

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2013AP000557 CR
Trial Court Case No. 10 CF 652

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

COREY R. KUCHARSKI,

Defendant-Appellant.

ON APPEAL FROM THE CIRCUIT COURT OF MILWAUKEE COUNTY
THE HONORABLE JEANE DIMOTTO
CIRCUIT COURT JUDGE PRESIDING

CORRECTED REPLY BRIEF OF THE DEFENDANT-APPELLANT

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ARGUMENT

Appellant relies on his initial brief to this Court in support of his arguments and incorporates those arguments in this Brief. Undersigned counsel uses this opportunity to supplement those positions.

I. THE TRIAL COURT ERRED IN ITS APPLICATION OF WISCONSIN STATUTES § 971.15.

As outlined extensively in appellant's initial brief, trial counsel inquired of the Court whether it was making a finding as to *both* of the categories under the second prong of Wis. Stats. Sec. 971.15. *Initial Brief of Defendant-Appellant at pp. 12-16.* Trial counsel did not mis-state the law, rather, the Trial Court's statements did not appear to address the second component of the second prong of the analysis required under Wis. Stats. Sec. 971.15. The Trial Court vacillated in its' reasoning in its' denial of Mr. Kucharski's NGI defense. *Initial Brief of Defendant-Appellant at pp. 14-15.*

Appellant relies on his initial brief to this Court on this issue. The Trial Court did not fully address the question of whether Mr. Kucharski's mental illness rendered him incapable of conforming his conduct to that which the law required.

II. THE TRIAL COURT'S CONCLUSIONS REGARDING MR. KUCHARSKI'S MENTAL RESPONSIBILITY LACK SUPPORT IN THE RECORD.

The State challenges the strength of the unanimous expert opinions in favor

of an NGI finding and then claims that the strength of the Trial Court's own speculation overwhelmed the uncontroverted evidence in the Record. This position runs contrary to both the Record and a reasonable review of same.

The question this Court must answer is whether there exists, in the Record, *sufficient credible evidence* to support the findings and conclusions of the Trial Court. As discussed in appellant's initial brief, a "finding will be upset when the evidence is not sufficient to support it and especially when no credible evidence has been received to support it." *State v. Leach*, 124 Wis.2d 648, 660, 370 N.W.2d 240, 247 (WI 1985). When reviewing whether a trier of fact had credible evidence at trial sufficient to support its decision, courts have looked to four Wisconsin Supreme Court opinions (*Kemp*, *Pautz*, *Schultz*, and *Sarinske*) for the relevant standards when addressing this issue. *State v. Murdock*, 238 Wis.2d 301, P 32, 617 N.W.2d 175 (Wis. Ct. App. 2000). The Supreme Court has granted defendants a new trial on the issue of defendant's mental responsibility when the weight of the evidence predominates "quite heavily" for the defendant, and the Court believes that a new trial would likely produce a different result. *Kemp v. State*, 61 Wis.2d 125, 138, 211 N.W.2d 793 (WI 1973). The evidence in the instant case weighs "quite heavily" for the appellant. There is nothing in the Record, other than the Trial Court's own speculation, to support its' conclusions.

The burden of proof for the defense at Trial was a preponderance of the

evidence, the lowest standard. Wis. Stats. Sec. 971.15(3). The Trial Court itself opined that, whether the burden of proof was “preponderance of the evidence” versus the higher standard of “clear and convincing” was critical:

That’s a very important distinction to me, in terms of the burden of proof because I think this is a very close question, despite the fact that there are two doctors who have opined that Mr. Kucharski lacked substantial capacity to appreciate the wrongfulness of his actions or conform them to the law.

R. 53, p. 2. Such a distinction can only be critical if one has already met the lower of the two burdens. Since the Trial Court’s comments indicate that the defense had met the lower of the two burdens, it is respectfully argued that the Trial Court’s ultimate rejection of Mr. Kucharski’s defense is, on its’ face, erroneous. The State fails to address this point.

The State’s challenge to the unanimous expert opinions appears to be rooted in the claim that the opinions were reliant on information provided by the defendant. This ignores the fact that the doctors themselves indicated that, in addition to meeting with Mr. Kucharski, they also reviewed voluminous materials related to the case against him. Dr. Rawski testified that he reviewed documents which included the criminal file supplied by the defense counsel, audio recordings of the 911 call and detective’s interviews, writings and diagrams discovered among Mr. Kucharski’s possessions, medical records from the Milwaukee County Jail, a psychologist’s report from the Wisconsin Forensic Unit, a disability report

from September 2009 from a Social Security evaluation, and a personal interview with Mr. Kurcharski. R. 52 at pp. 20-21. Dr. Pankiewicz also personally reviewed these same documents and conducted his own interviews. R. 11. The information the two primary doctors relied upon (Dr. Jurek did not provide a detailed opinion) can hardly be classified as being entirely dependent on the defendant-appellant's self-reporting. The State ignores (as well) the fact that Mr. Kucharski was independently tested by yet a fourth doctor to determine whether malingering was an issue. Dr. Lundbohm found that Mr. Kucharski's "classification of genuine responding had greater than 90 percent accuracy" and concluded that Mr. Kucharski reported legitimate psychological experiences. R. 52 at p. 33. *See also* R. 11, p. 6 and R. 12.

The State asserts that the lack of treatment and/or reporting of symptoms by Mr. Kucharski prior to the offense is indicative of a lack of support for the NGI defense. This ignores the extensive reviews conducted by both Drs. Rawski and Pankiewicz as well as the malingering testing conducted by Dr. Lundbohm. It further indicates an untenable position – that the only time an NGI defense could be raised is if there exists a documented mental health history. Individuals can, and do, have psychotic breaks without any prior mental health treatment history. Life is never clean and tidy – before individuals seek treatment for mental health issues there have to be discernible problems. For some, they recognize the

symptoms immediately or have the family support that they obtain treatment prior to a full collapse. Others do not obtain treatment until after there is a complete psychotic break.

Appellant has discussed in his initial brief the various factors to use when assessing whether a trier of fact could conclude that the evidence was sufficient. *Brief of Defendant-Appellant, pp. 18-23.* While these factors relate to the question of whether a new trial should be ordered in the interests of justice, they are also applicable when reviewing the question of whether or not the Trial Court's determination is supported by credible evidence.

The Record is replete with support for Mr. Kucharski's NGI defense. Three expert opinions in support of the defense and a fourth doctor's testing to verify the validity of Mr. Kucharski's claims of mental illness far outweigh any speculation on the part of the Trial Court as to why Mr. Kucharski did not kill himself as the voices *originally* directed him. There exists nothing in the Record to support the conclusion that was reached. The Trial Court's comments about the decision being a "close question" based on an initial uncertainty over whether the burden of proof was the lowest (as it is) or the intermediate further belies the fact that the defense met its' burden – it had, and has, established, at the very least by a preponderance of the evidence, that Mr. Kucharski lacked the ability to either appreciate the wrongfulness of his actions or conform his conduct to that which is

required by the law.

III. THE INTERESTS OF JUSTICE DICTATE THAT MR. KUCHARSKI SHOULD BE GRANTED A NEW TRIAL.

The bulk of the State's argument on this issue is a recitation of the facts from *Kemp v. State*, 61 Wis.2d 125, 211 N.W.2d 793 (1973). The State discusses, at length, Mr. Kemp's history of mental health treatment and diagnoses in support of its' belief that somehow *Kemp* is distinguishable from the instant case. The State's implication appears to be that Mr. Kucharski's assertion of mental health problems and his NGI defense are suspect due to the lack of prior treatment for Mr. Kucharski. The State's reliance on this point fails to acknowledge the fact that Mr. Kucharski's mental health diagnosis of active schizophrenia has not once been challenged and, in fact, was even found to be a valid claim by the Trial Court itself. Four doctors (including Dr. Lundbohm who conducted testing to rule out malingering) all agreed that Mr. Kucharski clearly suffered from schizophrenia at the time of this offense with nary a voice in opposition. The State can cite nothing in the Record to support its' implied assertion that Mr. Kucharski did not suffer from significant mental health problems – it simply appears to claim that if you don't have a history of treatment, you don't have a problem. Such logic is akin to saying that the person who suffers a major heart attack or stroke didn't really have one since they haven't had one before. Health, life, and logic do not work that

way.

While a lack of prior treatment history may be a consideration, it is one which can, and should obviously, be overwhelmed once it is demonstrated, through expert opinions, that the individual, though having gone untreated, truly does suffer from significant mental impairments. Such was the case in the instant matter. Four doctors, and even the Trial Court, said so.

The State's next claim was that Mr. Kucharski's NGI defense should fail because the facts surrounding the offense itself were largely self-reported. The State relies again on the facts in *Kemp* and claims that they are distinguishable. The reality, however, is that they are not remotely distinguishable. The State itself discusses throughout its recitation that "Kemp explained" and "Kemp made statements" and "Kemp's account" regarding what the events were surrounding the murder of his wife. *Brief and Supplemental Appendix of Plaintiff-Respondent*, pp. 17-18. Other than the physical evidence which could be developed from the crime scene (as in Mr. Kucharski's case), investigators were largely dependent on Mr. Kemp's accounts as to what happened to his wife and why it happened. In both cases investigators were reliant, to a large extent, on the accounts provided by each of the accused.

The State's final salvo on this issue appears to be that Mr. Kucharski's actions after the event – calling the police, providing a statement, indicating an

understanding that he may need a lawyer¹ – belie any claim that he did not understand right from wrong or lacked the capacity to conform his behavior accordingly. This argument again must fail when looking at the Record in the instant matter as well as the very sources the State relies upon.

Again, the State can cite to nothing in the Record to support or defend its’ position that Mr. Kucharski was not NGI. All of the doctors supported the defense and there existed no expert testimony to refute it. The State, instead, relies on speculation that Mr. Kucharski must have been mentally responsible because he called the police and provided a statement. The State engages in the same error as the Trial Court did in this matter – it is not applying the Record we have, but speculates about possible other explanations for facts which the experts already addressed in their respective opinions in favor of Mr. Kucharski’s defense. This

1 The fact that Mr. Kucharski fully confessed his involvement and even summoned police to the scene demonstrates that he was not acting in a logical fashion. A man who kills his parents does not normally call the police on himself. One could certainly argue that the actions of Mr. Kemp – taking his children and fleeing to California after killing his wife – are far more goal driven and logical than calling 911 and, in a detached and disjointed way, informing authorities that a hearse is needed. This, however, would require speculation surrounding Mr. Kemp and his condition.

State v. Vento, 348 Wis.2d 763, 2013 WL2157900 (Wis. App.), an unpublished decision cited by the State, discusses how:

. . . as we did in *Murdock*, we conclude that evidence that Vento “appeared to be behaving rationally in some instances does not mean that he was generally able to control his behavior or appreciate its wrongfulness” at the time of the attack. *See id.*, para. 44. Indeed, in this particular case, the fact that Vento appeared to behave rationally at the time of his arrest – by not resisting, and by being cordial with the police during booking -- only strengthens the conclusion that Vento was acting upon a delusion when he attacked his neighbor.

runs counter to *State v. Vento*, 348 Wis.2d 763, 2013 WL2157900 (Wis. App.), an unpublished decision the State has attached to its' brief. *Vento* discusses how the Trial Court, by engaging in the very same type of speculation we have in the instant case, effectively changes the legal standard by requiring the defense to show “no other possible explanation for his behavior”. *Id.* at Para. 28. The legal standard is not that the defense must prove beyond any doubt the validity of an NGI defense, it is by a preponderance of the evidence. To require a defendant to demonstrate that there is no other explanation violates the established law and creates an impossible burden – there could always exist some other possible explanation for anything.

Trial Courts, like any other fact finder, must still base decisions off of the evidence before them. They are not to speculate about the “what ifs” or the “how do I know”. The Record in the instant matter is what the Court must consider, not speculate as to whether there is some other explanation. Four doctors spoke, from the witness stand or through their reports, to the fact that Mr. Kucharski lacked the mental capacity to be held legally responsible in the instant matter. Those doctors took into account the facts surrounding Mr. Kucharski's case and rendered opinions based on them. There exists nothing to counter these expert opinions.

Vento at para. 33.

IV. ALTERNATIVELY, TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CALL MULTIPLE WITNESSES AND ENTER MULTIPLE EXHIBITS IN SUPPORT OF MR. KUCHARSKI'S MENTAL HEALTH DEFENSE.

Throughout its' brief, the State asserts that the Trial Court's speculation as to Mr. Kucharski's ability to understand right from wrong or conform his behavior accordingly was appropriate as "all we have is the Defendant's behavior and a few statements made in varying degrees of closeness of time, afterwards." R. 53, p. 3; *Brief and Supplemental Appendix of Plaintiff-Respondent*, p. 13. This position² demonstrates how critical presentation of all of the evidence, including Mr. Kucharski's delusional writings, was.

The State has claimed that Mr. Kucharski's self-reporting of symptoms and the facts surrounding this event were suspect and, therefore, supports the Trial Court's speculation and effective alteration of both the legal standard and the defense's burden of proof related to the NGI defense. Surely, then, the very documents and other evidence within the hands of the defense, items which they did not present to the Trial Court, become all the more important? Surely, then, evidence of Mr. Kucharski's delusional state, delusions including beliefs that both he and his cell phone were being raped, would have been critical for the Trial Court to consider? Surely, then, calling all of the doctors, including Dr. Lundbohm, in order to

² The defense continues to maintain that, in addition to the defendant's behavior and statemetns, the Trial Court also had multiple doctor's opinions and expert testimony at its disposal.

demonstrate that Mr. Kucharski was both significantly mentally ill and that his illness prevented him from being able to understand right from wrong or conform his behavior accordingly, would have been critical for the Trial Court to hear? It is respectfully argued that the State cannot argue in favor of requiring the defense to present irrefutable proof in order to overwhelm all possible speculation and reach its' interpretation of "preponderance of the evidence" and then claim that trial counsel was not ineffective when they fail to do everything possible in an attempt to meet such a burden.

The State asserts that counsel was not ineffective as the Trial Court was "aware" of the existence of Mr. Kucharski's writings as they were referenced in the various expert reports. *Brief and Supplemental Appendix of Plaintiff-Respondent*, p. 26. "Aware" of the existence versus actually seeing the content of the writings are two very different things. Neither of the substantive expert reports included the content of the various writings. They simply referenced having "reviewed" various writings of Mr. Kucharski.

The State further points out that the Trial Court indicated that, even if it had had the writings themselves, it could not have "independently evaluated the writings without the assistance of a mental health expert." *Brief and Supplemental Appendix of Plaintiff-Respondent*, p. 26. The Trial Court's claim that it needed the assistance of mental health experts to evaluate the matter runs counter to its' ultimate decision that

it, in fact, knew better than all of the mental health experts retained to evaluate the matter.

It is respectfully argued that trial counsel should have presented all of the evidence it had in support of Mr. Kucharski's mental health defense. Failure to do so amounted to ineffective assistance of counsel and creates significant doubts as to the validity of the outcome.

CONCLUSION

For the foregoing reasons, Mr. Kucharski asks this Court to grant the relief requested in his original brief.

Respectfully submitted this 26th day of November, 2013.

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CERTIFICATION

I certify that this Brief conforms to the rules contained in Wis. Stats. §§ 809.19(8)(b) for a brief produced using the following font:

Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is **2,875** words.

Dated this 26th day of November, 2013, at Milwaukee, Wisconsin.

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**CERTIFICATION
As to E-Filing**

Undersigned counsel certifies that he has electronically filed an exact copy of the attached “Corrected Reply Brief of Defendant-Appellant” for Mr. Corey Kucharski, Case No. 2013AP000557-CR, pursuant to Wis. Stats. § 809.19(12)(f).

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