no reason to so limit the defense. Even if forewarned of the intoxicating effect of a prescription drug, a person should have recourse to the defense if the drug renders him or her unable to distinguish between right and wrong. When faced with a medical condition requiring drug treatment, the patient hardly has a choice but to follow the doctor's orders. Intoxication resulting from such compliance with a physician's advice should not be deemed voluntary just because the patient is aware of potential adverse side effects. We agree with the Texas courts' formulation of when the defense is available. "The involuntary intoxication defense is limited to (1) the defendant's unawareness of what the intoxicating substance is; (2) force or duress; or (3) medically prescribed drugs *taken according to prescription*." *Shurbert v. State*, 652 S.W.2d 425, 428 (Tex. Ct. App. 1982) (emphasis added). We note that this does not include cases where a patient knowingly takes more than the prescribed dosages,

[2] 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).

> *see Goldsmith v. State*, 252 S.E.2d 657 (Ga. Ct. App. 1979), or mixes a prescription medication with alcohol or other controlled substances, *see State v. Voorhees*, 596 N.W.2d 241 (Minn. 1999). Neither would the defense be available to one who voluntarily undertakes an activity incompatible with the drug's side effects. *See City of Wichita v. Hull*, 724 P.2d 699 (Kan. Ct. App. 1986) (holding that involuntary intoxication defense was properly denied where defendant drove after taking sleeping pill).

Gardner, 230 Wis. 2d at 41-42.

Wisely, Anderson does not argue that this portion of *Gardner* is irrelevant because it involves an involuntary defense to the underlying crime rather than a lack of mental responsibility defense. The two are closely related. *Gardner*, 230 Wis. 2d at 38-39.[3]

Rather, Anderson asserts only that this court should ignore the quoted language in *Gardner* because it is dictum. He asserts the court of appeals is free to ignore dictum in its own prior cases, citing *State v. Harvey*, 2006 WI App 26, ¶ 19, 289 Wis. 2d 222, 710 N.W.2d 482), although the court of appeals is not free to ignore dictum in Wisconsin supreme court cases, citing *Zarder v. Acuity*, 2010 WI 35, ¶¶ 57-58, 324 Wis. 2d 325, 782 N.W.2d 682. Anderson's Br. at 24 n.8.

Anderson is wrong. *Harvey* predates *Zarder* and is no longer good law in light of *Zarder*. In holding that the court of appeals cannot disregard a statement in a supreme court opinion as dictum, the supreme court expressly relied on *Cook v. Cook*, 208 Wis. 2d 166, 560 N.W.2d 246 (1997), explaining:

[3] Anderson relied only on the substantial incapacity to conform his behavior to the requirements of law prong of the insanity defense because his expert testified that he could distinguish right from wrong and appreciate the wrongful nature of his conduct (92:160-61).

> In *Cook*, this court explained that the court of appeals may not overrule, modify, or withdraw language from a prior supreme court or court of appeals opinion—even if the court of appeals believes that the prior precedent is erroneous. 208 Wis. 2d at 189-90. Rather, we concluded that this court has the exclusive power to overrule, modify, or withdraw language from prior Wisconsin cases. *Id.* at 189. The *Cook* court, explained that this result upheld principles of predictability, certainty, and finality relied upon by litigants, attorneys and courts alike. *Id.* at 189.
>
> . . . .
>
> If the court of appeals could dismiss a statement in a prior case from this court as dictum, the limitation in *Cook* against overruling, modifying, or withdrawing language would be seriously undermined. We therefore conclude that to uphold the principles of predictability, certainty, and finality, the court of appeals may not dismiss a statement from an opinion by this court by concluding that it is dictum.

Zarder, 324 Wis. 2d 325, ¶¶ 54, 57-58.

Although the *Zarder* court specifically addressed only the court of appeals' authority to disregard a statement in a supreme court opinion, its rationale applies equally to a prior court of appeals' opinion. *Cook* held that the court of appeals cannot overrule, modify, or withdraw language in a prior supreme court or court of appeals decision. *Cook*, 208 Wis. 2d at 189-90; *Zarder*, 324 Wis. 2d 325, ¶ 54. *Zarder* held that when the court of appeals dismisses a statement in a prior opinion as dictum, it necessarily withdraws or modifies language in that opinion, contrary to *Cook*. *Zarder*, 324 Wis. 2d 325, ¶ 57. Logically, when the court of appeals dismisses a statement in a prior court of appeals' opinion as dictum, it also necessarily withdraws or modifies language in that opinion, which is contrary to *Cook*. Accordingly, the rule in *Zarder* prohibiting the court of appeals from dismissing a statement in a prior supreme court opinion also applies to a prior court of appeals' opinion. This court should

recognize that after *Zarder*, it does not have authority to dismiss a statement in a prior supreme court or court of appeals decision as dictum.

Furthermore, this court must reject Anderson's view that this court's language in *Gardner*, quoted above, is dictum. As the *Zarder* court explained:

> There are two disparate lines of Wisconsin cases defining dicta. Under one line of cases, this court's discussion of a question "germaine to . . . the controversy" is not dictum, even if that discussion is not "decisive of [] the controversy":
>
> > It is deemed the doctrine of the cases is that when an appellate court of last resort intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a dictum but is a judicial act of the court which it will thereafter recognize as a binding decision. *State v. Picotte*, 2003 WI 42, ¶ 61, 261 Wis. 2d 249, 661 N.W.2d 381.
>
> However, a competing line of cases, exemplified by *State v. Sartin*, 200 Wis. 2d 47, 546 N.W.2d 449 (1996), defines dictum as "a statement or language expressed in a court's opinion which extends beyond the facts in the case and is broader than necessary and not essential to the determination of the issues before it." *Id.* at 60 n.7.

Zarder, 324 Wis. 2d 325, ¶ 52 n.19.

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. *Gardner*, 230 Wis. 2d at 35. In order to answer that question, it was necessary for this court to set forth the contours or boundaries of that defense. The court could not be expected to credibly answer that question without also addressing when, if at all, the defense applies to prescription medication. It cannot be said, therefore, that the *Gardner* court's statement that the defense does not apply if the defendant mixes prescription

medication with alcohol or other controlled substances was broader than necessary, extended beyond the facts in the case or was not essential to the issue before it. Similarly, it cannot be said that the *Gardner* court's statement that the defense does not apply if the defendant mixes prescription medication with alcohol or other controlled substances is dictum, because the statement was germane to the controversy before the court, even though it was not necessarily decisive because of the particular record in *Gardner*.

Moreover, even if this court were free to disregard *Gardner* and consider the matter anew, it should reject Anderson's argument. In *State v. Kolisnitschenko*, 84 Wis. 2d 492, 501-03, 267 N.W.2d 321 (1978), the Wisconsin Supreme Court held that a lack of mental responsibility 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. *See also Gibson v. State*, 55 Wis. 2d 110, 197 N.W.2d 813 (1972). The 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.
>
> 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. *Gibson v. State*, 55 Wis. 2d 110, 114, 197 N.W.2d 813 (1972); *Loveday v. State*, 74 Wis. 2d 503, 514, 247 N.W.2d 116 (1976). 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 (footnotes omitted). Although *Kolisnitschenko* involved amphetamine and alcohol rather than a prescription medicine and alcohol, the policy underlying the rule set forth in *Kolisnitschenko* is still 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 *Gardner*, this court did not require proof of knowledge of the potential synergistic effect of mixing prescription drugs with alcohol. *See also Commonwealth v. Smith*, 831 A.2d 636, 640 (Pa. Superior Ct. 2003) (holding voluntary consumption of prescription drug and alcohol is

not "involuntary" for purposes of claiming an intoxication defense even if consumption was without knowledge of a synergistic effect and citing *Gardner* in support of that view).

Anderson tries 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 asserts 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 points 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 Br. 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), although Anderson was trying to reconcile with her during the time period before he murdered her (92:141-42). The content of Anderson's text message 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 message 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.

Anderson claims that the rule barring an insanity defense when a temporary mental state is brought into existence by the taking of a prescribed medicine 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 and the jury instruction was erroneous and misleading because it did not so advise the jury. Anderson does not attempt to define the terms he seeks to distinguish, or suggest how they should have been defined for the jury. He provides no case law in support of such distinction. His broad policy argument that excessive consumption of alcohol is morally blameworthy, whereas reasonable or moderate consumption is not, is unconvincing.

Furthermore, his own rule is of little moment here. 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 over the legal limit of 0.08 for operating a motor vehicle (92:220; 93:25-26). This record does not demonstrate that Anderson combined his prescribed medicine with only moderate or reasonable consumption of alcohol, as opposed to excessive consumption of alcohol.

Based on *Kolisnitschenko* and *Gardner*, 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 a defense of lack of mental responsibility. *Kolisnitschenko* was decided over thirty years ago. *Gardner* was decided over ten years ago. Anderson has provided no persuasive reason or basis for this court to depart from this established case law.

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 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. If the Legislature wishes to essentially overturn *Gardner* by creating 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 must reject Anderson's argument on the merits. The optional standard instruction given to the jury was not erroneous, misleading or confusing. The instruction did not prevent the controversy from being fully tried. Accordingly, Anderson is not entitled to a new trial.

CONCLUSION

Based on the record and the legal theories and authorities set forth herein, the State asks this court to affirm the judgment of conviction and order denying post-conviction relief entered below.

Dated this 8th day of February, 2012.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,918 words.

Dated this 8th day of February, 2012.

_____
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 8th day of February, 2012.

_____
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