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STATE OF WISCONSIN

C O U R T OF A P P E A L S

DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. No. 2014AP2370-CR

AARON SCHAFFHAUSEN,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF
THE ST. CROIX COUNTY CIRCUIT COURT
HONORABLE HOWARD W. CAMERON, PRESIDING

APPELLANT'S BRIEF

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ISSUES PRESENTED

1. In this sanity trial, when the court-appointed and defense doctors were offered as experts, whether it was plain error for the court below to defer the issue of expert qualifications to the jury, promising to give the jury an instruction on it.

In both instances, the court told the jurors they would decide if the doctors were experts and the second time told them an instruction would be given. No such instruction was given.

2. Whether Mr. Schaffhausen's basic Due Process right to present a defense was violated when the court below refused to provide the deliberating jury the 3 expert medical reports it requested.

Over defense objection, the court found it would be prejudicial to provide the jury the reports it wanted.

3. Whether the real controversy of legal sanity was ever tried here, considering the errors noted above and that the State was allowed to present evidence primarily relevant to guilt without restriction over counsel's objection.

STATEMENT ON ORAL ARGUMENT

Oral argument is not requested.

STATEMENT ON PUBLICATION

Counsel requests publication because the opinion here is likely to apply established rules of law to a factual situation significantly different from those in previous opinions and therefore will clarify those rules. The first issue is one of first impression.

STATEMENT OF THE CASE

1. Nature of the Case

This is a review of the jury's rejection of Mr. Schaffhausen's sanity defense presented at the second phase of his trial pursuant to §§971.15 to 971.165, *Wis Stats.* (He previously changed his plea to guilty to 3 counts of 1st Degree Intentional Homicide and Attempted Arson.)

2. Proceedings Below

(Ordinarily, counsel reviews all of the proceedings. But here, since most of the proceedings have little to do with the issues raised, counsel provides only an outline of the major events, emphasizing the period after the guilty plea was entered. The entire 21 page index to record is provided in the first volume of the separate Appendix.)

On July 12, 2012, complaint number 12-CF-227 was filed in St. Croix County Circuit Court charging Mr. Schaffhausen with 3 counts of violating §§ 940.01(1)(a)(1st Degree Intentional Homicide) (3). Mr. Schaffhausen appeared with appointed counsel on that date, waived reading of the complaint and requested a preliminary hearing (58:5-6). The court set bond at $2 million. (4)(58:5).

Preliminary examination was held on July 24, 2013. (71). After taking testimony, the court bound Mr. Schaffhausen over for trial. (71:78).

On August 28, 2012, Mr. Schaffhausen was arraigned on an information making the identical charges as in the complaint and adding a charge of Attempted Arson. (87)(135). He stood mute and the court entered not guilty pleas for him. (135:4).

On January 17, 2013, the court allowed Mr. Schaffhausen to join a plea of not guilty by reason of mental disease or defect to his not guilty plea. (370:7).

On March 27, 2013 trial counsel filed a motion to exclude certain evidence relating to guilt from the sanity phase of the bifurcated trial. (415). The State responded by filing a brief opposing the motion. (421).

On March 28, 2013, Mr. Schaffhausen changed his not guilty plea to guilty. (428)(512:16-46). There was no plea agreement. (512:45). The court set the sanity phase to begin on April 1, 2013. (512:46). The court also deferred ruling on trial counsel's motion to exclude specific guilt evidence until such evidence was sought to be introduced at trial. (512:7-9).

On April 1, 2013, jury trial of the sanity phase began with jury *voir dire*. (520). A jury was selected and sworn. (520:213).

On April 2, 2013, trial counsel began presenting testimony on Mr. Schaffhausen's behalf. (518).

On April 3, 2013, counsel continued presenting Mr. Schaffhausen's case. (519). The principal witness that day was his wife, Jessica. *Id.*

On April 4, 2013, Mrs. Schaffhausen's testimony was concluded and counsel presented other witnesses. (521).

On April 5, 2013, counsel continued presenting Mr. Schaffhausen's case. (522).

On April 8, 2013, witnesses for Mr. Schaffhausen included his parents, other relatives and the court-appointed expert, Dr. Baker. (523).

On April 9, 2013, Mr. Schaffhausen's expert, Dr. Meloy, testified. (524).

On April 10, 2013, Mr. Schaffhausen rested his case (525:1612), waiving his right to testify. (512:1612-1613). The State began presenting its witnesses. (525:1615).

On April 11, 2013, the State continued presenting its case. (526).

On April 12, 2013, witnesses for the State continued testifying. (527). Trial counsel's relevancy objections to witnesses presenting only guilt related-evidence were overruled. (55:2242-2246)(527:2272-2274).

On April 15, 2013, the State's expert, Dr. Knudson, testified (528) and the State rested. (528:2467).

On April 16, 2013, the case went to the jury. (529). The jury returned its verdict, finding Mr. Schaffhausen suffered from a mental disease but that he did not lack substantial capacity. (439-442)(529:2611-2618). The court granted judgment on the verdict. (529:2619).

On July 15, 2013, the court sentenced Mr. Schaffhausen to life imprisonment without eligibility for release on the homicides and 12 years confinement followed by 7 ½ years extended supervision for the attempted arson. (511:69-77). The sentences were consecutive. (475).

Notice of Intent was filed July 17, 2013 (476) and Notice of Appeal was filed October 3, 2014. (550).

3. Facts of the Offenses

On March 28, 2013, Mr. Schaffhausen changed his plea to guilty to the homicides of his 3 young daughters by taking a knife to their throats (512:38-41)(71:52), and to the attempted arson by placing an open gasoline can near an

ignition source in the basement. (512:40).

Argument

Introduction

The insanity defense sits astride the fundamental premises, the *a priori* assumptions, of criminal law.

"[S]ubstantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and wrong and choosing freely to do wrong." *Morissette v. U.S.*, 342 U.S. 246, 250, n.4 (1952)(quoting Dean Pound). The corollary to this principle is since "insane individuals are incapable of understanding when their conduct violates a legal or moral standard, they [are] relieved of criminal liability for their actions." *Finger v. State*, 117 Nev. 548, 27 P.3d 66, 71 (2001). Or, simply, "our collective conscience does not allow punishment where it cannot impose blame." *Holloway v. U.S.*, 80 U.S. App. D.C. 3, 148 F.2d 665, 666-667 (D.C. Cir.1945).

Perhaps because the insanity defense involves the core philosophical premises of the criminal law, it is shrouded in myths. See generally, Nat'l Mental Health Ass'n, *Myths and Realities: A Report of the Nat'l Comm'n on the Insanity Defense* (1983) at 14-27 (identifying Myths). And see Wallace A. MacBain, *The Insanity Defense: etc.*, 67 Marq. L.Rev. 1, 2, n.15 & 7, n. 29 (quoting the Myths).

Of these ten myths, ironically the "#7 Myth: Insanity trials are a 'circus' of conflicting expert testimony that confuses the jury," 67 Marq. L.Rev at 7, n. 29, seems, as counsel submits below, to have been true here.

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I. IT WAS PLAIN ERROR TO TELL THE JURORS THEY WOULD DECIDE WHETHER TWO EXPERTS WERE QUALIFIED, PROMISE THEM AN INSTRUCTION ON THE ISSUE, AND THEN NEVER PROVIDE ONE.

A. Additional Facts

As part of Mr. Schaffhausen's case on sanity, trial counsel presented testimony of the court-appointed doctor. (523:1227-1359). After counsel asked this doctor qualifying questions, he offered him to the court as an expert. (523:1240). The court replied, "I'll let the jury decide whether he qualifies as an expert." (523:1240 [lines 14-15]).

Similarly, when trial counsel offered the defense doctor to the court as an expert, the court replied, "Members of the jury, I'll let you decide if he's an expert. I'll give you a jury instruction on it, and you make that determination." (524:1397 [lines 9-11]).

B. Discussion

1. a. Qualification of experts is a determination of preliminary fact for the court.

It has, of course, been long settled experts' qualifications are determined by the court, whether the case is criminal, *State v. Friedrich*, 135 Wis.2d 1, 15, 398 N.W.2d 763 (1987)("Whether or not expert opinion should be admitted into evidence is largely a matter of the trial court's discretion."), or civil. *Parker v. Wis. Patients Comp. Fund*, 2009 WI App 42, ¶28, 317 Wis.2d 460, 767 N.W.2d 272, 280 ("Whether a witness is qualified to provide expert testimony is a preliminary question of fact for the judge to determine under Wis. Stat. §901.04."). This rule is of ancient vintage. 2 Wigmore, Evidence §561 (Chadbourn rev.1979) & cases there cited and discussed. So, it was clear error to defer the issue of expert qualifications to the jury.

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b. There is no jury instruction on determining an expert's qualifications.

Although the court promised to give the jurors an instruction on how to determine if a witness is an expert (524:1397 [lines 9-11]), it never gave any such instruction. This is, of course, because there is no such instruction since the jury is not supposed to be making that determination. The only instruction the court gave on expert testimony was the standard Wis-JI Criminal 200. (529:2489-2490).

Of course, counsel cannot argue it was error for the court to fail to give an instruction which does not exist, but promising to give an instruction on this issue and then failing to do so "is tantamount to telling the jury to 'go in there and do whatever you think is right.' " *Harmon v. Marshall*, 69 F.3d 963, 967 (9th Cir.1995)(complete failure to define any element of offense, habeas relief aff'd).

That is to say, here the jurors could use any criteria they wished for determining the doctors' qualifications and completely ignore any doctor's testimony failing to meet their criteria. Now a jury is certainly free to reject an expert's testimony, but here the jury could simply refuse to consider it at all. This implicates Mr. Schaffhausen's basic right to present a defense. If one or more jurors never even considered his expert's testimony, he did not get a fair trial of his sanity defense.

2. Plain Error

Since trial counsel did not object on this ground here, this Court may consider these errors if they were "plain." See generally §901.03(4), *Wis. Stats.* (court may consider "plain errors affecting substantial rights although they were not called to the attention of the judge."); *Vigil v. State*, 84 Wis.2d 166, 189-195, 267 N.W.2d 852, 864-866 (1978)(discussing meaning of plain error rule).

Although plain error " 'is a concept appellate courts find impossible to define, save they know it when they see it,' " 84 Wis.2d at 191 quoting 3 Wright, Fed. Prac. & Proc. §856 (1969) with approval, it is clear "where a basic constitutional

right has not been extended to the accused," *id*. at 195(conc. opn. per Beilfuss, J.), "the plain error doctrine should be utilized." *State v. Jorgenson*, 2008 WI 60, ¶21, 310 Wis.2d 138, 754 N.W.2d 77. If "the unobjected to error is fundamental, obvious and substantial," then the burden shifts to the State to show the error was harmless. *Id.* at ¶23.

It seems clear enough the court below's error abdicating its responsibility to determine the expert's qualifications was "obvious" in that it violated a basic rule of evidence centuries old. It is further clear failing to give the promised jury instruction was both "fundamental" and "substantial" since it gave the jury the power to completely ignore the defense expert's testimony, thereby violating Mr. Schaffhausen's fundamental substantive right to present a defense.

It is now well settled an accused has a fundamental constitutional right to present a defense. *Holmes v. South Carolina*, 547 U.S. 319, 324-326. 126 S.Ct. 1427, 164 L.Ed.2d 503 (2006); *State v. Pulizzano*, 155 Wis.2d 633, 645-646, 456 N.W.2d 325 (1990). This right includes the right to jury consideration of relevant expert testimony. *Morgan v. Krenke*, 72 F.Supp.2d 980, 1000-1023 (E.D. Wis.1999). Obviously, the heart of any sanity defense is the defense doctor's testimony. Since the court's errors allowed the jurors to ignore the defense doctor's testimony, the heart was cut out of Mr. Schaffhausen's defense. Thus, his fundamental right to present a defense was violated and the trial was basically unfair.

Counsel further submits the State cannot meet its burden on harmless error because a key part of its case was precisely that the defense expert should be ignored. In closing argument, the State repeatedly argued the jury didn't need the opinion of any doctor to decide the case. (529:2552 [lines 14-15] "Even without the opinions of any doctors" jury could find no mental illness)(529:2566 [lines 9-13] "no matter what any doctor said. They could bring in ten doctors" and jury could conclude legally sane.)(529:2573 [lines 1-7] questioning defense doctor's qualifications).

Therefore, on this ground alone, the judgment in the sanity phase here should be reversed.

II. THE TRIAL COURT'S REFUSAL TO PROVIDE THE DELIBERATING JURY WITH THE MEDICAL REPORTS IT REQUESTED VIOLATED MR. SCHAFF-HAUSEN'S RIGHT TO PRESENT A DEFENSE.

A. Additional Facts

In closing argument, trial counsel urged the jurors to examine the experts' reports. (529:2502 [line 24] – 2503 [line 4] "And the reports are in evidence. *** If you want to understand this puzzle . . .then you are going to have to take your time and think and look at what these experts say and why they say it.").

During deliberations, the jury sent a note to the court, asking for, among other things, "3 Medical Expert reports." (558 [copy of note])(529:2598-2610 [discussion of response to note]). Over defense objections, the trial court refused to send the medical reports to the jury because "it could be unduly prejudicial." (529:2610 [lines 1-3]). All of these reports were admitted in evidence. (387)(419)(420) [in App., Vol. 2].

B. Discussion

This issue is just another aspect of the problem introduced in the previous argument. Very likely confused by the court's failure to explain how to determine expert qualifications and taking trial counsel's request "to take your time and think and talk and look at what these experts say and why they say it." (529:2503 [lines 3-4]), seriously, the jury requested the reports of all 3 doctors who testified. That the jury was looking for guidance to dispel its confusion is evidenced by the fact it also asked for a "definition of catathymia" which was the primary mental disease the defense expert testified Mr. Schaffhausen had. (524:1443-1460). It seems clear the requested reports "would have been of aid to the jury in the proper consideration of the case." *State v. Anderson*, 2006 WI 77, ¶99, 291 Wis.2d 673, 717 N.W.2d 74. After all, "the jury itself considered [this] evidence important enough to request it during its deliberations." *State v. Jaworski*, 135 Wis 2d 235, 244, 400 N.W.2d 29 (Ct.App.1986) quoted with approval 2006 WI 77,

¶106. By refusing to provide the requested reports, the court did nothing to help the jury resolve its confusion and instead exacerbated it.

On review, the court examines the reasoning behind the circuit court's exercise of discretion refusing the jury the reports. 2006 WI 77, ¶94. Proper exercise of discretion requires consideration of:

1) "whether the exhibit will aid the jury in proper consideration of the case,"

2) "whether a party will be prejudiced by submission of the exhibit, and"

3) whether the exhibit could be subjected to improper use by the jury."

State v. Jensen, 147 Wis.2d 240, 260, 432 N.W.2d 913, 922 (1988).

The court's ruling (529:2609-10) reveals (1) it never considered whether the reports would aid the jury; (2) the finding it would be unduly prejudicial to send the reports back is unfounded since the jury asked for all 3 of the experts reports, court appointed, defense and State, and (3) as to improper use by the jury, the court claimed it would be "impossible" to redact those portions of the reports containing inadmissible hearsay, but the reports had already been admitted into evidence. (523:1240 [court-appointed])(524:1461 [defense])(528:2319 [State]). The first 2 reports were admitted without objection and defense counsel waived his earlier objection to the State's report. (529:2604-2605). So, no redaction was necessary.

Therefore, it was an erroneous exercise of discretion to refuse the jury's request for the medical reports. Beyond that, counsel submits it was a violation of Mr. Schaffhausen's basic Due Process right to present a defense. See generally *Holmes*, *supra*; *Pulizzano*, *supra*. Defense counsel specifically directed the jury's attention to the reports (529:2502-03) and strenuously argued to send them back. (529: 2602-2604). Thus, the reports were a key part of the

defense case. That the jury was interested in properly evaluating the defense case seems clear from the fact it asked the court for a "definition of catathymia" (558 [jury note]), the primary mental disease the defense expert testified Mr. Schaffhausen had. (524:1443-1460). The right to present a complete defense includes the right to present the jury a report of a psychiatrist to support an insanity defense. *Ellis v. Mullin*, 326 F.3d 1122, 1128-1130 (10th Cir.2002)(opn. on den. of rehearing aff'g grant of habeas relief) cert. den. 540 U.S. 977 (2003).

Therefore, the court should reverse the judgment at the sanity phase on this ground as well as on the ground explained in I, *supra*.

III. THE REAL CONTROVERSY WAS NOT TRIED.

A. Additional Facts

On March 27, 2013, trial counsel filed a motion to exclude from evidence 1) threats to Mrs. Schaffhausen or the children, 2) autopsy and medical examiner data and 3) crime scene data as irrelevant to the issue of whether Mr. Schaffhausen was legally sane. (415). The trial court considered this motion on March 28, 2013 and deferred ruling on it until such evidence was sought to be introduced at trial. (512:7-9).

During trial, defense counsel objected to the crime lab analyst's testimony about blood and DNA as irrelevant to legal sanity. (527:2242). The court overruled the objection. (527:2242-2246). The court noted a continuing objection. (527:2246).

Later, trial counsel renewed his relevancy objection, now objecting to the pathologist's testimony about the autopsies. (527:2272). The court again denied the objection, noting it was continuing. *Id*.

B. Discussion

The rules on discretionary reversal are doubtless well known to the Court. "[T]he real controversy has not been

tried if the jury was not given the opportunity to hear and examine evidence that bears on a significant issue in the case . . .” *State v. Maloney*, 2006 WI 15, ¶14, n. 4, 288 Wis.2d 551, 709 N.W.2d 436. This Court’s power of discretionary reversal under §752.35, *Wis. Stats*., is identical to the state supreme court’s power under §751.06, *Wis. Stats*., *Vollmer v. Luety*, 156 Wis.2d 1, 19, 456 N.W.2d 797 (1990), and so includes the power to reverse in the interest of justice where the real controversy has not been tried without finding probability of a different result on retrial. *State v. Hicks*, 202 Wis.2d 150, 160, 549 N.W.2d 435 (1996).

Here, the State’s case was focused in large part on convincing the jury it did not need the opinion of any expert doctor to decide legal sanity. See (529:2552 [lines 14-15] jury could find legal sanity “without the opinions of doctors”)(529:2573 [lines 9-13] jury could find sanity “no matter what any doctor said. They could bring in ten doctors . . .”). When the court initially told the jury it could decide whether the defense doctor was an expert followed by its refusing its request for the doctors’ reports, this sent a not so subtle message the State’s argument was correct. Allowing unrestricted presentation of State’s evidence more relevant to guilt than to sanity was just icing on the State’s case.

Counsel submits the real controversy of Mr. Schaffhausen’s sanity defense was never tried because of these cumulative errors. There was especial prejudice to Mr. Schaffhausen since the heart of his expert’s testimony was the finding catathymia caused his actions (524:1443-1460) and not only was the jury’s request for a “definition of catathymia” denied, but so was its request for the report which explained it. As an articulate judge summarized a similar situation, the jury “wanted to hear it all, so they heard nothing.” *State v. Anderson*, 2005 WI App 238, ¶35, 288 Wis.2d 83, 707 N.W.2d 159 (conc. & dis. opn. per Kessler, J.) followed in *Anderson, supra*, 2006 WI 77, ¶97.

Conclusion

Counsel respectfully submits the foregoing demonstrates Mr. Schaffhausen’s sanity defense was unfairly tried and prays the Court for reversal and remand of the judgment

below.

Dated: December 19, 2013

Respectfully submitted,

_____

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STATE OF WISCONSIN

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CERTIFICATIONS

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) & (c) for a brief produced with a proportional serif font.

The length of this brief is 3,437 words.

ACCURACY CERTIFICATION

I hereby certify that the electronic copy of this brief conforms to the rule contained §809.19(12)(f) in that the text of the electronic copy of this brief is identical to the text of the paper copy of this brief.

Dated: December 19, 2014 So Certified,

Signature: _____

Timothy A. Provis

Bar No. 1020123

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DISTRICT III

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CERTIFICATE OF MAILING

I certify that this brief was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first class mail on December 22, 2014. I further certify that the brief was correctly addressed and postage was prepaid.

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Timothy A. Provis

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