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STATE OF WISCONSIN

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

DISTRICT I

Appeal No. 17AP001206CR
Milwaukee County Cir. Court Case No. 2015CF3109

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

EMMANUEL EARL TRAMMELL,
Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION, SENTENCE, AND THE DECISION AND ORDER DENYING MOTION FOR POSTCONVICTION RELIEF ENTERED BY BRANCH 38, MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. WAGNER PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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<u>Wisconsin Statutes</u>

I. ARGUMENT I -- THAT THIS COURT "LACKS THE POWER TO REVIEW" THE INSTRUCTIONAL ERROR "BECAUSE [TRAMMELL] DID NOT OBJECT IN THE CIRCUIT COURT" -- FAILS BECAUSE IT RELIES ON A MISUNDERSTANDING OF THE FACTS AND ON AUTHORITIES NOT CONTROLLING HERE.

In its Argument I, the State argues that this Court "lacks the power to review" the complained-about instructional error "because [Trammell] did not object in the circuit court." Brief of Plaintiff-Respondent ("Brief") at 6.

A. Section 805.13 and its common law predecessor rule do not control here.

This argument fails because it relies on Wis. Stats Section 805.13 and the predecessor common law rule barring review of errors waived by failure to object timely. Section 805.13 and its common law predecessor rule do not control here, as stated infra.

This argument also fails because it misstates the facts here. Trammel's instructional error was not waived by failure to object *timely*. Trammell's trial counsel did not object during trial, but he did not waive the instructional error by failing to object, because during trial he lacked grounds for objecting. Such grounds came into existence 2 years *after the trial*, when the results of the Two Studies were announced.

Review of Trammell's instructional error is not barred by common law or Section 805.13, because the error here was *timely* raised in circuit court, post-conviction. Because this instructional error could not have been

objected-to during trial -- for lack of grounds in the form of empirical data from the Two Studies -- failure to object during trial did not waive the right to appeal the error, and objecting post-conviction was timely. Failure to object at trial does not bar this Court's review based on the "proper judicial administration" justification for the common law doctrine of waiver and Section 805.13. See *Vollmer v. Luety*, 456 N.W.2d 797, 802, 156 Wis.2d 1 (1990) (identifying this justification for requiring objections at trial: allowing trial judges opportunities to correct or avoid errors, ensuring efficient judicial administration; citing *Cappon v. O'Day*, 165 Wis. 486, 162 N.W. 655 (1917): "One of the rules of well nigh universal application established by courts in the administration of the law is that questions not raised and properly presented for review in the trial court will not be reviewed on appeal.")).

Also *State v. Schumacher*, 144 Wis.2d 388, 424 N.W.2d 672 (1988), as invoked at pp. 7-9 of the Brief, does not bar this Court's review and, like Section 805.13, does not apply or control here.

Schumacher does not bar review of an error unobjected-to at trial where the error could not have been validly objected-to during trial, for lack of grounds in the form of supporting empirical data; and where for this reason alone the error was unobjected-to during trial; but where such error was timely objected-to in circuit court, postconviction, on Trammell's *first opportunity* to object, after the publication of the empirical data supporting the objection.

Nothing in Argument I, and no authority there cited, supports the claim that Trammell failed to preserve the instructional error for this Court's review by not timely

objecting, or that review by this Court is now barred under Section 805.13 or other iterations of the well-settled rule that "[f]ailure to timely object to jury instructions is waiver of alleged defects in the instructions," *State v. Zelenka*, 130 Wis.2d 34, 44, 387 N.W.2d 55, 59 (1986).

Nothing in Argument I supports the claim that this Court may not review the jury instruction error timely raised by Trammell, on the first opportunity available to him, in postconviction court.

Trammell -- by first raising this issue in postconviction court on his first opportunity, and now in this Court, upon denial in postconviction court -- is taking all the required, necessary, reasonable, and lawful steps towards obtaining review of this instructional error and obtaining relief from the grave due process violation caused by the error.

The State asserts that "[s[ince Trammell did not object to the instruction, *he placed this case beyond this Court's power to consider [Trammell's] claims*." Id. at 8. This is incorrect and unsupported by the record. No act *on Trammell's part* "placed this case beyond this Court's power to consider [Trammell's] claims." The State does not point to any such act of Trammell's. As shown in the Brief in Chief and supra, grounds for objecting during trial did not exist. Trial-time objection was not an available option. The State cannot validly argue that Trammell failed to preserve this instructional error for review by not objecting during trial.

B. This Court has power to review and reverse.

Trammell asks this Court to review his grave instructional error under any of the theories advanced in his

Brief in Chief or any other theory and/or power available to this Court, including the theory of "plain error" and/or this Court's power of discretionary reversal under Sec. 752.35, Stats.[1]

This Court's "discretionary power of reversal, granted to [it] by statute . . . is compatible with doing justice in an individual case, which is primarily the duty of the court of appeals" and because this Court "is destined to be the court of last resort for most cases . . . it would be inappropriate for [this Court] to have no discretion with respect to claimed error in instruction." *Vollmer v. Luety*, 156 Wis.2d 1, 456 N.W.2d 797, 803-804 (1990) (citing prior decisions of the Supreme Court). Therefore, this Court has "the substantial discretion granted under [Section] 752.35, as that statute is liberally construed." Id. at 804.

This Court's "substantial discretion" liberally construed allows review of errors *despite waiver*. Id. By extension, it allows review of errors *not* waived by failure to object timely, like the error in this case.

Nothing in the law limits this Court's authority to review preserved errors, like the error here.

This Court has the "broad statutory authority" to achieve justice in its discretion in the individual case. Id. at 805.

This "broad authority" to reverse on the ground that the real controversy was not fully tried extends to situations involving instructional errors. Id. at 806 (stating that this Court's authority equals the authority of the Supreme Court,

[1] This Court's power to review and reverse under Section 752.35 is discussed in additional detail infra.

giving examples of such authority's use to review situations involving waived erroneous jury instructions and verdict questions).

This broad authority allows review of waived errors and reversal "on the grounds that the real controversy was not fully tried in situations where, either due to error of the trial judge or counsel, a significant legal issue was not properly tried to the court." Id at 806. (citation omitted).

This "broad authority" allows review of waived errors and reversal "where conduct during the course of trial prevented the jury from fairly considering a crucial issue before the court." Id. (citation omitted).

This authority allows reversal "on the grounds that the real controversy was not fully tried where the 'record of the whole case shows such an abundance of misunderstanding, cross-purposes, and frustration that dismissal would leave us with a strong belief that the issues had not been fully tried nor justice done.'" Id. at 806 (citing *Erickson v. Westfield Milling & Electric Light Co.*, 263 Wis. 580, 589, 58 N.W.2d 437 (1953)).

"In a case *where an instruction obfuscates the real issue or arguably caused the real issue not to be tried*, reversal would be available in the discretion of the court of appeals under sec. 752.35." Id. at 807 (emphasis added).

In light of such broad discretionary authority and this Court's task of doing justice in a particular case, Trammell asks this Court to review the raised instructional error and reverse his convictions, because here the Truth Instruction both "obfuscate[d] the real issue" and "arguably caused the real issue not to be tried." The "real issue" of Trammell's innocence/guilt was obfuscated and "not tried" according to

the exacting standards of due process, requiring the absence of reasonable doubt before "guilt" could be found.

Should this Court find itself powerless to review the merits of this instructional error, Trammell asks this Court to certify this matter to the Supreme Court, so he may receive review of this fundamental due process violation.

II. ARGUMENT II -- THAT TRAMMELL IS NOT ENTITLED TO REVERSAL/NEW TRIAL IN THE INTEREST OF JUSTICE -- FAILS FOR SEVERAL REASONS.

The State admits that this Court "has authority to reverse in the interest of justice" under Section 752.35, but insists that Trammell is "not entitled" to reversal. Brief at 9-13.

A. Argument II fails because the State too narrowly defines the test for "whether the real controversy has not been fully tried."

The State erroneously asserts that the first path to reversal ("real controversy not fully tried") opens only when errors in evidentiary admissions and presentation "cloud a crucial issue that it may be fairly said that the real controversy was not fully tried," citing *State v. Hicks*, 202 Wis. 2d 150 (1996). Brief at 10. The State seems to perceive this clause from *Hicks* as "the supreme court's long-standing definition of when the real controversy was not fully tried." Id. at 12. [2]

But this is not the proper test for reversal on this theory. As shown supra, "the real controversy" is

[2] See footnote 5, infra, for additional details on a lack of clarity in the State's Brief.

sometimes "not fully tried" in situations involving instructional errors. See *Vollmer,* 456 N.W.2d at 806 (examples of discretionary review/reversal in situations involving waived erroneous jury instructions and verdict questions).

Promotion of *Hicks's* narrow "definition" of reversal on this theory is contrary to the controlling precedent of *Vollmer*. [3]

B. The State's discussion of *Austin* is consistent with Trammell's reliance on *Austin*.

In a one-paragraph discussion of Trammel's reliance on *State v. Austin,* 2013 WI App 96, at p. 12 of the Brief, the State does not deny or rebut that *Austin* supports Trammell's arguments and controls here, thus admits those points. *State v. Chu*, 2002 WI App 98, P41, 253 Wis.2d 666, 643 N.W.2d 878 (argument admitted when not rebutted or responded to). The State admits that *Austin* involves instructional errors causing an unclear statement of the State's burden of proof, like this case; and that the *Austin* court found the unclear instructions erroneous, as Trammell is urging this Court to do. Id. The State does not distinguish *Austin* from Trammell's case. Id. [4]

Seeking to weaken the import of *Austin*, the State "speculates" that *Austin's* reversal on the "real controversy

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[3] The State fails to acknowledge *Vollmer* and/or its import for Trammell's case.

[4] The State asserts that *Austin* involved a "complex interplay of the various instruction at issue" while '[i]n contrast, this case presents a very straightforward set of instruction." Brief at 12. If this statement was the State's attempt to distinguish the two cases, such attempt fails for being vague, conclusory, and unsupported by detailed comparative case-to-case analysis.

was not fully tried" ground "stemmed from obscuring the State's burden of proof in the complex interplay of the various instructions at issue," while Trammell's "case presents a very straightforward set of instructions." The State speculates that "*Austin* appears to be inconsistent with the supreme court's long standing definition of when the real controversy was not fully tried." Brief at 12. [5] These speculations, unsupported by reasoning or authority, are not valid legal argument and do not rebut Trammell's *Austin*-based arguments.

C. The State's reliance of *State v. Avila*, 532 N.W.2d 423 (1995), misses the point of this appeal.

The State attempts to rebut Trammell's arguments by citing to the very precedent whose validity the Two Studies disprove, by asserting at pp. 12-13 that the challenged jury instructions are not erroneous because *Avila* so held. This is failed circular argument. When Trammell challenges the validity of *Avila's* holding and asks that it be overruled based on the empirical results of the Two Studies, then citing *Avila* is not valid rebuttal on the merits.

[5] On page 12 the State does not identify the source of this "long standing definition" nor cite to controlling case law. Undersigned counsel is left guessing as to precisely what "long standing definition of when the real controversy was not really tried" the State refers to. Counsel concludes, based on pages 10-12 of the State's Brief, that here the State is referring back to a formulation of "when the real controversy was not really tried" found in *State v. Hicks*, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996), and cited in the last paragraph on page 10 of the State's Brief: "Under the first aspect of the interest of justice analysis, the real controversy has not been tried when the jury was erroneously prevented from hearing testimony that bore on an important issue of the case or when the jury had before it improperly admitted evidence…".

The Brief does not rebut Trammell's arguments for overruling *Avila*. It does not deny or rebut that *Avila's* holding regarding JI-140CR does not withstand the empirical data "reality check" from the Two Studies. The State does not assert that -- in light of the Two Studies -- *Avila* is still correctly decided, or that the *Avila* court would issue the same holding if it had access to the Two Studies. Thus, the State admits these claims of Trammell. *Chu*, 2002 WI at P41.

D. The State argues that a substantial probability of a different result on retrial does *not* exist here, so reversal is unwarranted on the "miscarriage of justice" theory.

The State labors to rebut an argument *not* made by Trammell: that a substantial probability of a different result on retrial exists warranting reversal on the "miscarriage of justice" theory. Brief at 13. The State argues that Trammell cannot demonstrate a substantial probability of a different result on retrial because witnesses testified that Trammell "stole" the victim's car. Id.

This rebuttal fails because it misrepresents the testimonial record, misrepresents the contested element of the crime, and ignores Trammell's theory of defense.

No witness testified that Trammel "stole" the victim's car. Witnesses testified that Trammell took the car from the victim. Trammell's identity as the one who took the car was not contested. Trammell's defense was that he had taken the car without intent to permanently deprive the owner of it. Defense counsel elicited testimony supporting this theory and argued this theory to the jury, as stated in the Brief in Chief. Trammell's identity as the one who took the

car would not be dispositive of acquittal/conviction on retrial.

The State also misrepresents the record in stating that "proof of Trammell's guilt was overwhelming." Brief at 13. Proof that Trammell took the car was overwhelming. Proof that he took the car *with intent to keep it permanently* was thin and countered by defense-presented evidence showing that Trammell had intended to hold the car temporarily, until a debt was repaid; and that Trammell discussed the return of the car with a co-actor, who then discussed such return with the victim.

For the above reasons, the State fails to show a lack of probability of acquittal on retrial.

In rebutting the State's arguments at p. 13, Trammell submits that reversal is warranted on "miscarriage of justice grounds" because:

(1) substantial probability of acquittal on retrial exists when evidence of the contested element (intent to keep the vehicle permanently) was weak and contradicted by testimony from the victim and another that Trammell felt that the victim was indebted and willing to pay such debt, Trammell believed the victim would sooner repay if the car were held as "collateral" temporarily, Trammell discussed return of the car with a co-actor who then discussed its return with the victim; and

(2) justice probably miscarried and fairness broke down due to the misstatement -- and empirically proven lowering -- of the State's burden of proof by the Truth Instruction.

E. The State admits Trammell's claims by failing to deny or rebut them.

Also deemed admitted should be Trammell's claims -- unaddressed and unrebutted by the State -- regarding the scientific soundness of the Two Studies, the import of the Two Studies' results, and the reasonable implications of such results for Wisconsin's criminal jury instructions on the State's burden of proof. *Chu,* 2002 WI App at P41.

F. This Court has the authority to review the instructional error that prevented Trammell's innocence/guilt from being decided based on the fairness-mandated burden of proof.

As stated in post-conviction court and in his Brief in Chief, Trammell had a fundamental due process right to have his innocence/guilt decided based on the due-process-mandated high burden of proof involving absence of "reasonable doubt." That fundamental right was violated by the wording of the instructions. The Two Studies prove that such wording convinces some jurors that they may convict even when reasonable doubt lingers.[6] Post-conviction, Trammell brought this violation to the circuit court's attention on his first opportunity, never waiving this error by failure to object timely.

As proven by the Two Studies, due to the erroneously worded jury instruction -- that expressly

[6] The State fails to deny or rebut that the Two Studies support Trammell's arguments about the due-process-violative impact of the "truth language" in JI-140CR; or that the Two Studies are scientifically sound and provide reliable empirical evidence that the Truth Language in fact has such effect on jurors. Thus, these claims should be deemed admitted. *Chu,* 2002 WI App at P41.

required the jurors to *not* search for doubt, but search for the truth instead – one or more jurors probably concluded (as did mock jurors in the Two Studies) that Trammell was "guilty" based on an erroneous belief, created by the wording of the instruction, that they could find "guilt" even when reasonable doubt lingered. The real controversy of Trammell's guilt/innocence was not "fully tried" in this prosecution, because the guilt-vs.-innocence question was not answered based on the correct, exacting standard mandated by due process.

In light of the above, "interests of justice" require reversal and a new trial, where the controversy over his guilt-vs.-innocence is "fully tried" -- considered and resolved -- based on the due-process-mandated exacting standard requiring the absence of reasonable doubt in all 12 jurors' minds.

This Court has the authority to review Trammell's claim and correct the errors caused by the Truth Instructions by reversing "in the interest of justice." Section 752.35; *State v. Ray*, 166 Wis. 2d 855, 874, 481 N.W.2d 288 (Ct. App. 1991).

This Court has the authority to correct the erroneous Truth Instruction, whose "plain error" is revealed through the uncontroverted scientific findings of the Two Studies about how the Truth Language causes some jurors to misunderstand the State's burden of proof. The State's Brief does not show that this Court lacks such power or authority. [7]

[7] As argued elsewhere in this Brief, the State asserts erroneously that the "plain error" doctrine is unavailable here because it was superseded by Section 805.13, and that Section -- in the State's erroneous view -- controls this case. Brief at 8.

CONCLUSION

For the reasons stated above, Emmanuel Trammell asks this Court to review his grave instructional error under any of the theories advanced in his Brief in Chief or any other theory and/or power available to this Court, including the theory of "plain error" and/or this Court's power of discretionary reversal under Sec. 752.35, Stats.

Should this Court find itself powerless to review the merits of the instructional error Trammell complains about, Trammell asks this Court to certify this matter to the Supreme Court, so he may receive review of the fundamental due process violation the error has effected in his case.

Dated this 22nd day of December, 2017.

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 2811 words.

Dated this 22nd day of December, 2017.

Signed:

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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 22nd day of December, 2017.

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