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STATE OF WISCONSIN

IN THE SUPREME COURT

Case 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 of the Circuit Court for Milwaukee County, Honorable Jean A. DiMotto, Presiding

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AMICUS CURIAE BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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This Court Should Not Change Appellate Courts' Discretionary Authority to Order a New Trial Due to a Miscarriage of Justice Where a Criminal Defendant Raised the Affirmative Defense of Lack of Responsibility Due to a Mental Disease or Defect.

A. Appellate courts' discretionary reversal authority.

Both this Court and the court of appeals have the inherent and statutory authority to reverse judgments and order new trials in the interests of justice. ***State v. Armstrong***, 2005 WI 119, ¶113, 283 Wis. 2d 639, 700 N.W.2d 98. *See* Wis. Stat. §§ 751.06 and 752.35.

This Court's statutory authority to reverse in the interests of justice is set forth in Wisconsin Statutes Sections § 751.06 and may only be exercised where it appears from the record that either "the real controversy has not been fully tried" or "it is probable that justice has for any reason miscarried":

> **751.06 Discretionary reversal.** In an appeal in the supreme court, 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 the 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.

Wis. Stat. § 751.06 (2013-2014).

The discretionary reversal authority is broad and provides appellate courts the power to achieve justice in an individual case. ***Vollmer v. Luety***, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990).

This Court's statutory power of discretionary reversal in the interests of justice is over a century old. In 1913, the Wisconsin legislature first conferred this power upon this Court. Wis. Stat. § 2405m (1913). The legislature has not changed the statutory language of the miscarriage of justice prong. Then, as now, if it appears to this Court from the record "that it is probable that justice has for any reason miscarried," this Court may reverse the judgment. *See* § 2405m (1913), as quoted in ***State v. Schumacher***, 144 Wis. 2d 388, 399, n.8., 424 N.W.2d 672 (1988) and Wis. Stat. § 751.06.

When the court of appeals was instituted, the legislature similarly gave it the power of discretionary reversal in § 752.35. ***Schumacher***, 144 Wis. 2d at 399-400. This Court's and the court of appeals' discretionary reversal powers are coterminous. ***Vollmer***, 156 Wis. 2d at 18 (citation omitted).

B. Appropriate legal standards already exist for appellate courts' exercise of discretionary reversal due to a miscarriage of justice in mental responsibility cases.

1. Legal standards for exercising discretionary reversal authority due to a miscarriage of justice.

Guiding legal principles exist for appellate court's exercise of discretionary reversal due to a miscarriage of justice. First, appellate courts approach requests for new trials in the interest of justice with great caution, are reluctant to grant such relief and do so "only in exceptional cases." ***Morden v. Continental AG***, 2000 WI 51, ¶87, 235 Wis. 2d 325, 611 N.W.2d 659 (citations omitted). ("We are reluctant to grant a new trial in the interests of justice, and thus we exercise our discretionary power of reversal only in exceptional cases.")

Additionally, reversal due to a miscarriage of justice cannot occur for just any *de minimis* reason. As this Court explained "in order to grant a discretionary reversal under [the miscarriage of justice] prong, the court would have to conclude that there would be a substantial probability that a different result would be likely at trial." ***Schumacher***, 144 Wis. 2d at 400-01 (citing ***State v. Wyss***, 124 Wis. 2d 681, 741, 370 N.W.2d 745 (1985)); *See* ***State v. Henley***, 2010 WI 97, ¶81, 328 Wis. 2d 544, 787 N.W.2d 350 (citation omitted). A miscarriage of justice occurs where something substantial enough has happened to throw the outcome into doubt, regardless of whether any legal error has occurred.

In any event, the exercise of discretionary reversal authority due to a miscarriage of justice is not unfettered. An

appellate court's exercise of that discretion must comply with the legal standards for discretionary decision-making. The exercise of discretion requires the appellate courts to rely on relevant facts of record and apply the proper legal standard and use a rational process to reach a reasonable decision. ***State v. Foster***, 2014 WI 131, ¶28, __ Wis. 2d __, 856 N.W.2d 847 (citation omitted).

2. Application of these legal standards in mental responsibility cases.

Appellate courts have applied these legal principles when determining whether or not to exercise discretionary reversal due to a miscarriage of justice in mental responsibility cases. Not guilty by reason of mental disease or defect is an affirmative criminal defense which an accused must prove "to a reasonable certainty by the greater weight of the credible evidence". Wis. Stat. § 971.15(3). The defendant must establish that he had a mental disease or defect at the time of the offense and that as a result of this disease or defect that he lacked the substantial capacity to either appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law. *See* Wis. Stat. § 971.15(1). The defendant's burden of proof on the issue of his mental responsibility is the same as most issues in a civil trial. ***State v. Maggett***, 2014 WI 67, ¶39, 355 Wis. 2d 617, 850 N.W.2d 42.

In prior cases, courts have found a miscarriage of justice where it appears from the record that determination that defendant did not meet his burden of proof on his mental responsibility by the greater weight of credible evidence was erroneous. In ***Kemp v. State***, this Court exercised discretionary reversal in a mental responsibility case. 61 Wis. 2d 125, 137-38, 211 N.W.2d 793 (1973). This Court considered the record as a whole and concluded that the

weight of the evidence, which "predominate[d] quite heavily on the side of the defendant on the issue of mental responsibility" was such that justice has been miscarried and that a new trial would probably bring a different result. ***Id***. *See* ***State v. Murdock***, 2000 WI App 170, ¶40, 238 Wis. 2d 301, 617 N.W.2d 175. (finding "that the evidence as a whole predominated heavily" on the defendant's side and there is a substantial probability that a new trial on the defendant's mental responsibility would produce a different result). Where the weight of the evidence was not on the defendant's side regarding his mental responsibility, appellate courts have not found a miscarriage of justice. *See e.g.* ***Pautz v. State***, 64 Wis. 2d 469, 479, 219 N.W.2d (1974) and ***Schultz v. State***, 87 Wis. 2d 167, 173-75, 274 N.W.2d 614 (1979).

In these cases, the appellate courts, in essence, evaluated, whether or not the determination below that the defendant did not meet his burden of proof on a § 971.15(3) affirmative defense was erroneous based on the evidence at trial. The courts' approach to assessing whether sanity determinations below are erroneous is consistent with appellate review in civil cases. *See* ***Kuehn v. Kuehn***, 11 Wis. 2d 15, 20, 104 N.W.2d 138 (1960) (appellate court's "duty is to determine if the trial court's findings are so erroneous as to be contrary to the great weight and clear preponderance of the evidence.") Thus, appellate courts have granted relief due to a miscarriage of justice upon an implicit finding that the determination that defendant did not meet his burden of proof was erroneous.

The State appears to concede that appellate have the authority to find that sanity determinations below are clearly erroneous. The State argues that the ***Kemp*** court's result was probably correct as it could have reached the same result by finding that the jury's sanity determination was clearly

erroneous. (State's Reply Brief, p.3) Yet, the State criticizes the ***Kemp*** court's analysis by claiming that the court sanctioned discretionary reversal by substituting its judgment for the fact-finder. ***Id***. However, the State fails to recognize that implicitly the ***Kemp*** court did find that the jury's sanity determination was clearly erroneous and that it did not substitute its judgment for that of the jury. Rather, it reviewed the weight of the evidence.

In the instant case, consistent with the applicable legal standards, the court of appeals considered the evidence as a whole and found that that the evidence showing that the defendant lacked the substantial capacity either to appreciate the wrongfulness of his conduct or to conform it to the requirements of law was "very strong" and compromised the greater weight of the credible evidence. *Slip op. at* ¶35; (Pet.-Ap. 114) This finding is essentially that the circuit court's determination that Kucharski had not met his burden of proof was erroneous. The court found that that the evidence "'predominate[d] quite heavily on the defendant's side on the issue of his mental responsibility'", that justice had miscarried and it was probable that a new trial would have a different outcome. *Slip op. at* ¶44; (Pet.-Ap. 118) (quoting ***Kemp***, 61 Wis. 2d at 138).

C. No reasons exist for changing appellate courts' discretionary reversal authority due to a miscarriage of justice in mental responsibility cases.

There are no reasons to change appellate courts' discretionary reversal authority due to a miscarriage of justice in a mental responsibility case. Appellate courts have carefully evaluated the trial evidence below to determine if a finding that defendant did not meet his burden of proof is erroneous and whether it is substantially probable that a new

trial would have a different outcome. Appellate courts have the authority to assess whether the determination that the defendant did not meet his burden of proof on his mental responsibility is erroneous if it is against the greater weight of the credible evidence. This assessment requires the appellate court to evaluate the weight of the trial evidence. Why should a court doing so be considered to have usurped the trier of fact?

The appellate courts have approached such cases cautiously and have rarely ordered new trials. Counsel's research revealed only four cases over the last 41 years in which an appellate court ordered a new trial in a mental responsibility case due to a miscarriage of justice: ***Kemp, Murdock***, ***State v. Vento***, No. 2012AP1763-CR, 2013 Wisc. App. LEXIS 428 (Wis. Ct. App. May 21, 2013) (Pet-Ap. 139-153) and the instant case.

Further, there is no basis for why the legal standard for miscarriage of justice should be different in a mental responsibility case than in all other criminal and civil cases, including paternity, evictions, contracts, and insurance coverage issues. Why should an appellate court be more limited to grant discretionary relief due to a miscarriage of justice to a mentally ill criminal defendant arguing that he or she is not legally responsible for their criminal conduct than perhaps a construction firm seeking monetary damages?

Finally, the fact that different results occur for different defendants does not warrant changing the legal standard for discretionary reversals in mental responsibility cases. In this context, the appellate court is exercising its discretion in individual cases to achieve justice in that specific case. Differing outcomes in this context result from exercising discretion in different factual situations while applying the guiding legal standards.

CONCLUSION

For all of the reasons set forth above, WACDL respectfully requests that this Court reject the State's invitation to create a different legal standard for a finding of miscarriage of justice in mental responsibility cases.

Dated this 27th day of February, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: 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 and maximum of 60 characters per line of body text. The length of the brief is 1,983 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 27th day of February, 2015.

Respectfully submitted,

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