STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2013AP557-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

COREY R. KUCHARSKI,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND FROM AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEAN A. DIMOTTO PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

ISSUES PRESENTED FOR REVIEW

1. Did the trial court incorrectly believe that to satisfy its burden in the sanity phase of Kucharski's trial, the defense had to prove that as a result of his mental

[1] Judge DiMotto presided at trial (52; 53) and denied Kucharski's Wis. Stat. §809.30 motion (42). Due to judicial rotation, however, the Honorable Jeffrey Conen denied Kucharski's presentencing motion for plea withdrawal (59), and the Honorable David Borowski sentenced Kucharski (32).

condition, Kucharski lacked substantial capacity both to appreciate the wrongfulness of his conduct AND to conform his conduct to the requirements of law?

In rejecting Kucharski's postconviction motion, the court denied that it had required the defense to prove both prongs of the test by a preponderance of the evidence.

2. Was the trial court's finding that Kucharski had failed to prove by a preponderance of the evidence that as a result of his schizophrenia, he lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law clearly erroneous?

The trial court said no.

3. Should this court exercise its power of discretionary reversal under Wis. Stat. § 752.35 because it is probable justice has miscarried?

4. Was Kucharski deprived of the effective assistance of counsel during the sanity phase of his trial when his attorney failed to call two other doctors who had examined Kucharski and to introduce numerous delusional writings found at the crime scene?

The trial court said no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument because the parties' briefs thoroughly set forth the relevant facts and legal authorities necessary to resolve the issues presented.

Because of the paucity of Wisconsin case law involving the insanity defense and claims of ineffective assistance in connection with presenting that defense, the

State asks that the opinion be published to provide guidance to the criminal bench and bar.

SUPPLEMENTAL STATEMENT OF FACTS

The State will present facts additional to those set forth in Kucharski's brief where necessary in the course of argument. Apart from this supplementation, the State disagrees with Kucharski's assertion that the trial court, in rendering its oral decision in the sanity phase of trial, "did not appear to address whether Mr. Kucharski could conform his conduct to the requirements of law." Kucharski's brief at 5.

In fact, in finding that Kucharski had not carried his burden on the affirmative defense in phase two, the trial court explicitly found that the evidence of Kucharski's ability to conform his conduct to the requirements of law was in equipoise:

> I'm finding him legally responsible because I'm not persuaded beyond a level scale. I can't – *it's not tipping, even slightly, that he lacked substantial capacity to conform his conduct to the law.*

(53:7; emphasis added.)

ARGUMENT

I. THE TRIAL COURT PROPERLY APPLIED WIS. STAT. § 971.15(1) IN CONCLUDING THAT HIS SCHIZOPHRENIA DID NOT CAUSE KUCHARSKI TO LACK SUBSTANTIAL CAPACITY TO APPRECIATE THE WRONGFULNESS OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW.

Kucharski's first argument is that the trial court misapplied Wis. Stat. § 971.15(1) in determining that

Kucharski failed to show that as a result of mental disease or defect, he lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. According to Kucharski, the trial court mistakenly believed that he was required to show both an inability to appreciate the wrongfulness of his conduct, and an inability to conform his conduct to the requirements of law, to prevail on his affirmative defense. Kucharski's brief at 10-16.

Contrary to Kucharski's claim, the trial court's oral decision rejecting the affirmative defense (53), as well as the court's oral decision denying Kucharski's postconviction motion (62), demonstrate that the court was aware that Kucharski was not required to prove both impairments in order to prevail on the affirmative defense.

A. In deciding that Kucharski failed to show he lacked responsibility for his crimes, the trial court explicitly found that he did not establish that he lacked substantial capacity to conform his conduct to the requirements of law.

The trial court's oral decision rejecting the insanity defense belies Kucharski's contention that the court found only that he had not established a lack of substantial capacity to appreciate the wrongfulness of his conduct and did not address whether he lacked substantial capacity to conform his conduct to the requirements of law. The court's comments at the September 27, 2010 hearing reveal that the court explicitly addressed and rejected both alternatives:

> I'm finding him legally responsible because I'm not persuaded beyond a level scale. I can't – It's not tipping, even slightly, *that he lacked substantial capacity to conform his conduct to the law.*

. . . .

> What the speculation is, is *whether in killing his parents, he could not appreciate, he lacked substantial capacity to appreciate, the wrongfulness of his conduct*.
>
> *I'm not convinced that he did*.

(53:7; emphasis added.)

The above comments reflect that the court first addressed and rejected the proposition that Kucharski's schizophrenia caused him to lack substantial capacity to conform his conduct to the requirements of law, before addressing whether his schizophrenia caused him to lack substantial capacity to appreciate the wrongfulness of his conduct. In arguing to the contrary, Kucharski points to the following exchange between the court and defense counsel Cynthia Wynn, which occurred *after* the trial court had already made the above findings:

> MS. WYNN: Your Honor, my understanding [is] that the court has to find whether or not he could have appreciated the wrongfulness of his actions *and also,* that he could conform his conduct to the requirements of the law.
>
> JUDGE DiMOTTO: It's an either or under the statute. And I don't – Well, I can't explain it any better than I have.
>
> MS. WYNN: Well, I thought it was *and* conform his behavior to the requirements of the law.
>
> JUDGE DiMOTTO: It's not.

(53:8; emphasis added.)

The foregoing exchange reveals that the trial court knew that either impairment – an inability to appreciate the wrongfulness of one's conduct or an inability to conform one's conduct to the requirements of law – sufficed to satisfy the affirmative defense. It was defense

counsel's remarks that were confusing insofar as she said she thought the statute said "*and* conform his behavior to the requirements of the law" (53:8). In fact, § 971.15(1) is phrased in the disjunctive, i.e., "or conform his or her conduct to the requirements of law." Counsel was therefore wrong when she indicated the statute was phrased in the conjunctive; it is not.

It appears from the foregoing exchange that counsel was attempting to make the point that the trial court had to address both prongs of the statute, assuming it found the defendant had not satisfied his burden as to one of them. If so, counsel's attempt fell short of the mark. In turn, this led to the court making comments that are subject to interpretation. Nevertheless, from other remarks the trial court made at the hearing, it is obvious the court knew that once it found that Kucharski had a mental disease or defect, it could find he was not responsible if he made one of two showings.

Immediately after finding that there was no reasonable doubt Kucharski suffered from schizophrenia, the court stated:

> The close call is whether he lacked substantial capacity to conform his conduct to the law or to understand the wrongfulness of his conduct.

(53:2-3.) This statement reflects the court's understanding that either finding would satisfy the affirmative defense.

In addition, the court's comments after this statement strongly suggest that the court separately considered each alternative although it did not specifically say it was doing so. To illustrate, the following comments are relevant to whether Kucharski appreciated the wrongfulness of his conduct when he killed his parents:

> One [expert] speculates that the Defendant . . . developed an altruistic motive, where he got to

> the point in his head, that it was the right thing to do. . . .
>
> The – The prosecution points out . . . that there are indications, very near the point in time that the Defendant committed these crimes, that he understood they were wrongful, illegal.
>
> Dr. Rawski has opined that . . . he understood the wrongfulness of it, shortly thereafter when he talks about not only needing a lawyer, that he could pay . . . from the funds now due him, from the estate.

(53:3-4.) These comments appear to be the court's musings on whether the evidence showed Kucharski knew that what he was doing was wrong.

In contrast, the following comments are directed more to the question of whether Kucharski lacked the substantial capacity to conform his conduct to the requirements of law:

> He had command voices about killing himself, and he did not follow through with that before or after he killed his parents. . . . Dr. Pankiewicz's opinion . . . in essence saying he was responding to the command voices of his hallucinatory experience. And yet he doesn't respond to the command voice, especially the derogatory one that he was the cause of the fight, and he should kill himself and so on, whether directly, or through a shootout with the police.

(53:4.)

The State maintains that the foregoing comments are directed to the alternative of whether Kucharski was able to conform his conduct to law. The court's observation that he was able to ignore the voices' command that he kill himself suggests the court's doubt that the voices rendered Kucharski unable to resist their command to kill his parents.

The foregoing discussion shows that the trial court considered and rejected both alternative forms of impairment in concluding that Kucharski was responsible for murdering his parents. Moreover, as the State will demonstrate below, any doubt on this score was erased by the trial court's comments in denying Kucharski's postconviction motion.

B. In denying Kucharski's postconviction motion, the court clarified that it knew Kucharski did not have to prove that schizophrenia impaired his ability both to appreciate the wrongfulness of his conduct AND to conform his conduct to the requirements of law.

Were there were any doubt about whether the trial court had addressed the "inability to conform conduct" alternative under § 971.15(1) when it found Kucharski responsible for his crimes, the trial court erased that doubt when it orally denied his § 809.30 motion.

After declaring that it had "a strong and distinct independent recollection" of the earlier hearing (62:2), the trial court explained what it had considered:

> I indicated that I was unpersuaded as to both prongs of Section 971.15. What's operative in my thinking at the time is the word both, that I was unpersuaded as to both prongs. So it didn't seem disjunctive to me at the point that Ms. Wynn questioned me because I'd found both prongs not satisfied if you will.
>
> So it seemed that the connotation of the word both meant that it was not disjunctive or that it was conjunctive. But in fact I found that he lacked [sic, did not lack] substantial capacity to appreciate the wrongfulness of his conduct, and he lacked [sic,

> did not lack] [2] substantial capacity to conform his conduct to the laws or rather to the law.
>
> . . . .
>
> So to clarify my findings, I find or I did find that Mr. Kucharski did not lack substantial capacity to appreciate the wrongfulness of his conduct. Mr. Kucharski did not lack the substantial capacity to conform his conduct to the laws.

(62:4.)

The trial court's comments in denying the postconviction motion reveal that the court – at the time it found Kucharski had not proven the affirmative defense – had considered whether his schizophrenia deprived him of the substantial capacity to appreciate the wrongfulness of his conduct OR to conform his conduct to the law. While the court's comments at the original hearing (53) could have been more artful, any confusion about what the court was saying was partly the fault of counsel, who misstated the language in § 971.15(1). Taken as a whole, the court's remarks in finding Kucharski responsible and in denying his postconviction motion leave no doubt that the trial court considered both prongs of the second requirement for a successful sanity defense.[3]

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[2] Ironically, in attempting to clarify what it had done at the original fact-finding hearing, the trial court misspoke, thereby wrongly suggesting it had found Kucharski not guilty by reason of insanity.

[3] Interestingly, the verdict forms submitted when a jury acts as factfinder in the responsibility phase of a trial do not require separate findings on each alternative. Rather, Wis. JI-Criminal 605B (2011), "Verdict: Not Responsible by Reason of Mental Disease or Defect," merely requires the jury to answer yes or no to the following question:

> Question 2: As a result of the mental disease or defect, did the defendant lack substantial capacity either to appreciate the wrongfulness of the conduct or to conform that conduct to the requirements of law?

This court should therefore reject Kucharski's first argument.

II. THE TRIAL COURT'S FINDING THAT KUCHARSKI FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT HE WAS NOT RESPONSIBLE FOR MURDERING HIS PARENTS IS NOT CLEARLY ERRONEOUS.

A. General principles and standard of review governing the determination of a criminal defendant's sanity.

In *State v. Sarinske*, 91 Wis. 2d 14, 48, 280 N.W.2d 725 (1979), the supreme court summarized the principles and standards governing a factfinder's determination on the issue of a criminal defendant's sanity:

> [I]t is the responsibility of the trier of fact to determine the weight and credibility of the testimony on the issue of insanity and to determine whether the accused has met the burden of proving he was insane. The opinion of an expert even if uncontradicted need not be accepted by the jury. The question of whether an accused has or has not met this burden is one of fact, not one of law for this court on appeal. Where there is sufficient credible evidence to support the jury's finding, the jurys verdict will not be upset. *State v. Bergenthal*, 47 Wis. 2d 668, 685, 178 N.W.2d 16 (1970), *cert. denied,* 402 U.S. 972, 91 S. Ct. 1657, 29 L.Ed.2d 136 (1971); *Pautz v. State*, 64 Wis. 2d 469, 475-476, 219 N.W.2d 327 (1974).

Applying *Sarinske*, the State will show below why this court should uphold the trial court's finding that Kucharski was mentally responsible for killing his parents.

B. That no expert opined that Kucharski was mentally responsible for killing his parents does not mean the trial court's finding that he had failed to prove the insanity defense by a preponderance of the evidence is clearly erroneous.

Kucharski's second argument is that the trial court's finding that his schizophrenia did not cause him to lack substantial capacity to appreciate the wrongfulness of his acts or to conform his conduct to the requirements of law is clearly erroneous. Kucharski's brief at 16-24. This argument hinges on the fact no expert opined that Kucharski was responsible for his acts. Dr. Rawski, the court-appointed expert, concluded that Kucharski suffered from schizophrenia that resulted in the lack of substantial capacity to appreciate the wrongfulness of his actions (10:17; 52:35-36). Dr. Pankiewicz, the defense expert, agreed that Kucharski was suffering from schizophrenia at the time of the crimes and that as a result, he lacked substantial capacity both to appreciate the wrongfulness of his conduct and to conform his behavior to the requirements of law (11:9). Dr. Jurek, the prosecution's expert, stated in his report that Kucharski "does suffer from a genuine mental illness" and that "it is unlikely that my conclusions regarding [his] criminal responsibility would differ from Dr. Rawski's finding as . . . expressed in his report" (12).

Kucharski apparently believes that the lack of a dissenting expert opinion means that the trial court's finding that he was responsible for his crimes must be clearly erroneous. If so, that belief is misguided.

In *Sarinske*, 91 Wis. 2d at 48-49, the supreme court reiterated that the trier of fact (there a jury, here the trial court) is free to disbelieve the defense experts even if the

State does not present any experts to rebut the defense experts' opinions:

> As the court in *Pautz v. State*, 64 Wis. 2d 469, 219 N.W.2d 327 (1974), noted, the jury is free to disbelieve the defense witnesses entirely, and even if the state declines, as it did in *Pautz*, to present any experts in rebuttal, the accused may fail to satisfy his burden of affirmatively proving that he was suffering from mental disease. *State v. Bergenthal*, 47 Wis. 2d 668, 178 N.W.2d 16 (1970). Because the defense doctors relied substantially on information provided by Sarinske, the basis of their opinion and their diagnoses could be questioned by the jury on this ground alone. *Pautz v. State*, *supra,* 64 Wis. 2d at 476, 477, 219 N.W.2d 327.

The foregoing excerpt from *Sarinske* establishes that when defense doctors base their opinions primarily on information obtained from the defendant, the factfinder can questions those opinions on that basis alone. This is the situation here.

The reports prepared by Dr. Pankiewicz and Dr. Rawski reveal that the bulk of the information on which they relied in concluding that Kucharski was not responsible for his conduct came from Kucharski himself. Dr. Rawski, the only witness to testify during the sanity phase, noted in his report that Kucharski had never revealed the symptoms of schizophrenia – primarily "auditory hallucinations, referential delusions and nihilistic dilemmas that veered from reality over time" – prior to killing his parents (10:17). In an evaluation conducted by Dr. Mark Pushkash at the behest of the Social Security Administration in September 2009 – a mere five months before the murders – Kucharski "denied any hallucinatory experiences" and "made no obvious statements reflective of delusional thinking" (*id.*:15). Dr. Rawski acknowledged that his diagnosis was based primarily on Kucharski's subjective reports (*id.*:17). He noted that Kucharski "has never revealed these symptoms prior to the index offenses" (*id.*). Significantly, in the section of his report titled "Criminal Responsibility," Dr.

Rawski observed that "[t]he most helpful evidentiary source as to mental state at the time of the offense is direct observations of the defendant's statements and behaviors during the incident by others" (*id.*:18). He added that no such observations were available, given that the deceased victims were the only witnesses to the crime (*id.*).

Judging by the trial court's comments, it was this weakness in the defense case that caused the court to reject the affirmative defense. The court agreed that Kucharski was suffering from the mental illness of schizophrenia when he murdered his parents (53:2, 5), but found that there was insufficient proof that the illness caused him to lack substantial capacity to appreciate the wrongfulness of his acts or to conform his behavior to the law (*id.*:6-7). The court found that Dr. Rawski and Dr. Pankiewicz were speculating about what was going on in Kucharski's mind when he killed his parents "because all we have is the Defendant's behavior itself and a few statements made in varying degrees of closeness of time, afterwards" (*id.*:3).

Regarding the alternative of inability to appreciate the wrongfulness of one's conduct, the court remarked that Dr. Rawski's opinion that Kucharski had developed an altruistic motive for killing his parents was undercut by "indications, very near the point in time that [Kucharski] committed these crimes, that he understood they were wrongful, illegal" (53:5).

As for Dr. Pankiewicz's opinion that Kucharski could not conform his conduct to the requirements of law because he was responding to the command voices when he committed his crimes, the trial court essentially rejected this opinion because it failed to account for the fact Kucharski did not kill himself even though the voices told him to do so (53:4).

In arguing that Kucharski had failed to meet his burden of proof, the prosecutor voiced the concern that "the whole history we have about Mr. Kucharski and his

mental health is self-reported. We don't have any history of that" (52:79). The prosecutor – like the trial court when it rejected the affirmative defense – pointed out the incongruity in Kucharski supposedly following the command voices when he shot his parents but then having the ability to ignore the voices' urging to "take his life or die by suicide by cop" (*id.*:80).

The concern voiced by both the prosecutor and the trial court with respect to Kucharski's self-reporting being the basis for the doctors' opinions is consistent with what the supreme court said in *Sarinske*:

> Because the defense doctors relied substantially on information provided by [the defendant], the basis of their opinion and their diagnosis could be questioned by the [factfinder] on this ground alone.

91 Wis. 2d at 49.

While Kucharski relies heavily on *Kemp v. State*, 61 Wis. 2d 125, 211 N.W.2d 793 (1973), to support his contention that the trial court's finding lacks evidentiary support, the supreme court did not find clearly erroneous the jury's finding that Kemp was responsible for killing his wife. Rather, the supreme court exercised its power of discretionary reversal, awarding Kemp a new trial on the issue of mental responsibility because the court found "that justice has probably miscarried and that it is probable a new trial will result in a contrary finding." 61 Wis. 2d at 137. *Kemp* is therefore relevant to the question of whether this court should grant Kucharski a new trial in the interest of justice, and the State will discuss *Kemp* in that context in the next section of the Argument. But *Kemp* does not support Kucharski's claim that the trial court's finding of mental responsibility was clearly erroneous, and Kucharski has not cited any case overturning a factfinder's determination on sanity on that basis.

For all these reasons, this court should reject Kucharski's argument that the trial court's finding in phase two is clearly erroneous and entitles Kucharski to a new trial on the issue of sanity.

III. KUCHARSKI IS NOT ENTITLED TO A NEW TRIAL IN THE INTEREST OF JUSTICE ON THE GROUND IT IS PROBABLE THAT JUSTICE HAS MISCARRIED.

A. Principles governing the grant of a new trial in the interest of justice on the ground of a probable miscarriage of justice.

New trials in the interest of justice are to be granted only in "'exceptional cases.'" *State v. Avery*, 2013 WI 13, ¶ 38, 345 Wis. 2d 407, 826 N.W.2d 60 (citations omitted). Accordingly, the appellate court approaches a request for a new trial with great caution. *State v. Armstrong*, 2005 WI 119, ¶ 114, 283 Wis. 2d 639, 700 N.W.2d 98.

When a defendant seeks a new trial on the issue of criminal responsibility under the probable-miscarriage-of-justice prong of Wis. Stat. § 752.35, this court should grant a new trial only where the evidence as a whole predominates so heavily on the side of the defendant that there is a substantial probability a new trial would produce a different result. *State v. Murdock*, 2000 WI App 170, ¶ 40, 238 Wis. 2d 301, 617 N.W.2d 175.

B. This is not an exceptional case warranting this court's exercise of its discretionary power of reversal under § 752.35.

The State acknowledges that the supreme court and this court have granted new trials in the interest of justice on the issue of a criminal defendant's sanity on the ground it is probable that justice has miscarried. The supreme court did so in *Kemp*, 61 Wis. 2d 125, and this court did so in *Murdock*, 238 Wis. 2d 301, and *State v. Vento*, No. 2012AP1763-CR, 2013 WL 2157900 (Wis. Ct. App. May 21, 2013), *pet. for rev. filed* (Wis. Sup. Ct. June 19, 2013) (R-Ap. 101-08).

Kucharski asserts that his case is similar to *Kemp* and distinguishable from three cases in which the supreme court refused to grant a new trial on the issue of sanity on the ground of a probable miscarriage of justice: *Pautz v. State*, 64 Wis. 2d 469, 219 N.W.2d 327 (1974); *Schultz v. State*, 87 Wis. 2d 167, 274 N.W.2d 614 (1979); and *Sarinske*, 91 Wis. 2d 14. Kucharski's brief at 25-27.

A comparison of the facts in *Kemp* with the facts in Kucharski's case reveals that this is not the exceptional case that *Kemp* was.

Kemp was convicted of first-degree murder for shooting his wife. *Kemp*, 61 Wis. 2d at 127. Kemp was a Viet Nam veteran who developed battle-related neurosis and experienced recurring dreams of war conflict with the Viet Cong prior to his discharge from service. *Id*. at 133-34. Following his discharge, he was seen intermittently at the Veterans Administration Hospital on an inpatient and outpatient basis for the treatment of mental and emotional problems. He complained of recurring dreams of Viet Nam violence, suspicion and hostility of others, alcoholism and drug use. *Id*. at 134. Kemp slept with a gun under his pillow for self-protection. *Id.*

Kemp made statements indicating he and his wife got along well, and several neighbors who were positioned to observe Kemp's interactions with his family confirmed that the family got along very well, with no noticeable fights or quarrels. 61 Wis. 2d at 134.

From February 1 to May 5, 1971, he was confined to the Veterans Administration Hospital for treatment of his mental problems and from May 5 to June 10, 1971, he was treated on outpatient status. On June 10, 1971, he was released from outpatient status. 61 Wis. 2d at 134.

On June 11, 1971, Kemp took his two children and flew to California. 61 Wis. 2d at 131. On June 14, he returned to the Milwaukee-Waukesha area, where he registered at a motel and did not return home. *Id*. at 131-32. On June 15, he went to the Veterans Administration Hospital with his children. He had been drinking and had a pistol with him. *Id*. at 132. He was interviewed by police and stated he had no recollection of anything that transpired from the time he left the Veterans Hospital on June 10 except that he realized at one interval that he was in California with the children and had the gun with him. *Id*.

The body of Diane Kemp was found in the couple's bed with two wounds caused by bullets fired from Kemp's pistol. When Kemp was informed of his wife's death, he appeared emotionally upset but did not deny his involvement or explain his sudden departure from Wisconsin with the children and without his wife. 61 Wis. 2d at 128-32, 134.

In interviews with several psychiatrists, Kemp explained his wife's death by saying he was sleeping and had a dream that he was in Viet Nam and being attacked by the Viet Cong, that he killed some of them, that the shots woke him and that his wife was in bed with him. 61 Wis. 2d at 134.

Six psychiatrists testified at Kemp's trial. Two court-appointed psychiatrists and the defense-retained psychiatrist testified that, because of a mental disease or defect, Kemp lacked substantial capacity to either appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. 61 Wis. 2d at 135. Two psychiatrists hired by the State testified that they could not express an opinion on Kemp's mental condition and a third psychiatrist hired by the State testified that Kemp may have been legally insane at the time of the homicide. *Id*.

Kemp's account of the events surrounding his wife's murder showed that Kemp was neither awake nor aware of his actions when he committed the crime. Rather, Kemp awoke only after hearing shots fired.

Kemp's account of the crime was consistent with prior documented events, in particular his recurring dreams of war conflicts with the Viet Cong. Those dreams predated his discharge from the service and he complained of having such dream during psychiatric treatment postdating his discharge but preceding the shooting of his wife. 61 Wis. 2d at 134. This evidence would weigh so heavily on Kemp's side at a retrial that a court might reasonably find a substantial probability of a different outcome on the issue of whether Kemp had the capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law when he shot his wife.

In contrast to the situation in *Kemp*, Kucharski had not been undergoing treatment for his mental problems prior to killing his parents. Accordingly, there were no existing treatment records for any of the three examining experts to review. While Kemp's account of the events surrounding his wife's shooting were consistent with historical facts – his prior recurring dreams of Viet Cong violence – Kucharski told Dr. Rawski that the day of the shootings was the first time he had heard voices telling him to kill both parents (51:60).

Apart from the differences discussed above, there are circumstances present in this case that were not at work in *Kemp* that render this case a poor candidate for discretionary reversal.

Here, the events surrounding the crime justifiably caused the trial court to conclude that Kucharski had not shown by a preponderance of the evidence that his schizophrenia impaired his ability to understand the wrongfulness of his conduct or to conform his conduct to the requirements of law. As the trial court observed, Kucharski made statements shortly after committing the crimes indicating that he understood the illegality of what he had done (53:3). The court referenced Kucharski's comments about needing a lawyer and possibly paying for one out of his parents' estate as suggesting he understood the wrongfulness of his conduct (*id.*:4).

As for Kucharski's ability to conform his conduct to the requirements of law, the court was bothered by Dr. Pankiewicz's conclusion that the command voices made him kill his parents, given that Kucharski was able to resist the voices when they allegedly ordered him to kill himself or to die in a shootout with the police (53:4).

Because of the above-described differences between *Kemp* and this case, this is not the exceptional case that *Kemp* was. Rather, this case is more akin to *Pautz*, 64 Wis. 2d 469, where the supreme court concluded that the jury had not acted unreasonably in finding that Pautz did not meet his burden of proof on the insanity defense. *Id.* at 479. In upholding the jury's determination, the supreme court found significant the following distinctions between *Kemp* and the facts in *Pautz*:

> Kemp had an extensive history of psychiatric problems prior to the murder – such history is lacking here. In *Kemp* the mental disorder matched the nature of the crime—here that issue is in great dispute to say the least. And, most conclusively, Kemp did not even remember the crimes—here, the

> defendant signed a confession not only clearly recounting the incidents but also indicating his clear intent to commit such a crime.

64 Wis. 2d at 479.

Similar to the situation in *Pautz*, Kucharski did not have an extensive history of psychiatric problems; he remembered committing the crimes; and he intended to do so. As Dr. Rawski stated in his report, Kucharski's history "reveal[ed] no indication that these incidents were expectable. Despite the presence of guns in the home, there is no history of routine reliance upon aggression to manage interpersonal conflicts" (10:19).

For the reasons discussed above, this court should deny Kucharski's request for a new trial in the interest of justice; it should not award him a do-over on the issue of whether he was sane when he intentionally killed his parents.

IV. DEFENSE COUNSEL WAS NOT INEFFECTIVE DURING THE SANITY PHASE OF TRIAL IN FAILING TO CALL DOCTORS PANKIEWICZ AND JUREK OR IN FAILING TO INTRODUCE KUCHARSKI'S DELUSIONAL WRITINGS.

A. General principles governing claims of ineffective assistance and standard of review.

Strickland v. Washington, 466 U.S. 668 (1984), establishes the standards for evaluating claims of ineffective assistance of counsel. To prove an ineffective-assistance claim, the defendant must satisfy *Strickland's* two-part test: he must prove that counsel's performance was deficient and that the deficient performance was

prejudicial. *Id.* at 687. Given this two-pronged test, this court in reviewing a claim of ineffective assistance "may reverse the order of the two tests or avoid the deficient performance analysis altogether if the defendant has failed to show prejudice." *State v. Johnson*, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990); *State v. Kuhn*, 178 Wis. 2d 428, 438, 504 N.W.2d 405 (Ct. App. 1993).

An attorney's performance is deficient if the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Johnson*, 153 Wis. 2d at 127, quoting *Strickland*, 466 U.S. at 687. Performance is deficient if it falls outside the wide range of professionally competent representation. *State v. Pitsch*, 124 Wis. 2d 628, 636-37, 369 N.W.2d 711 (1985). Performance is measured by the objective standard of what a reasonably prudent attorney would do in similar circumstances. *See Strickland*, 466 U.S. at 688. The reviewing court indulges in a strong presumption that counsel acted reasonably within professional norms. *Pitsch*, 124 Wis. 2d at 637.

The prejudice component of *Strickland* focuses "on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). In other words, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

A claim of ineffective assistance of counsel presents a mixed question of fact and law. *State v. O'Brien*, 223 Wis. 2d 303, 324, 588 N.W.2d 8 (1999). The appellate court will affirm the trial court's findings of historical fact concerning counsel's performance unless those findings are clearly erroneous. *Id.* at 324-25. However, the ultimate question of ineffective assistance is one of law, subject to independent review. *Id.* at 325.

B. Counsel's decision to forego presenting doctors Pankiewicz and Jurek as witnesses during the sanity phase and to forego introducing the delusional writings found at the crime scene was neither deficient performance nor prejudicial.

Kucharski argues that his attorneys were ineffective in their handling of the sanity phase because they failed to call doctors Pankiewicz and Jurek to testify and failed to introduce delusional writings that were discovered at the crime scene. Kucharski's brief at 27-33. The trial court did not hold a hearing on this specific claim of ineffective assistance, which was raised in Kucharski's § 809.30 motion (36:2). Nevertheless, the testimony of defense counsel Robin Dorman at the presentencing *Machner* hearing[4] held April 14, 2011 (58:12-50), is relevant to this issue, as are the findings made by Judge Conen in denying the plea-withdrawal motion. The trial court considered Dorman's testimony when it denied the postconviction motion (*see* 42:2-3), and the State will rely in part on Dorman's testimony to support its argument that counsel was not ineffective.

[4] The April 14, 2011 hearing involved Kucharski's motion for plea withdrawal, in which Kucharski claimed defense counsel rendered ineffective assistance in advising him to plead guilty in the guilt phase (20). Kucharski is not pursuing that claim on appeal.

1. The decision to forego the presentation of additional expert witnesses and the introduction of the delusional writings was not deficient performance.

Contrary to Kucharski's claim, counsel's decision to forego presenting doctors Pankiewicz and Jurek as witnesses and to forego introducing delusional writings by Kucharski was not deficient performance. There are at least three reasons why counsel's strategic decision was reasonable: 1) the examining experts unanimously supported the insanity defense; 2) the prosecutor agreed not to object to admission of the nontestifying doctors' reports; and 3) the prosecutor indicated that the State would not be presenting any evidence in phase two.

At the hearing on Kucharski's plea-withdrawal motion, attorney Dorman explained why she viewed the NGI defense as "probably the strongest case I've ever seen" (58:23):

> [W]e believed that these two doctors, specifically Dr. Rawski and Dr. Pankiewicz, had such a fine reputation and are actually I believe viewed as somewhat conservative, and these are not diagnoses that they make lightly, we thought by having these well-known and well-respected doctors supporting it, we were in very good shape. We also thought that the fact that the state hired their own doctor and he came up with the same conclusion also gave us a great deal of confidence.

(*Id.*)

Dorman testified that she had "sort of a gentleman's agreement" with the prosecutor that "this hearing would be mostly a formality" (58:24). The prosecutor told her the State would not present any evidence contesting the NGI plea (*id.*). The prosecutor

also told her the State would not object to admitting the other doctors' reports even if the doctors did not testify (*id.*:47-48). Under these circumstances, Dorman and co-counsel decided to call only Dr. Rawski as a witness, and gave the following explanation for that decision:

> We thought because his report seemed to be the most thorough, because he had used the assistance of a psychologist to help him prepare the report, because he was appointed by the court and was, therefore . . . the strongest person to put in the evidence.

(58:37.)

Although Dorman in hindsight described their decision to put in a streamlined case as "very foolish" (58:37), at the time the decision was made "we all understood that this hearing was going to be a formality" (*id.*), so they opted not to present any evidence other than the three doctors' reports and Dr. Rawski's testimony (*id.*:37-38).

The strategic decision to present a streamlined NGI defense must be judged based on the circumstances existing when the decision was made; the decision cannot be judged based on hindsight. Given that the experts unanimously supported the NGI defense and that the State did not plan to present any evidence or object to admission of the nontestifying experts' reports, counsel's decision did not amount to deficient performance. Rather, it fell within "the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. This is especially so in light of counsel's knowledge that the judge hearing the case was formerly a psychiatric nurse and had recently ruled in favor of the defense on a motion for conditional release (58:36). Based on all of these factors, counsel's decision to forego calling the other two doctors as witnesses and to forego introducing the delusional writings found at the crime scene was not deficient performance.

2. The decision to forego the presentation of additional expert witnesses and the introduction of the delusional writings was not prejudicial.

If this court disposes of Kucharski's claim of ineffective assistance on the ground that counsel's performance was not deficient, it need not address *Strickland*'s prejudice prong. But if this court finds it necessary to address whether counsel's failure to call doctors Pankiewicz and Jurek and to introduce delusional writings found at the scene prejudiced Kucharski, for the following reasons the court should find no prejudice.

In denying Kucharski's motion for plea withdrawal, Judge Conen – having heard attorney Dorman's testimony and having read the parties' briefs – decided that Kucharski was not prejudiced by counsel's decision to forego having doctors Pankiewicz and Jurek testify (59:9).[5] Because all three doctors "were very adamant about their feelings that Mr. Kucharski was not responsible" and the reports of the nontestifying doctors were admitted into evidence, Judge Conen found that it was "[h]ighly unlikely" that the live testimony of the other two experts would have changed Judge DiMotto's mind (*id.*:9-10).

In denying Kucharski's § 809.30 motion, Judge DiMotto confirmed that having the additional doctors testify would not have altered her finding that Kucharski was mentally responsible because she had considered the reports and opinions of all three doctors in reaching her conclusion (42:2-3). Judge DiMotto further found that the

[5] Although this claim of ineffective assistance was not raised in the plea-withdrawal motion, the court addressed it in its decision, likely because defense counsel raised it in his reply brief in support of the motion (*see* 24:2).

introduction of Kucharski's delusional writings would not have changed the result (*id.*:3-4).

In finding that introduction of the writings would not have changed the result of phase two, the court said it was aware of the writings because both Dr. Rawski and Dr. Pankiewicz referenced them in their respective reports (42:3-4). The court added that it could not have independently evaluated the writings without the assistance of a mental health expert (*id.*:4). The court found that having the reports would not have changed the court's reasoning (*id.*:3).

For all these reasons, Kucharski was not prejudiced by counsel's decision to forego presentation of his delusional writings. This is the second reason this court should reject his claim of ineffective assistance.

CONCLUSION

For all of the foregoing reasons, this court should affirm the judgment of conviction and the order denying Kucharski's postconviction motion.

Dated this 10th day of October, 2013.

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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 6503 words.

_____
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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 10th day of October, 2013.

_____
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