STATE OF WISCONSIN

IN SUPREME COURT

No. 2013AP557-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

COREY R. KUCHARSKI,

Defendant-Appellant.

PETITION FOR REVIEW

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PETITION FOR REVIEW

The State of Wisconsin hereby petitions this court, pursuant to Wis. Stat. §§ 808.10 and (Rule) 809.62, to review the decision of the Wisconsin Court of Appeals, District I, dated May 6, 2014, reversing Corey Kucharski's conviction on two counts of first-degree intentional homicide and remanding for a new trial in the interest of justice on the sanity phase of Kucharski's trial. *State v. Corey R. Kucharski*, Case No. 2013AP557-CR (Wis. Ct. App. Dist. I, May 6, 2014) (Pet-Ap. 101-123).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. In granting Kucharski a new trial on the issue of mental responsibility under the miscarriage-of-justice prong of Wis. Stat. § 752.35, did the court of appeals substitute its judgment for that of the trial court

on issues that are within the sole province of the finder of fact, so that the appellate court's decision conflicts with this court's decision in *State v. Sarinske*, 91 Wis. 2d 14, 280 N.W.2d 725 (1979)?

In the court of appeals, Kucharski argued he was entitled to a new trial in the interest of justice under Wis. Stat. § 752.35 because there is a substantial probability that a new trial would produce a different result.

Without citing *State v. Sarinske*, the majority of the court of appeals agreed with Kucharski that "there is a substantial probability that a new trial would produce a different result because he met his burden under WIS. STAT. § 971.15(3)." Pet-Ap. 114, ¶ 35.

In dissent, Judge Brennan found that the majority had substituted its judgment for that of the trial court on issues that this court in *Sarinske* 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." Pet-Ap. 120, ¶ 45.

2. Should a defendant ever be entitled to a new trial on the affirmative defense of insanity under the miscarriage-of-justice prong of Wis. Stat. § 752.35 where the court of appeals does not find any error or unfairness at his trial, but 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 province of the fact-finder alone?

In *Kemp v. State*, 61 Wis. 2d 125, 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 of the case that there was a substantial probability a different finder of fact would reach a

different result on retrial. *Id.* at 138. And in *State v. Murdock*, 2000 WI App 170, 238 Wis. 2d 301, 617 N.W.2d 175, the court of appeals granted a new trial in the interest of justice on the issue of the defendant's mental responsibility, finding a substantial probability of a different result on retrial because the evidence as a whole predominated heavily on the defendant's side. *Id.* ¶ 40.

The courts in *Kemp* and *Murdock* implicitly found a probable miscarriage of justice not on the basis of any error or unfairness in the first trial, but solely because the courts weighted the evidence on the defendant's side differently than did the finder of fact.

The State did not ask the court of appeals to consider whether it could grant a new trial in the interest of justice if the sole basis for doing so is that the appellate court weighs the evidence differently than did the finder of fact, and the court of appeals did not consider that question. This legal issue was not raised in the court of appeals because only this court has the power to overrule, modify, or withdraw language from a previous supreme court case or from a published court of appeals decision. *Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). Any modification or qualification of *Kemp* and *Murdock* must come from this court.

STATEMENT OF RULE 809.62 CRITERIA RELIED ON FOR REVIEW

The first issue presented satisfies the criterion for review in Wis. Stat. § (Rule) 809.62(1r)(d) because the court of appeals' decision conflicts with this court's decision in *Sarinske*, 91 Wis. 2d 14, insofar as the majority substituted its judgment for that of the trial court on matters that are within the sole province of the fact-finder on the issue of criminal responsibility. Review of this issue is warranted because this is the second time in

less than a year that the court of appeals, by substituting its judgment for that of the trial court, has reversed a circuit court's finding that a criminal defendant has not met his burden of proof on the affirmative defense of insanity The court of appeals did the same thing in *State v. Vento*, Case No. 2012AP1763-CR (Wis. Ct. App. Dist. I, May 21, 2013) (Pet-Ap. 139-53). The State filed a petition for review in *Vento*, but this court denied the petition.

Although *Vento* is unpublished, and the decision in this case is not recommended for publication, both decisions are citable as persuasive authority pursuant to Wis. Stat. § (Rule) 809.23(3)(b).

The second issue presented satisfies the criteria for review contained in Wis. Stat. § (Rule) 809.62(1r)(c)3. A decision by this court regarding the circumstances under which it is appropriate for the court of appeals to grant a new trial on criminal responsibility under the miscarriage-of-justice prong of § 752.35 will help develop and harmonize the law, and the question presented is a legal one likely to recur unless this court resolves it.

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.*:2-3). Based on a report by

psychologist Deborah Collins (4), the trial court on March 29, 2010 found Kucharski competent to proceed (47:2-3).

On April 8, 2010, Kucharski waived his preliminary hearing (6), and an information charging him with two counts of first-degree intentional homicide was filed the same date (5). At his arraignment, Kucharski entered pleas of not guilty and not guilty by reason of mental disease or defect as to both counts (49:2). 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 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).

The trial court concluded 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 on the motion before the Honorable Jeffrey Conen (58), the trial court on August 22, 2011, denied the motion (59:11).

On December 16, 2011, Kucharski was sentenced to concurrent terms of life imprisonment with eligibility for extended supervision after thirty years (32).

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).

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 (Pet-Ap. 101-23).

The State now seeks review of the court of appeals' decision.

ARGUMENT AMPLIFYING THE REASONS SUPPORTING THE PETITION FOR REVIEW

I. REVIEW IS WARRANTED BECAUSE THE APPELLATE COURT'S DECISION CONFLICTS WITH *STATE V. SARINSKE* AND UNDERMINES THE PRINCIPLE THAT NEW TRIALS IN THE INTEREST OF JUSTICE ARE TO BE GRANTED ONLY WITH GREAT CAUTION AND IN EXCEPTIONAL CASES.

A. The applicable law on granting a new trial in the interest of justice on the criminal responsibility phase of a case.

New trials in the interest of justice are to be granted only in "'exceptional cases.'" *State v. Avery*, 2013 WI 13, ¶ 38, 345 Wis. 2d 407, 826 N.W.2d 60 (citations omitted). As this court has repeatedly emphasized, "'This court approaches a request for a new trial with great caution. We are reluctant to grant a new trial in the interest of justice.'" *Id.* (citing *State v. Armstrong*, 2005 WI 119, ¶ 114, 283 Wis. 2d 639, 700 N.W.2d 98).

Wisconsin Stat. § 971.15(1) provides that "[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." This is an affirmative defense which the defendant must prove "to a reasonable certainty by the greater weight of the credible evidence." Wis. Stat. § 971.15(3); *State v. Leach*, 124 Wis. 2d 648, 658-59, 370 N.W.2d 240 (1985).

Under Wis. Stat. § 752.35,[1] the court of appeals may grant a discretionary reversal and a new trial on the issue of a defendant's criminal responsibility for either of two reasons: (1) because the real controversy has not been fully tried; or (2) because it is probable that justice has miscarried for any reason. *State v. Caban*, 210 Wis. 2d 597, 609, 563 N.W.2d 501 (1997).

If a new trial is sought on the ground it is probable that justice has miscarried, a reviewing court will only grant a new trial if it determines that there is "'a substantial degree of probability that a new [hearing] would produce a different result.'" *Caban*, 210 Wis. 2d at 610 (citing *State v. Wyss*, 124 Wis. 2d 681, 734, 370 N.W.2d 745 (1985)).

This court reviews a discretionary determination to reverse a conviction in the interest of justice for an erroneous exercise of discretion. *Avery*, 345 Wis. 2d 407, ¶ 23. Although discretionary determinations of the court of appeals normally are accorded extreme deference, this court will not hesitate to review or reverse discretionary determinations where the exercise of discretion rests on an error of law. *State v. McConnohie*, 113 Wis. 2d 362, 371, 334 N.W.2d 903 (1983).

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

> 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.

B. The court of appeals' reversal was not based on any perceived error the trial court committed but on the appellate court's independent view of how much weight to accord the experts' opinions.

While the court of appeals paid lip service to the maxim that granting a new trial in the interest of justice is reserved for exceptional cases (*see* Pet-Ap. 114, ¶ 33), the court did not explain why this case is exceptional, nor did it identify the factors that generally render a case exceptional. Instead, the court recounted at length the evidence presented at Kucharski's court trial (Pet-Ap. 103-11, ¶¶ 6-26) and then explained why it believed the evidence showing that Kucharski lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was "very strong, and certainly comprised 'the greater weight of the credible evidence.'" Pet-Ap. 114, ¶ 35.

As Judge Brennan in dissent pointed out, the majority did not say that the trial court committed any error such as applying the wrong law or failing to consider certain evidence.[2] Pet-Ap. 120-21, ¶ 46. Rather, the majority essentially said that if it had been the finder of fact, it would have given the experts' opinions more weight than the trial court afforded them and would have found that Kucharski met his burden on the affirmative defense. *Id.*

[2] The majority actually declined to address Kucharski's arguments that the trial court misapplied Wis. Stat. § 971.15 and that its conclusions regarding Kucharski's mental responsibility lack support in the record. *See* Pet-Ap. 113 n.2.

The result here is at odds with *Sarinske*, 91 Wis. 2d at 48, where this court declared:

> [I]t is the responsibility of the trier of fact to determine the weight and credibility of the testimony on the issue of insanity and to determine whether the accused has met the burden of proving he was insane. The opinion of an expert even if uncontradicted need not be accepted by the [trier of fact]. The question of whether an accused has or has not met this burden is one of fact, not one of law for this court on appeal. Where there is sufficient credible evidence to support the [trier of fact's] finding, the [trier of fact's] verdict will not be upset.

(citations omitted.)

Under *Sarinske*, the trial court was not required to accept the experts' opinion that because of his schizophrenia, Kucharski was unable to appreciate the wrongfulness of his conduct and/or to conform his conduct to the requirements of law. Yet in reversing the trial court, the court of appeals relied in part on the fact the expert testimony was "uncontroverted." Pet-Ap. 115, ¶ 37.

Nor did the court of appeals hold that there was insufficient credible evidence to support the trial court's determination that Kucharski had failed to meet his burden of proof on the affirmative defense, although that was one of the claims Kucharski raised on appeal. *See* Brief of the Defendant-Appellant in *State v. Kucharski*, Case No. 2013AP557-CR (Dist. I), at 16-24.

Although the court of appeals' decision is not recommended for publication, as an authored opinion it can be cited for its persuasive value, as can the opinion in *State v. Vento* (Pet-Ap. 139-153). In both cases, the court of appeals substituted its judgment for that of the trial court on matters entrusted solely to the trier of fact, such as determining how much weight to accord expert

testimony. That course of action conflicts with this court's declaration in *Sarinske*, 91 Wis. 2d at 48, and is one reason this court should grant review and reverse the decision below.

II. THIS COURT SHOULD GRANT REVIEW AND HOLD THAT THE COURT OF APPEALS SHOULD NOT AWARD A NEW TRIAL ON THE ISSUE OF MENTAL RESPONSIBILITY UNDER THE MISCARRIAGE-OF-JUSTICE PRONG OF § 752.35 SOLELY BECAUSE THE APPELLATE COURT WOULD EVALUATE THE EVIDENCE DIFFERENTLY THAN DID THE FACT-FINDER.

This court in *Kemp*, 61 Wis. 2d 125, and the court of appeals in *Murdock*, 238 Wis. 2d 301, implicitly found a probable miscarriage of justice not on the basis of any error or unfairness in the sanity phase of the defendant's first trial, but solely because those courts weighted the evidence on the defendant's side differently than did the jury.

Likewise, the court of appeals did not find any error in the responsibility phase of Kucharski's trial to the court although Kucharski gave the appellate court several opportunities to do so. Not only did Kucharski argue that the trial court misapplied the standard in § 971.15 and that its findings lacked support in the record; he also claimed that trial counsel was ineffective in failing to call any expert other than Dr. Rawski to testify and in not introducing the delusional writings that were found at the crime scene. Rather than address those arguments, the court of appeals reversed in the interest of justice.

Granting a new trial in the interest of justice without finding any error or unfairness in the original proceeding fails to square with this court's repeated admonition that the power of discretionary reversal should be used with great caution and reserved for truly exceptional cases. This court should grant review and hold that a new trial under the miscarriage-of-justice prong of § 752.35 should not be awarded absent a finding that there was some error or unfairness in the original sanity phase of the defendant's trial.

Alternatively, given the dearth of authority on what makes a case "exceptional" so that a new trial in the interest of justice is warranted, this court should grant review and clarify what factors the court of appeals should consider when asked to exercise its power of discretionary reversal under § 752.35. Otherwise, the decisions in this case and in *Vento* can be read to suggest that the court of appeals has carte blanche to substitute its judgment for that of the fact-finder on the affirmative defense of insanity, or on any other affirmative defense for that matter.

CONCLUSION

For the above reasons, the State of Wisconsin respectfully requests that this court grant review, reverse the decision of the court of appeals, and remand to that court to decide the remaining issues raised by Kucharski.

Dated this 5th day of June, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. § 809.62(4)(a) for a petition produced with a proportional serif font. The length of this petition is 3032 words.

Marguerite M. Moeller
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that I have submitted an electronic copy of this petition for review, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.62(4)(b).

I further certify that this electronic petition is identical in content and format to the printed form of the petition filed as of this date.

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

Dated this 5th day of June, 2014.

Marguerite M. Moeller
Assistant Attorney General