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

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER, STATE OF WISCONSIN

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TABLE OF CONTENTS

Page

I. THE COURT OF APPEALS ERRONEOUSLY EXERCISED ITS DISCRETION IN GRANTING KUCHARSKI A NEW TRIAL ON SANITY. 1

A. Insofar as *Kemp* allows an appellate court to grant a new sanity trial based on its reweighing of the evidence, *Kemp* was wrongly decided; alternatively, this case is not the exceptional one that *Kemp* was. 2

B. The State's reliance on language in *Sarinske* and *Pautz* is proper. 5

II. REQUIRING MORE THAN A SUBSTANTIAL PROBABILITY OF A DIFFERENT RESULT ON RETRIAL TO GRANT A NEW TRIAL ON SANITY UNDER THE MISCARRIAGE-OF-JUSTICE PRONG OF WIS. STAT. § 751.06 OR § 752.35 IS CONSISTENT WITH PREVIOUS CASES AND WOULD NOT CREATE ABSURD RESULTS.....6

A. Requiring that a substantial probability of a different result on retrial be coupled with a finding of error, attorney misfeasance, or other unfairness is consistent with prior cases of this court.....7

B. The miscarriage-of-justice test has not been as clearly articulated as Kucharski suggests.....9

Page

C. The State is not suggesting that any error, no matter how insignificant, would allow discretionary reversal under a miscarriage-of-justice rationale. 10

CONCLUSION 12

CASES CITED

Kemp v. State,
61 Wis. 2d 125, 211 N.W.2d 793 (1973) 2, 3, 4

Noll v. Dimiceli's, Inc.,
115 Wis. 2d 641, 340 N.W.2d 575
(Ct. App. 1983) 2

Okrasinski v. State,
51 Wis. 2d 210, 186 N.W.2d 314 (1971) 10

Paladino v. State,
187 Wis. 605 (1925) 7, 8

Pate v. State,
61 Wis. 2d 25, 211 N.W.2d 495 (1973) 7, 8

Pautz v. State,
64 Wis. 2d 469, 219 N.W.2d 327 (1974) 2, 5

State v. Booker,
2006 WI 79, 292 Wis. 2d 43, 717 N.W.2d 676 3

State v. Elson,
60 Wis. 2d 54, 208 N.W.2d 363 (1973) 9

State v. Henley,
2010 WI 97, 328 Wis. 2d 544, 787 N.W.2d 350 10

Page

State v. Hintz,
200 Wis. 636, 229 N.W. 54 (1930) 9

State v. Leach,
124 Wis. 2d 648, 370 N.W.2d 240 (1985) 2

State v. Mayo,
2007 WI 78, 301 Wis. 2d 642, 734 N.W.2d 115 11

State v. Ruiz,
118 Wis. 2d 177, 347 N.W.2d 352 (1984) 10

State v. Sarinske,
91 Wis. 2d 14, 280 N.W.2d 725 (1979) 2, 5

State v. Thiel,
2003 WI 111, 264 Wis. 2d 571, 665 N.W.2d 305 11

State v. Wyss,
124 Wis. 2d 681, 370 N.W.2d 745 (1985) 9

Strickland v. Washington,
466 U.S. 668 (1984) 11

Vollmer v. Luety,
156 Wis. 2d 1, 456 N.W.2d 797 (1990) 10

STATUTES CITED

Wis. Stat. § 251.09 7

Wis. Stat. § 752.35 7

Wis. Stat. § 2405m (1913) 9

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REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER, STATE OF WISCONSIN

I. THE COURT OF APPEALS ERRONEOUSLY EXERCISED ITS DISCRETION IN GRANTING KUCHARSKI A NEW TRIAL ON SANITY.

Kucharski argues that the court of appeals properly exercised its discretion in awarding him a new sanity trial

because *Kemp v. State,* 61 Wis. 2d 125, 211 N.W.2d 793 (1973), allows an appellate court to grant a discretionary reversal under a miscarriage-of-justice rationale by substituting its judgment for that of the factfinder on the question of sanity. Relatedly, Kucharski says the State's reliance on language to the contrary in other cases is misplaced. The State addresses both contentions below.

A. Insofar as *Kemp* allows an appellate court to grant a new sanity trial based on its reweighing of the evidence, *Kemp* was wrongly decided; alternatively, this case is not the exceptional one that *Kemp* was.

In granting Kemp a new sanity trial, this court struggled with the ramifications of its decision, calling it "a close question." *Kemp*, 61 Wis. 2d at 137. Over a vigorous dissent, *id.* at 139-42, the majority concluded that "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."*Id.* at 137.

Kucharski is correct that *Kemp* can be read to allow an appellate court to substitute its judgment for that of the factfinder on the question of sanity because that is essentially what happened there. Read that way, *Kemp* was wrongly decided because, as post-*Kemp* cases repeatedly state, whether an accused has met his burden to prove insanity is a question of fact. *State v. Leach*, 124 Wis. 2d 648, 660, 370 N.W.2d 240 (1985); *State v. Sarinske*, 91 Wis. 2d 14, 48, 280 N.W.2d 725 (1979); *Pautz v. State*, 64 Wis. 2d 469, 475-76, 219 N.W.2d 327 (1974). Because an appellate court will not reverse a trial court's factual finding unless it is clearly erroneous, *see Noll v. Dimiceli's, Inc.*, 115 Wis. 2d

641, 643, 340 N.W.2d 575 (Ct. App. 1983),[1] the *Kemp* court circumvented this rule by substituting its judgment on sanity for that of the jury without making such a determination.

Judging by the court's discussion in *Kemp*, the court could have reached the same result by labeling the jury's finding on sanity clearly erroneous. Thus, the result in *Kemp* was probably correct although the court's analysis was not insofar as it sanctions discretionary reversal based on substituting the appellate court's judgment for that of the factfinder.

In any event, a comparison of the *Kemp* facts reveals that this is not the exceptional case that *Kemp* was.

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. 61 Wis. 2d at 133-34. After discharge, he was seen intermittently 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; he slept with a gun under his pillow. *Id.* at 34.

Kemp indicated he and his wife got along well, and several neighbors confirmed his assessment. *Id.* at 134.

From February 1 to May 5, 1971, Kemp was being treated at the Veterans Administration Hospital for his mental problems. He was then placed on outpatient status from May 5 until June 10, 1971. Within a day of being released from outpatient status, Kemp had fatally shot his wife. 61 Wis. 2d at 134.

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[1] In contrast, the sufficiency of evidence to support a conviction is a legal question reviewed de novo. *State v. Booker*, 2006 WI 79, ¶ 12, 292 Wis. 2d 43, 717 N.W.2d 676.

When police interviewed Kemp several days after the murder, Kemp had no recollection of anything that happened from when he left the hospital on June 10 except that he realized at one interval that he was in California with his children and had the gun with him. When informed of his wife's death, Kemp appeared emotionally upset but did not deny his involvement. 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.

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 such dreams during psychiatric treatment following his discharge but before shooting his wife. 61 Wis. 2d at 134.

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

The timing of the murder vis-à-vis Kemp's release from outpatient treatment, the consistency between his documented mental problems and the circumstances

surrounding the shooting, and Kemp's amnesia about the killing and subsequent events render *Kemp* the exceptional case and distinguish it from Kucharski's murder of his parents.

B. The State's reliance on language in *Sarinske* and *Pautz* is proper.

Kucharski says the State's reliance on language in *Sarinske*, 91 Wis. 2d 14, and *Pautz*, 64 Wis. 2d 469, is misplaced because the language appears not in the court's discussion of reversal in the interest of justice but in its discussion of whether to set aside the jury's verdict on sanity. The State disagrees.

The section in *Sarinske* Kucharski references dealt with Sarinske's request for discretionary reversal on the question of guilt – not sanity – based on the failure to submit a lesser-included offense. 91 Wis. 2d at 58-60. The language the State relied on did appear in the court's earlier discussion of whether to set aside the verdict on sanity, but that discussion was intertwined with a discussion of *Kemp* and reversal in the interest of justice. *Id.* at 48-49.

Kucharski is correct that the language the State cited from *Pautz* does not appear in the one-paragraph discussion on reversal in the interest of justice. Nevertheless, principles developed in the sufficiency-of-the-evidence context are also relevant in determining whether discretionary reversal is appropriate.

II. REQUIRING MORE THAN A SUBSTANTIAL PROBABILITY OF A DIFFERENT RESULT ON RETRIAL TO GRANT A NEW TRIAL ON SANITY UNDER THE MISCARRIAGE-OF-JUSTICE PRONG OF WIS. STAT. § 751.06 OR § 752.35 IS CONSISTENT WITH PREVIOUS CASES AND WOULD NOT CREATE ABSURD RESULTS.

Before addressing Kucharski's specific arguments counseling against adoption of the State's position, the State needs to correct a misapprehension Kucharski has regarding the contours of that position.

Kucharski characterizes the State's argument as requiring the appellate court to find a substantial probability of a different result on retrial, as well as an error at trial. *See*, *e.g.*, Kucharski's brief at 24 ("Even in a case where the record clearly shows that the factfinder got it wrong, the court of appeals would be unable to reverse absent some error"). But that representation is inaccurate.

Beginning with its framing of the issues, and continuing with its heading to argument II., the State described its position as requiring the reviewing court to find some error *or unfairness* at trial, in addition to a substantial probability of a different result. *See* State's opening brief at 2-3, 26. The State said that to find a probable miscarriage of justice, "the court of appeals should also identify some error, *attorney misfeasance, or other unfairness* that renders the case before it an 'exceptional' one." State's opening brief at 33 (emphasis added).

Even absent an identifiable error, the court could reverse if it found some attorney misfeasance not rising to the level of ineffective assistance or some other unfairness

that made it probable justice had miscarried in a particular case.

A. Requiring that a substantial probability of a different result on retrial be coupled with a finding of error, attorney misfeasance, or other unfairness is consistent with prior cases of this court.

Kucharski asserts that the rule the State advocates is contrary to decisions of this court that have reversed for a miscarriage of justice absent any other identifiable error. In support, he cites *Paladino v. State*, 187 Wis. 605 (1925). Kucharski's brief at 23.

As the State has already explained, its view is not that an appellate court invariably would have to find error to reverse under § 752.35's miscarriage-of-justice prong; attorney misfeasance short of ineffective assistance or some other unfairness in the trial would also suffice. *Pate v. State*, 61 Wis. 2d 25, 211 N.W.2d 495 (1973), illustrates the latter situation.

The *Pate* court found no reversible error in the admission of eyewitness identification testimony (61 Wis. 2d at 31), and determined that counsel's decision to forego filing a notice of alibi was "a reasonable and competent trial tactic" (*id.* at 32). The court also did not question the correctness of the jury's guilty verdict based on the evidence presented. *Id.* at 33. Nevertheless, the court granted Pate a new trial under the miscarriage-of-justice prong of § 251.09 based on evidence that had not been presented at trial but that did not qualify as newly discovered because Pate had known about most of it before trial.

That information included the names of the persons responsible for the armed robbery Pate was found guilty of committing. The reason Pate had ordered his attorney to

forego presenting the evidence was that Pate feared for the physical well-being of his five children. 61 Wis. 2d at 29-30.

In reversing Pate's conviction, the court reiterated that "[i]n criminal cases . . . such grave doubt must exist regarding the defendant's guilt to induce the belief that justice has miscarried or that 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." *Id.* at 36-37. *Pate* supports the rule the State is advocating because in granting Pate a new trial, the court implicitly found unfairness in allowing his conviction to stand following post-trial testimony from several sources that he was not involved in the armed robbery for which he had received a twenty-year sentence. *Pate* exemplifies the truly exceptional case where reversal under the miscarriage-of-justice prong is warranted despite the absence of trial court error or attorney misfeasance, but where allowing the conviction to stand would be grossly unfair.

As for *Paladino*, a fair reading of that case is that the court did find error but no single error sufficient to "work a reversal of the judgment." 187 Wis. at 606. Due to the brevity of the decision, it is impossible to discern how many errors the court may have found. But the following language indicates that the combination of less-than-reversible error and the closeness of the case made it unfair to allow Paladino's statutory rape conviction to stand: "While the errors complained of are not sufficient to work a reversal under the rule, this being a very close and doubtful case . . . the defendant should have an opportunity of presenting the matter to another jury." *Id.*

Paladino therefore supports creation of a rule that a substantial probability of a different result[2] must be coupled with some type of error or unfairness for an appellate court to exercise its discretionary power to reverse based on a probable miscarriage of justice. *Paladino* is not inconsistent with the position the State advocates.

B. The miscarriage-of-justice test has not been as clearly articulated as Kucharski suggests.

In opposing the modification the State is advocating, Kucharski suggests that this court and the court of appeals have uniformly recognized that "nothing more than a substantial probability of a different result" is needed to justify a reversal in the interest of justice under a miscarriage-of-justice rationale. Kucharski's brief at 23.

While the State concedes that there are cases so holding, the suggestion that the appellate courts have been uniform in this regard is inaccurate.

For example, in *State v. Elson*, 60 Wis. 2d 54, 69, 208 N.W.2d 363 (1973), this court said that "[a] new trial in the interest of justice will be granted only if there has been an apparent miscarriage of justice *and* it appears that a retrial under optimum circumstances *will produce* a different result" (citation omitted and emphasis added). The same

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[2] *Paladino* did not say that a substantial probability of a different result was a necessary condition for granting a new trial in the interest of justice under the miscarriage-of-justice prong of former Wis. Stat. § 2405m (1913). In *State v. Wyss*, 124 Wis. 2d 681, 736, 370 N.W.2d 745 (1985), however, this court said that the court in *Paladino* and in *State v. Hintz*, 200 Wis. 636, 642, 229 N.W. 54 (1930), "had implicitly complied with the standard that the probability of a different result had to be established before a new trial was ordered."

language appears in *Okrasinski v. State*, 51 Wis. 2d 210, 219, 186 N.W.2d 314 (1971), and *State v. Ruiz*, 118 Wis. 2d 177, 200, 347 N.W.2d 352 (1984). These cases not only omit the "substantial probability" language used in more recent cases like *State v. Henley*, 2010 WI 97, ¶ 81, 328 Wis. 2d 544, 787 N.W.2d 350; they also use the conjunctive "and" instead of simply equating a miscarriage of justice with a determination that there is a substantial probability of a different result on retrial. By using the conjunctive, these cases indicate that a substantial probability of a different result on retrial is a requirement for granting a new trial under the second prong of the statute, but that the reviewing court must first conclude that there has been an apparent miscarriage of justice.[3]

C. The State is not suggesting that any error, no matter how insignificant, would allow discretionary reversal under a miscarriage-of-justice rationale.

Kucharski says the State's proposed rule would lead to absurd results because any error, regardless of its significance, could justify discretionary reversal as long as there is a substantial probability of a different result. But that assuredly is not the State's position.

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[3] In *Vollmer v. Luety*, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990), this court also used the conjunctive but reversed the order of the requirements for discretionary reversal based on a miscarriage of justice, saying that an appellate court "must *first* make a finding of substantial probability of a different result on retrial" (emphasis added). This language implies that such a finding is a condition to granting a new trial based on a probable miscarriage of justice; it does not imply that whenever an appellate court finds a substantial probability of a different result on retrial, regardless of the reason, a miscarriage of justice probably has occurred.

As the State already pointed out, its proposal does not even require the appellate court to find error; unfairness or attorney misfeasance not amounting to ineffective assistance provide alternative reasons for discretionary reversal. And just because an error is deemed non-reversible does not mean the error is trivial or insignificant. Trial errors run the gamut from de minimis to prejudicial, with many intermediate degrees of seriousness. Where a reviewing court finds several trial errors, but a majority of the court does not agree that any one error is reversible, that case would be a good candidate for discretionary reversal, assuming there is a substantial probability of a different result on retrial.

The State's proposal is consistent with the "cumulative error test" this court has endorsed in cases involving claims of trial counsel deficiency, either alone or combined with other claims of error. In the former situation, a court may aggregate the effects of multiple deficiencies on the part of counsel in determining whether a defendant has suffered prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). *See State v. Thiel*, 2003 WI 111, ¶¶ 58-60, 264 Wis. 2d 571, 665 N.W.2d 305. Thus, a defendant can prevail on a claim of ineffective assistance of counsel even though no individual deficiency of counsel was sufficient to cause prejudice under *Strickland*.

Similarly, this court has applied the "cumulative error test" to a combination of trial counsel deficiencies and prosecutorial misconduct that individually did not warrant a new trial. *See State v. Mayo*, 2007 WI 78, ¶ 64 n.8, 301 Wis. 2d 642, 734 N.W.2d 115.

Under the State's proposed rule, a new trial in the interest of justice based on a probable miscarriage of justice would be warranted under a similar rationale.

Without the limitation the State is proposing, an appellate court could grant a new trial in the interest of

justice based on considerations that have nothing to do with fairness. For example, the defendant could drastically alter his appearance to his advantage after his original trial, making him appear more sympathetic to jurors. Even if an appellate court concludes that the newer, improved version of the defendant creates a reasonable probability of a different result before a new jury, where is the unfairness that demands a defendant receive a new trial?

For these reasons and the reasons advanced in the State's opening brief, this court should hold that a substantial probability of a different result, without more, is insufficient to grant a new trial under the miscarriage-of-justice prong of the discretionary-reversal statute.

CONCLUSION

This court should reverse the court of appeals' decision and remand for a decision on the remaining issues left undecided.

Dated this 17th day of February, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,999 words.

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

I hereby certify that:

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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 17th day of February, 2015.

_____
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