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STATE OF WISCONSIN

IN SUPREME COURT

No. 2013AP557-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

COREY R. KUCHARSKI,

Defendant-Appellant.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, REVERSING A JUDGMENT AND ORDER OF THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEAN A. DIMOTTO PRESIDING, AND REMANDING FOR A NEW TRIAL ON MENTAL RESPONSIBILITY

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER, STATE OF WISCONSIN

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ISSUES PRESENTED FOR REVIEW

1. This court has repeatedly stated that the discretionary reversal power Wis. Stat. § 752.35 vests in the court of appeals should be reserved for truly exceptional cases. And in *State v. Avery*, 2013 WI 13,¶ 55 n.19, 345 Wis. 2d 407, 826 N.W.2d 60, this court declared that the court

of appeals has "an obligation to analyze why a case is so exceptional to warrant a new trial in the interest of justice."

The court of appeals granted Kucharski a new trial on the issue of mental responsibility under § 752.35's miscarriage-of-justice prong without explaining why this is the exceptional case warranting such relief. Instead, the appeals court simply found that "there is a substantial probability that a new trial would produce a different result because [Kucharski] met his burden under Wis. Stat. § 971.15(3)." *State v. Kucharski*, No. 2013AP557-CR, 2014 WL 1775815, ¶ 35 (Wis. Ct. App. May 6, 2014) (Pet-Ap. 114).

Did the court of appeals erroneously exercise its discretion in doing so?

The majority of the court implicitly said no.

The dissenting judge found that the majority had substituted its judgment for that of the trial court on issues that this court in *State v. Sarinske*, 91 Wis. 2d 14, 48, 280 N.W.2d 725 (1979), held are the province of the fact-finder alone, i.e., "the credibility of witnesses, the weight of the evidence and the determination of whether the defendant has met his burden of establishing [his] lack of mental responsibility." *Kucharski*, slip op. ¶ 45 (Brennan, J., dissenting) (Pet-Ap. 120).

2. Should a defendant be entitled to a new trial on the affirmative defense of insanity under the miscarriage-of-justice prong of § 752.35 where the court of appeals, without finding any error or unfairness at trial, determines that there is a substantial probability of a different result on

retrial only by substituting its judgment for that of the fact-finder on issues that are the sole responsibility of the fact-finder to resolve?

In *Kemp v. State*, 61 Wis. 2d 125, 138, 211 N.W.2d 793 (1973), this court granted a new trial on the issue of the defendant's criminal responsibility because it concluded that the evidence predominated so heavily on the defendant's side that there was a substantial probability a different finder of fact would reach a different result on retrial. Relying on *Kemp*, the court of appeals did the same thing in *State v. Murdock*, 2000 WI App 170, ¶ 40, 238 Wis. 2d 301, 617 N.W.2d 175.

The courts in *Kemp* and *Murdock* therefore implicitly found a probable miscarriage of justice based not on any error or unfairness in the first trial, but solely on a recalibration of the weight assigned to the evidence on the defendant's side.

The State did not raise this legal issue in the court of appeals because only this court wields the power to overrule, modify, or withdraw language from a previous supreme court case or a published court of appeals decision. *Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). Only this court can modify or qualify *Kemp* and *Murdock*.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case has been scheduled for oral argument on March 10, 2015. Any case important enough to merit this court's review warrants publication.

STATEMENT OF THE CASE

In a criminal complaint filed February 10, 2010, Corey Kucharski was charged with two counts of first-degree intentional homicide with use of a dangerous weapon in the shooting deaths of his parents (2).

On the scheduled date of the preliminary hearing, Kucharski's attorneys requested that Kucharski be evaluated for competency to stand trial (46:2). The trial court ordered a forensic evaluation pursuant to Wis. Stat. § 971.14(2)(d) (*id.*). Based on a report by psychologist Deborah Collins (4), the trial court found Kucharski competent to proceed (47:2-3).

On April 8, 2010, Kucharski waived his preliminary hearing (6); an information charging him with two counts of first-degree intentional homicide by use of a dangerous weapon was filed (5).

At his arraignment, Kucharski entered pleas of not guilty and not guilty by reason of mental disease or defect on both counts (49:2). At the defense's request, the trial court appointed Dr. Robert Rawski to evaluate Kucharski (*id.*:2-3; 8).

In a report filed July 6, 2010 (10), Dr. Rawski concluded to a reasonable degree of medical certainty that at the time of the shootings, Kucharski suffered from schizophrenia that caused him to lack the substantial capacity to appreciate the wrongfulness of his actions (*id.*:20).

On August 27, 2010, the defense filed a report (11) from their retained expert, Dr. John Pankiewicz, who also concluded that Kucharski was suffering from schizophrenia when he killed his parents (*id.*:9). Dr. Pankiewicz found to a reasonable degree of medical certainty that because of his schizophrenia, Kucharski lacked substantial capacity to appreciate the wrongfulness of his conduct and to conform his behavior to the requirements of law (*id.*).

On September 25, 2010, Kucharski executed a plea questionnaire/waiver of rights form (17), waiving his right to a trial on the question of guilt but maintaining his NGI plea. On September 27, 2010, the trial court, the Honorable Jean DiMotto presiding, accepted Kucharski's no-contest pleas to both counts of first-degree intentional homicide (52:18) and then conducted a bench trial on the issue of mental responsibility (*id.*:18-83).

After hearing testimony from the sole defense witness, Dr. Rawski, the trial court found that Kucharski suffered from schizophrenia (53:2; Pet-Ap. 129) but that he had not shown by the greater weight of the credible evidence that he lacked substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law (53:6-7; Pet-Ap. 133-34).

On March 18, 2011, Kucharski filed a motion to withdraw his no-contest pleas (20). Following an April 14, 2011 hearing before the Honorable Jeffrey Conen (58), the trial court denied the motion on August 22, 2011 (59:11).

On December 16, 2011, the trial court, the Honorable David Borowski presiding, sentenced Kucharski to concurrent terms of life imprisonment with eligibility for extended supervision after thirty years (61:25).

On November 2, 2012, Kucharski filed a Wis. Stat. § 809.30 motion for postconviction relief (36). The trial court denied the motion in a written decision on February 14, 2013 (42; Pet-Ap. 124-27).

On February 26, 2013, Kucharski filed a notice of appeal from the judgment of conviction and from the order denying his postconviction motion (43). On May 6, 2014, the Wisconsin Court of Appeals, District I, reversed the judgment and order of the circuit court and remanded for a new trial on the issue of Kucharski's mental responsibility. *State v. Kucharski*, No. 2013AP557-CR, 2014 WL 1775815, ¶ 44 (Wis. Ct. App. May 6, 2014) (Pet-Ap. 118).

On September 24, 2014, this court granted the State's petition for review.

STATEMENT OF FACTS

Shortly before 1 a.m. on February 7, 2010, Corey Kucharski called 911 and advised the Milwaukee Police Department dispatcher that he had shot his parents (2:2). When asked if they should send medical help, Kucharski replied, "Just send the coroner" (*id.*).

When police arrived at the Kucharski residence, they saw Kucharski exit the rear door of the home, holding a telephone in his right hand

and what appeared to be a police scanner in his left hand (2:2). Kucharski was taken into custody and placed in a squad car (*id.*).

Upon entering the home, police found the bodies of Ralph and Pamela Kucharski (2:2). Autopsies showed that Ralph Kucharski had been shot ten times, while Pamela Kucharski had sustained four gunshot wounds (*id.*:2-3).

Shortly after his arrest, Kucharski was interviewed by Detective James Hensley (13:9). Before being read his *Miranda* rights, Kucharski told the detective he'd rather have legal representation before answering any questions other than his name, address, social security number, parents' names "and stuff like that" (*id.*:13). Kucharski added that "as far as anything that happened today . . . I want to have somebody sitting in here with me and consult with them first" (*id.*). After reading Kucharski his rights (*id.*:14), Hensley had a conversation with Kucharski but did not ask him any questions about the shootings (*id.*14-22).

Later that day, Kucharski was questioned by Detective James Hutchinson (*see* 13:3, 24-76). On February 8, 2010, Detectives Steven Caballero and Michael Sarenac conducted a third interview of Kucharski (*id*:78-103).

Two days later, Kucharski was charged with two counts of first-degree intentional homicide by use of a dangerous weapon (2:1). On the date set for his preliminary hearing, his attorneys informed the court they had reason to believe Kucharski was incompetent to stand trial,

whereupon the court ordered a competency evaluation (46:2).

Based on two clinical interviews of Kucharski and other information (4:1), Dr. Deborah Collins found Kucharski competent to proceed (*id.*8). Neither Kucharski nor his attorneys nor the prosecutor challenged the doctor's report (47:2), and the trial court found him competent.

After Kucharski pled not guilty and not guilty by reason of mental disease or defect (49:2), the court-appointed expert, Dr. Robert Rawski, prepared a report supporting the NGI plea (10; 49:2-3), as did the defense expert, Dr. John Pankiewicz (11). The State filed a letter from its expert, Dr. Anthony Jurek, who stated that "it is unlikely that my conclusions regarding Mr. Kucharski's criminal responsibility would differ from Dr. Rawski's findings as they were expressed in his report" (12).

On the scheduled trial date, the parties advised the court that they were entering into an agreement whereby Kucharski would plead no contest to both counts of first-degree intentional homicide by use of a dangerous weapon and then have a bench trial on the issue of mental responsibility. The prosecutor agreed he would not object on hearsay grounds to Dr. Rawski relying on the reports of the other two doctors who had examined Kucharski (52:11). After conducting a plea colloquy with Kucharski (*id.*:11-18), the court accepted his no-contest pleas and found him guilty of both counts (*id.*:18). The court then held a bench trial on the responsibility phase of the trial.

The sole defense witness was Dr. Rawski. He had met with Kucharski for three and one-half hours on May 26, 2010 (52:21). Dr. Rawski had also reviewed a number of documents, including the criminal file from defense counsel; writings and diagrams discovered among Kucharski's possessions; medical records from the county jail; a report by Dr. Lundbohm; and a September 2009 disability report by a psychologist who had evaluated Kucharski for Social Security disability (*id.*:20-21).

Kucharski told Dr. Rawski that he began having auditory hallucinations just before leaving for Las Vegas in 2005 (52:24). At the time, he blamed them on his use of crystal methamphetamine, but the hallucinations continued even after his drug usage ceased (*id.*).

Because Kucharski never sought treatment for his delusions and did not reveal them during his disability assessment in 2009, Dr. Rawski's information came almost exclusively from Kucharski (52:25).

Regarding the events leading up to the shootings, Kucharski reported that he and his father were drinking socially when his parents got into an argument, which he described as a very rare occurrence (52:26). Afterward, he heard voices blaming him for the argument because he had purchased Jack Daniels (*id.*). He went to his room and napped for several hours (*id.*:27). When he awoke, he heard voices telling him to kill his parents and other voices telling him to kill himself (*id.*). He reported holding a gun in his mouth for twenty minutes before going down and shooting his parents (*id.*). The voices told him to kill his

parents first and then kill himself (*id.*:27-28). He loaded up more than 200 rounds of ammunition to kill his parents (*id.*:28).

Kucharski said he killed his father first and then heard his mother running and went to another room where he shot her (52:30). Because Kucharski's father had reportedly said that if he were ever found in a life-threatening situation such as sustaining a heart attack, Kucharski should wait a couple of hours before calling 911, he waited a couple of hours before calling the police (*id.*). Kucharski told Dr. Rawski he put the gun down on the table and then forgot the plan to have a shootout with the police (*id.*:31).

Based on psychological testing, Dr. Rawski testified it was quite likely Kucharski was not malingering but was reporting "legitimate psychological experiences" (52:33). Prior to the shootings, Kucharski had not been prescribed any psychotropic medications (*id.*:34-35).

Dr. Rawski explained that Kucharski recognized the illegality of shooting his parents and that there would be legal repercussions, although he did not think he would have to face them because he would be killed by police in a shootout after committing the crimes (52:43).

Although Dr. Pankiewicz did not testify, his opinion was conveyed through Dr. Rawski. Dr. Pankiewicz also diagnosed Kucharski with schizophrenia (52:45). Dr. Pankiewicz opined that as a consequence of his schizophrenia, Kucharski lacked the substantial capacity to appreciate the wrongfulness of his acts and to conform his conduct to the requirements of law (*id.*). Because

Dr. Pankiewicz talked to Kucharski closer in time to the murders, i.e., on February 15 and June 9, 2010, he obtained details from Kucharski that were different from some of the details supplied to Dr. Rawski (*id.*:46). Dr. Rawski thought this was why Dr. Pankiewicz concluded that the auditory command hallucinations made Kucharski unable to conform his conduct to the requirements of law (*id.*).

After reading Dr. Jurek's report to himself during his testimony, Dr. Rawski related that Dr. Jurek said it would be unlikely his opinion would differ from that of the other examiners (52:49-50).

On cross-examination, Dr. Rawski testified that only Kucharski's mother had expressed the wish that somebody would shoot her; Kucharski never attributed such a statement to his father (52:60). The first time the voices clearly told Kucharski to kill his parents "to put them out of their misery" was on the day of the shooting (*id.*:61). This was a "stronger" and "clearer" command than he had experienced before (*id.*). Kucharski told him he held the gun in his mouth for twenty minutes but couldn't pull the trigger (*id.*:62). His plan for suicide by cop was related to his auditory hallucinations (*id.*).

Through his questioning of Dr. Rawski, the prosecutor pointed out that Kucharski followed the voices' command to kill his parents but then never killed himself or got into a shootout with police so they could kill him (52:62-63). Dr. Rawski admitted that Kucharski's ability to ignore one command was "certainly something that raises a – a red flag or a question about what his thought processes are" (*id.*:64). When Dr. Rawski

asked Kucharski why he didn't have a shootout, he said he put the gun down and then forgot; he also said the voices went away for a few hours after he heard the shots that killed his parents (*id.*). Dr. Rawski admitted that he "can only speculate as to why he doesn't follow through with that at that point other than . . . it's something that he couldn't bring himself to do initially" and was afterwards distracted by the wait to call 911 (*id.*:64-65).

Dr. Rawski opined that on the night of the shootings, Kucharski experienced "clarity" that identified an element of altruism in killing his parents and that's why he did it (52:65). Dr. Rawski explained the difference between his view and Dr. Pankiewicz's opinion: "[M]y opinion is more toward the development of the altruistic delusion and the role that the voices played in that rather than this irresistible command that – a force that he could not overcome and then suddenly starts to overcome" (52:66). He added, "I see his behavior as being planned and purposeful. It's for the purpose of executing his parents" (*id.*). "I believe he got to a point where he felt that it was justified, that it was the right thing to do and that it overcame the illegality of the situation" (*id.*:67).

Dr. Rawski acknowledged that Kucharski was "extremely reluctant" to discuss anything with regard to the actual charges (52:72). Dr. Rawski admitted that during one interview, Kucharski remarked that he might be able to use estate funds to hire an attorney (*id.*:75).

After cross-examining Dr. Rawski, the prosecutor called no witnesses. Defense counsel

gave a very brief closing argument, contending that because of mental illness, Kucharski "was unable to conform his conduct to the requirements of the law" (52:78).

In his closing argument, the prosecutor admitted the State did not have an expert to counter Dr. Rawski's testimony (52:78-79). Instead, the prosecutor argued that the facts did not support the expert's opinion:

> [O]bviously the whole history we have about Mr. Kucharski and his mental health is self-reported. . . .
>
> We have him saying that it started in 2005 and when he goes to get SSI in September of 2009, nothing is reported . . .
>
> Well, you're there trying to get government money for a disability and he doesn't mention anything about mental illness, he talks about physical illness. That's five months prior to this day.
>
> On this day you have him . . . getting this plan after an argument between at least his parents, and again he's the only surviving witness. He may have been involved in that argument and that led to the anger and what happened. . . . I'm stuck with what he says, but he says that his parents are arguing and that essentially for the first time he hears . . . this voice to kill his parents . . . and that at the same time that voice is telling him to take his life or die by suicide by cop.

52:79-80.

The prosecutor pointed out that Kucharski carried out only half the plan the voices laid out for him, killing his parents but not himself. The

prosecutor said he couldn't tell if the voices ended or whether that was just something Kucharski claimed had occurred but that "ultimately he knew exactly what he was doing and he's the one who calls 911" (52:80). The prosecutor also argued that Kucharski's statements during the 911 call were inconsistent with a person who doesn't know right from wrong or suffered from a severe mental illness; he cited Kucharski's request for an attorney; his refusal to discuss the shooting with detectives; and his talk about getting money from his parents' estate to pay an attorney (*id.*). He summed up by saying that if Kucharski were suffering from a mental illness or disease, "he would have followed through and killed himself or loaded up when the police came" (*id.*:81).

After some discussion about the proper burden of proof (52:81-82), the trial court adjourned the proceeding until 1:30 p.m. (*id.*:83). Upon reconvening, the court issued a lengthy oral decision explaining that although Kucharski undoubtedly suffered from schizophrenia, he had failed to carry his burden to show that his schizophrenia caused him to lack substantial capacity to conform his conduct to the law or to appreciate the wrongfulness of his conduct (53:2-8; Pet-Ap. 129-35).

On the date set for sentencing, the defense requested a competency evaluation, and the court adjourned the proceedings for that purpose (54:2-3). Based on a report from Dr. Rawski, the parties on January 10, 2011, agreed that Kucharski was competent to be sentenced (55:2-3).

On January 27, 2011, Kucharski's trial attorneys were allowed to withdraw based on a

conflict (56:2-5). Two months later, successor counsel filed a motion for plea withdrawal, claiming that trial counsel were ineffective in advising Kucharski to plead no contest (20).

A hearing on the motion was held April 14, 2011; trial counsel Robin Dorman was the sole witness (58). Following briefing (22; 23; 24), the court rejected the claim of ineffective assistance and denied the motion (59:8-11).

On December 16, 2011, Kucharski received concurrent life terms with eligibility for extended supervision after thirty years (61:25).

Additional facts will be presented in the Argument.

ARGUMENT

I. THE COURT OF APPEALS ERRONEOUSLY EXERCISED ITS DISCRETION WHEN IT GRANTED KUCHARSKI A NEW TRIAL ON CRIMINAL RESPONSIBILITY PURSUANT TO THE MISCARRIAGE-OF-JUSTICE PRONG OF WIS. STAT. § 752.35.

A. Applicable legal principles and standard of review.

Under Wis. Stat. § 971.15(1), a person is not responsible for his criminal conduct when the conduct results from mental disease or defect that caused the person to lack substantial capacity either to appreciate the wrongfulness of his

conduct or to conform his conduct to the requirements of law.[1] The defendant bears the burden of proving non-responsibility due to mental disease or defect "'to a reasonable certainty by the greater weight of the credible evidence.'" *Schultz v. State*, 87 Wis. 2d 167, 173, 274 N.W.2d 614 (1979), quoting Wis. Stat. § 971.15(3).

The trier of fact determines the credibility of witnesses and whether the defendant has met his burden of proving lack of capacity by reason of mental disease or defect. *Schultz*, 87 Wis. 2d at 173. Where expert testimony conflicts, it is the role of the trier of fact to determine weight and credibility. *Id.* This role is the same regardless of whether the trial court or a jury determines capacity under § 971.15. *Id*.

The trier of fact is not required to accept the opinion of an expert, even if uncontradicted. *State*

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[1] In its entirety, Wis. Stat. § 971.15 provides as follows:

> (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect the person lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of law.
>
> (2) As used in this chapter, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial acts.
>
> (3) Mental disease or defect excluding responsibility is an affirmative defense which the defendant must establish to a reasonable certainty by the greater weight of the credible evidence.

v. Sarinske, 91 Wis. 2d 14, 48, 280 N.W.2d 725 (1979). Rather, the fact-finder is free to disbelieve defense experts entirely, even where the State declines to present any experts in rebuttal. *Id.* And where defense experts rely substantially on information provided by the defendant, the basis of their opinion and their diagnoses can be questioned on that ground alone. *Id.* at 49.

Whether the accused has or has not met his burden to prove insanity is a question of fact, not a question of law for the appellate court. *State v. Leach*, 124 Wis. 2d 648, 660, 370 N.W.2d 240 (1985); *Sarinske*, 91 Wis. 2d at 48.

Under Wis. Stat. § 752.35[2], the court of appeals may grant a discretionary reversal in either of two situations: 1) if the real controversy has not been fully tried; or 2) if it is likely that justice has for any reason miscarried. *State v. Murdock*, 2000 WI App 170, ¶ 31, 238 Wis. 2d 301, 617 N.W.2d 175. *State v. Avery*, 2013 WI 13, ¶¶ 3,

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[2] Wisconsin. Stat. § 752.35 provides as follows:

> **Discretionary reversal.** In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

345 Wis. 2d 407, 826 N.W.2d 60. The power of discretionary reversal should be exercised only in exceptional cases. *State v. Burns*, 2011 WI 22, ¶ 25, 332 Wis. 2d 730, 798 N.W.2d 166. Although the court of appeals need not use the magic word "exceptional" before exercising its power of discretionary reversal, the appellate court "does have an obligation to analyze why a case is so exceptional to warrant a new trial in the interest of justice." *Avery*, 345 Wis. 2d 407, ¶ 55 n.19.

Where the defendant seeks a new trial on the ground it is probable that justice has miscarried, a reviewing court will not grant a new trial in the interest of justice unless it first concludes that there is "a substantial probability that a different result would be likely on retrial." *State v. Schumacher*, 144 Wis. 2d 388, 401, 424 N.W.2d 672 (1988) (citation omitted). "A probable miscarriage of justice exists only if the evidence and law are such that the defendant[] probably should have won and therefore deserve[s] another chance." *J.K. v. Peters*, 2011 WI App 149, ¶ 29, 337 Wis. 2d 504, 808 N.W.2d 141; *Ford Motor Co. v. Lyons*, 137 Wis. 2d 397, 422, 405 N.W.2d 354 (Ct. App. 1987).

This court reviews the court of appeals' award of a new trial under § 752.35 for an erroneous exercise of discretion. *State v. Wyss*, 124 Wis. 2d 681, 734, 370 N.W.2d 745 (1985), *overruled on other grounds by State v. Poellinger*, 153 Wis. 2d 493, 451 N.W.2d 752 (1990).

B. The court of appeals failed to explain why this case was the exceptional one meriting discretionary reversal and instead substituted its judgment for that of the fact-finder.

The closest the court of appeals came to finding that the trial court's decision was based on a legal error appears in paragraph 38 of its decision:

> While the trial court discounted this evidence on the basis that it was speculative, in doing so, it appeared to conclude that because the psychiatrists could not know *for certain* what was going through Kucharski's mind when he killed his parents, their opinions were invalid. However, this is not the standard to which we hold medical experts. *See Pucci v. Rausch*, 51 Wis. 2d 513, 518, 187 N.W.2d 138 (1971) ("The term 'medical certainty' is misleading if certainty is stressed to mean absolute certainty or metaphysical certainty. Medicine is not based upon such certitude but rather upon the empirical knowledge and experience in the area of cause and effect.").

Kucharski, slip op. ¶ 38 (Pet-Ap. 115).

But in observing that the experts were speculating, the trial court was simply picking up on something Dr. Rawski had said during cross-examination. While responding to the prosecutor's question regarding why Kucharski did not follow the voices' command to either kill himself or prompt police to shoot him, Dr. Rawski stated:

> I asked him afterwards why didn't you have the shootout. He says that he put the gun down and that after he put the gun down, he forg[o]t. I asked about the voices. He said that after he heard the gunshots and the ringing in his ears that the voices went away for a few hours until he got into the County Jail at which time they started to occur again. There's nothing that he reports and *I can only speculate as to why he doesn't follow through with that at that point other than . . . it's something that he couldn't bring himself to do initially and that he was distracted from afterwards by the waiting . . . to call the 911.*

(52:64-65; emphasis added.)

Dr. Rawski admitted that in his evaluation of Kucharski, there were some "glaring absences of information that we typically rely upon[,] one of which is the statements of the victim or witnesses and there are none in this particular situation." (52:31.)

The trial court's oral decision makes it apparent that the court was bothered by the fact that, after taking his parents' lives, Kucharski was able to resist the voices' command that he should kill himself or force police to kill him. Contrary to the appellate court's accusation, the trial court's view that the experts were "speculating" (53:3; Pet-Ap. 130) did not cause the court to reject their opinions as invalid. In fact, the trial court accepted the experts' shared view that Kucharski was suffering from schizophrenia when he killed his parents (53:2; Pet-Ap. 129). But, despite calling it a "close question," the trial court did not believe that Kucharski had satisfied the second part of the test for insanity, i.e., demonstrating 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 (53:2, 6-7; Pet-Ap. 129, 133-34). On this latter point, Dr. Rawski and Dr. Pankiewicz disagreed somewhat.

Dr. Rawski's opinion was that schizophrenia caused Kucharski to lack substantial capacity to appreciate the wrongfulness of his actions (10:20; 52:35-36). According to Dr. Rawski, although Kucharski had always known it was illegal to kill his parents (52:40), he developed the perspective that it would be altruistic to do so because it would be in their best interest, due to what Kucharski perceived to be their health problems (*id.*:39-40). Dr. Rawski characterized the murders as "a planned . . . set of executions" driven by motive, delusion and hallucinations (*id.*:42).

Dr. Pankiewicz held the opinion that schizophrenia caused Kucharski to lack substantial capacity both to appreciate the wrongfulness of his acts and to conform his behavior to the requirements of the law (11:9; 52:45). Dr. Rawski explained that Dr. Pankiewicz – who did not testify at trial – "puts a little bit more value in the influence of command auditory hallucinations resulting [i]n a[n] incapability of conforming conduct to the requirements of the law" (52:46). Dr. Rawski believed their difference of opinion stemmed partially from the fact Dr. Pankiewicz interviewed Kucharski nearer to the time of the incident than Dr. Rawski had (*id.*).

The trial court questioned Dr. Pankiewicz's opinion that the auditory command voices are what caused Kucharski to kill his parents, i.e., the opinion that the voices Kucharski heard made him

lack substantial capacity to conform his behavior to the requirements of law. As the court reasoned, "Dr. Pankiewicz's opinion . . . [is] 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 police" (53:4; Pet-Ap. 131). The court found Dr. Rawski's opinion that Kucharski had developed altruistic motives by the time he killed his parents to be "equally speculative" (53:5; Pet-Ap. 132). The reason the court viewed both opinions as speculative was not because it thought the experts needed to be "certain" of what was going through Kucharski's mind, but because the only sources of information available to them were Kucharski's behavior and a few statements he made after the shootings (*id.*).

The trial court's concern that the experts were relying largely on Kucharski's post hoc statements in concluding he was not responsible is well-founded. In *Pautz v. State*, 64 Wis. 2d 469, 476-77, 219 N.W.2d 327 (1974), this court indicated that this circumstance allows the trier of fact to question an expert's diagnosis:

> In making their diagnosis, both doctors relied almost entirely on information provided to them by the defendant. The bases of their opinion and the credibility of these experts and their diagnoses could be questioned on this ground alone.

Pautz bears several similarities to this case. There both the court-appointed expert and the defense expert testified that Pautz was suffering from a mental disease when he killed his

stepmother. The court-appointed expert, Dr. Lorenz, opined that Pautz lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. The defense expert, Dr. Purdy, opined that although Pautz knew the difference between right and wrong, he was unable to control his conduct as the law required. 64 Wis. 2d at 474-75.

Similarly, here the court-appointed expert and the defense expert agreed that Kucharski was suffering from schizophrenia. The defense expert opined that Kucharski could neither appreciate the wrongfulness of his conduct nor conform his conduct to the requirements of law; the court-appointed doctor found only that Kucharski lacked substantial capacity to appreciate the wrongfulness of his actions. In both *Pautz* and this case, the State did not present any contrary expert testimony.

In addition to arguing that the trial court should have granted his motion to set aside the jury's verdict, Pautz asked this court[3] to grant him a new trial in the interest of justice. He relied on *Kemp* to support his request. *See* 64 Wis. 2d at 479.

This court cited three reasons why *Kemp* was distinguishable from Pautz's situation. First, Pautz lacked the extensive history of psychiatric problems Kemp had. *Id.* Second, Kemp's mental disorder matched the nature of the crime, whereas there was a serious dispute whether Pautz's

[3] The court of appeals did not exist when Pautz appealed his conviction.

disorder – explosive personality – matched the nature of his stepmother's murder. *Id.* And third, whereas Kemp could not even remember the crime, Pautz in his confession recounted the incident and indicated his intent to commit the crime. *Id.*

Two of these reasons align this case with *Pautz*: like Pautz, Kucharski lacked much of a mental health history before the shootings, and he recalled the crimes and admitted they were planned.

Here the trial court, tasked with deciding the issue of mental responsibility, found that Kucharski's lack of a mental health history and the absence of witnesses to the crimes prevented it from finding that Kucharski had met his burden. That determination is completely consistent with this court's refusal to grant a new trial in the interest of justice in *Pautz*. Given that the court of appeals proffered no explanation whatsoever for why this case is exceptional and warrants the exercise of its "formidable power of discretionary reversal,"[4] its parallels with *Pautz* support the State's contention that the appellate court erroneously exercised its discretion in awarding Kucharski a new trial on mental responsibility under § 752.35.

In overturning the trial court's verdict, the court of appeals concluded that Kucharski's schizophrenia must have rendered him nonresponsible for killing his parents because "there was a complete lack of evidence of

[4] *State v. Wery*, 2007 WI App 169, ¶ 21, 304 Wis. 2d 355, 737 N.W.2d 66.

alternative explanations for Kucharski's behavior" *Kucharski*, slip op. ¶ 40 (Pet-Ap. 116). But the absence of a concrete motive provides no basis for disturbing the trial court's finding. No legal authority supports the proposition that merely because a defendant commits a crime for an irrational purpose or under the irrational belief that it is justified, he is automatically incapable of appreciating the wrongfulness of his actions. A mentally ill defendant who acts for incomprehensible or irrational reasons is nevertheless criminally responsible if he had the substantial capacity to conform his conduct to the requirements of the law and to appreciate the wrongfulness of his conduct. Moreover, contrary to the court of appeals' statement that there was no evidence to support the theory that Kucharski perpetrated the shootings as a type of "'mercy killing'" (*Kucharski*, slip op. ¶ 40; Pet-Ap. 116), Dr. Rawski testified that Kucharski believed it would be in his parents' best interest to kill them, although this belief was distorted (52:39-40).

The trial court's conclusion that it was unconvinced that schizophrenia caused Kucharski to lack the substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law is consonant with this court's declaration in *Sarinske*: the trier of fact is responsible for determining the weight and credibility of the testimony on the question of insanity and is free to reject an expert's opinion even if uncontradicted. 91 Wis. 2d at 48. As this court in *Sarinske* noted, it is permissible for the trier of fact to reject an expert's opinion on the ground it relies substantially on information provided by the defendant. *Id.* at 48-49. That is precisely what the trial court did here. As the

dissent observed, "[t]he trial court explained that it distrusted the self-report basis for the doctors' opinions." *Kucharski*, slip op. ¶ 48 (Brennan, J., dissenting) (Pet-Ap. 122). *Sarinske* teaches that the trial court had every right to do so.

The requirement that the discretionary reversal power should be used infrequently, judiciously and only in exceptional cases is not just window dressing. It is a limitation on the court of appeals' authority to grant a new trial in the interest of justice. By wholly ignoring this requirement and instead substituting its judgment for that of the fact-finder, the court of appeals misused its authority and erroneously exercised its discretion.

Because this is not an exceptional case warranting an exceptional remedy, this court should reverse the court of appeals and remand to that court with directions to consider Kucharski's remaining claims.

II. THIS COURT SHOULD HOLD THAT THE COURT OF APPEALS MAY NOT GRANT A NEW TRIAL ON MENTAL RESPONSIBILITY SOLELY BECAUSE IT FINDS A SUBSTANTIAL PROBABILITY THAT A NEW TRIAL WOULD PRODUCE A DIFFERENT RESULT; SOME ERROR OR UNFAIRNESS SHOULD ALSO BE NECESSARY.

In the court of appeals, Kucharski did not just seek a new trial in the interest of justice.

Rather, he argued that his trial on the question of sanity was infected by trial court error and the ineffectiveness of his attorneys. Specifically, he claimed that the trial court erred in applying Wis. Stat. § 971.15; that the trial court's finding that he was responsible for his crimes was clearly erroneous; and that trial counsel were ineffective because they failed to call additional expert witnesses and to introduce multiple exhibits. *See* Brief of Defendant-Appellant in *State v. Kucharski*, No. 2013AP557-CR (Wis. Ct. App.), at 10-24, 27-33.

The court of appeals did not address any of these claims.[5] Thus, the appellate court did not find any error on the part of the trial court or ineffectiveness on the part of defense counsel. Nor did the appellate court decide that the trial court's finding on the question of sanity was clearly erroneous. Instead, the court agreed with Kucharski's claim that he deserves a new trial in the interest of justice on mental responsibility "because there is a substantial probability that a new trial would produce a different result." *Kucharski*, slip op. ¶ 1 (Pet-Ap. 102).

Because the court of appeals sidestepped Kucharski's claims of trial court error and

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[5] In a footnote, the court of appeals said that it need not address whether the trial court had misapplied Wis. Stat. § 971.15 or whether its conclusions regarding Kucharski's mental responsibility lack support in the record; it remarked that these issues "are not dispositive." *Kucharski*, slip op. ¶ 31 n.2 (Pet-Ap. 113). The court of appeals did not even acknowledge that Kucharski had also raised a claim of ineffective assistance, *see id.*, although he devoted six pages of his brief to that argument. *See* Brief of Defendant-Appellant in *State v. Kucharski*, No. 2013AP557-CR (Wis. Ct. App.), at 27-33.

ineffective assistance, there is no way of knowing whether any of those arguments would have succeeded. Assuming Kucharski would not have prevailed on any of those claims, it is difficult to fathom why it would be unjust to allow the trial court's verdict to stand.

Granting a new trial under § 752.35's miscarriage-of-justice prong without also determining that there was some error or unfairness at trial raises a troubling question: why should similarly situated defendants be treated differently simply because some appellate judges exercise their discretion to affirm while other appellate judges exercise their discretion to reverse?

Courts should be particularly cautious about awarding new trials to defendants who are not entitled to a new trial under carefully developed rules because giving them a new trial anyway tends to render the established standards superfluous, may be unfair to other defendants who are held to the rules, and injects arbitrariness into the criminal justice system. In turn, those concerns undermine the public's respect for the system and the interest in finality.

Wisconsin case law is replete with warnings that the power of discretionary reversal should be exercised with great caution. *See*, *e.g.*, *State v. Watkins*, 2002 WI 101, ¶ 79, 255 Wis. 2d 265, 647 N.W.2d 244 (discretionary-reversal power "should be exercised sparingly and with great caution"); *Schultz*, 87 Wis. 2d at 175 (referencing former Wis. Stat. § 251.09 (1975), "[t]he discretionary power . . . is exercised with great caution"); *State v. Wery*, 2007 WI App 169, ¶ 21, 304 Wis. 2d 355,

737 N.W.2d 66 ("We use our formidable power of discretionary reversal 'sparingly and with great caution'").

But it is hard to exercise caution when there are no guiding principles or criteria to assist the court of appeals in deciding whether to grant a new sanity-phase trial when the court merely has to find "a substantial probability of a different result on retrial." Yet under existing case law, such a finding is itself sufficient to justify a discretionary reversal under § 752.35.

Illustrating this point is *Murdock*, 238 Wis. 3d 301, where the court of appeals granted Murdock's request for a discretionary reversal on the issue of mental responsibility. In discussing the standard for granting a new trial under § 752.35's miscarriage-of-justice prong, the court equated a miscarriage of justice with a substantial probability of a different result on retrial:

> We may conclude that justice has miscarried if we determine that there is a substantial probability that a new trial would produce a different result.

Id. ¶ 31 (citation omitted).

In upsetting the jury's verdict on mental responsibility, the *Murdock* court did not acknowledge that the power of discretionary reversal is a formidable one that should be exercised sparingly and with great caution. Instead, the court found that there were several parallels between Murdock's case and *Kemp v. State*, 61 Wis. 2d 125, 211 N.W.2d 793 (1973), where this court had exercised its power of

discretionary reversal under former § 251.09 and granted Kemp a new trial on mental responsibility. *See* 238 Wis. 2d 301, ¶ 40.

In *Kemp*, however, this court did not say that justice has miscarried whenever a reviewing court finds a substantial probability that a new trial would produce a different result. Rather, in using the conjunctive "and," this court indicated that the probability a new trial would have a different outcome is a condition for granting a new trial under the miscarriage-of-justice prong of § 751.06. The *Kemp* court did not say that such a determination automatically translates into a miscarriage of justice, however:

> We believe the weight of the testimony is such that justice has probably miscarried *and* that it is probable a new trial will result in a contrary finding.

Kemp, 61 Wis. 2d at 137 (emphasis added).

Reading *Kemp*'s use of the conjunctive to mean that the substantial probability of a different result on retrial is alone insufficient to conclude that a miscarriage of justice has occurred is consistent with the earlier case of *Lock v. State*, 31 Wis. 2d 110, 142 N.W.2d 183 (1966). The following passage from *Lock* reveals that decades ago, this court did not believe the substantial probability of a different result on retrial was all a defendant need show to receive a new trial under the miscarriage-of-justice prong of the discretionary-reversal statute:

> In order for this court to exercise its discretionary power under sec. 251.09, Stats., it should clearly appear from the record that for some reason it is probable there has been

> a miscarriage of justice. In order for this court to exercise its discretion and for such a probability to exist we would *at least* have to be convinced that the defendant should not have been found guilty *and* that justice demands the defendant be given another trial.

31 Wis. 2d at 118 (emphasis added).

Unfortunately, over time the court of appeals has come to equate a substantial probability of a different result on retrial with a miscarriage of justice. It has done so not only in *Murdock* but also here and in *State v. Vento*, No. 2012AP1763-CR, 2013 WL 2157900 (Wis. Ct. App. May 21, 2013) (Pet-Ap. 139-153), another case in which the court of appeals ordered a new trial on mental responsibility pursuant to § 752.35's miscarriage-of-justice prong. Quoting *Murdock*, the court of appeals in both *Vento* and *Kucharski* said, "'We may conclude that justice has miscarried if we determine that there is a substantial probability that a new trial would produce a different result.'" *Vento*, slip op. ¶ 26; Pet-Ap. 148; *Kucharski*, slip op. ¶ 33; Pet-Ap. 114 (citation omitted).

Allowing the court of appeals to award a new trial on the issue of sanity whenever the court finds a substantial probability of a different result invites the appellate court to reweigh the evidence submitted to the trier of fact and to second-guess the trier of fact's judgment on the credibility of witnesses. As the dissent observed, this is precisely what the majority did in granting Kucharski a new trial in the interest of justice. *Kucharski*, slip. op. ¶ 45 (Brennan, J., dissenting) (Pet-Ap. 120).

To prevent the court of appeals from doing so in future cases, the State asks this court to tighten the requirements for granting a new trial on mental responsibility under the miscarriage-of-justice prong of § 752.35. It should not be enough for the appellate court to find that there is a substantial probability of a different result on retrial; such a finding should also be coupled with a determination that error, counsel's misfeasance, or some form of unfairness infected the defendant's trial. Absent such tightening, the court of appeals will retain carte blanche to substitute its judgment for that of the fact-finder, be it judge or jury, on matters such as the weight of the evidence and the credibility of testimony on the issue of mental responsibility. But those matters are the responsibility of the fact-finder; they are not the business of an appellate tribunal. *Sarinske*, 91 Wis. 2d at 48.

As a matter of fairness, there must be rules to follow so courts can decide on a consistent basis, not just in the exercise of unfettered discretion that can vary from court to court and case to case, who gets a new trial and who does not. Under existing precedent, the court of appeals can award a new trial on mental responsibility simply by concluding that there exists a substantial probability of a different result on retrial. That conclusion can spring from a reweighing of the evidence and substitution of the appellate court's judgment for that of the fact-finder; no error, attorney malfeasance or other type of unfairness need be present.

This court should require more. Specifically, it should clarify that although a substantial probability of a different result is a necessary

prerequisite to granting a new trial under the miscarriage-of-justice prong of § 752.35, a substantial probability of a different result does not mean a miscarriage of justice probably occurred. Rather, to find that it is probable that justice has miscarried, the court of appeals should also identify some error, attorney misfeasance, or other unfairness that renders the case before it an "exceptional" one (*see Avery*, 345 Wis. 2d 407, ¶ 59) justifying the exercise of the court's formidable power of discretionary reversal.

CONCLUSION

This court should reverse the decision of the court of appeals and remand to that court to decide the remaining issues raised by Kucharski.

Dated this 14th day of January, 2015.

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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 7366 words.

_____
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

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

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

Dated this 14th day of January, 2015.

_____
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