

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 6, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP557-CR

Cir. Ct. No. 2010CF652

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

COREY R. KUCHARSKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEAN A. DIMOTTO, Judge. *Reversed and cause remanded with directions.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 CURLEY, P.J. Corey R. Kucharski appeals the judgment convicting him of two counts of first-degree intentional homicide with the use of a dangerous weapon, contrary to WIS. STAT. §§ 940.01(1)(a) & 939.63(1)(b)

(2009-10).¹ He also appeals the order denying his postconviction motion. On appeal, Kucharski argues that he is entitled to a new trial in the interest of justice on the issue of his mental responsibility because there is a substantial probability that a new trial would produce a different result. Considering the evidence as a whole, we agree. Therefore, we grant a discretionary reversal under WIS. STAT. § 752.35 and remand with directions to conduct a new trial on the issue of Kucharski's mental responsibility.

BACKGROUND

Procedural History

¶2 In February 2010, Kucharski was charged with two counts of first-degree intentional homicide with the use of a dangerous weapon. The criminal complaint alleged that Kucharski had, following a family argument, shot his parents and then called police to turn himself in.

¶3 Kucharski entered a special plea of not guilty and not guilty by reason of mental disease or defect (“NGI”), and later pled no contest during the first phase of the NGI trial. For the second phase, the criminal responsibility phase, Kucharski elected to have a court trial.

¶4 At the court trial, Kucharski introduced the reports of two psychiatrists, Dr. Robert Rawski and Dr. John Pankiewicz, and one psychologist, Dr. Anthony Jurek. Dr. Rawski and Dr. Pankiewicz provided very detailed and lengthy reports, while Dr. Jurek's report was very brief and essentially joined in

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Dr. Rawski's conclusions. Dr. Rawski and Dr. Pankiewicz personally interviewed Kucharski prior to creating their reports, and relied on additional materials, including the criminal file, the audio recordings of Kucharski's 911 call to police and interviews with detectives, numerous writings and diagrams that police found among Kucharski's possessions, Kucharski's medical records from the Milwaukee County Jail, a disability report from 2009, and the findings of psychologist Dr. Brooke Lundbohm, who administered the Structure Interview of Reported Symptoms—II (SIRS-II), a test used to detect feigning or exaggeration of mental health problems, to Kucharski. In addition, Dr. Rawski testified at trial.

¶5 The defense did not call any other witnesses. The State did not call any witnesses and did not introduce any evidence.

Kucharski develops symptoms consistent with schizophrenia.

¶6 The evidence adduced at trial described how Kucharski began having hallucinations and hearing voices in 2005, when he was about thirty years old, following a long period of heavy methamphetamine use while living in Las Vegas. Prior to hearing the voices, Kucharski had been depressed, suicidal, and had struggled with drug addiction for a number of years, but had never sought help for his afflictions. When he first heard the voices in 2005, Kucharski attributed them to his drug use and decided to stop using illicit drugs. After he stopped using, he moved back home to Milwaukee, where he had grown up and spent most of his life, but the voices did not stop.

¶7 Kucharski's condition continued to deteriorate after he moved back to Milwaukee in 2005. Up until that point he had worked various jobs, but he quit working altogether in 2008 and became very isolated. His primary activities included reading gun manuals and drinking beer in his parents' basement.

Dr. Rawski testified that, “Aside from his parents with whom he lived he had no friends, no other associates, no intimate relationships to speak of.”

¶8 Significantly, the voices continued. When other people spoke, Kucharski often heard voices that were not theirs. For example, Kucharski hallucinated at various points while Dr. Rawski interviewed him; and at one point he misinterpreted what Dr. Rawski said, hearing “different words coming out of [Dr. Rawski’s] mouth than the actual question that was asked.” The voices made derogatory remarks about Kucharski, and commanded him to do things. For example, Dr. Rawski’s report indicates:

Kucharski stated that the voices had commanded him to cut the trigger guard off of one of his pistols and that he followed the voice’s command, rendering the gun useless. He was not sure why the voice commanded him to do that. On another occasion, the voices told him not to plant tomatoes. He ignored the voices and planted the tomatoes, resulting in an aphid infestation destroying the crop in 2007.

¶9 Kucharski attempted to control the voices on his own, but could not do so. According to Dr. Pankiewicz’s report:

He began to suffer delusions including the belief that his tattoos were somehow affecting his parents’ health. As a consequence, he bought a number of long sleeved shirts in an effort to cover the tattoos to see if that would reverse the downward decline of his parents’ health. He tried staying away from home one night, spending the night at his grandparents. He found that the voices were still there. He tried going to a tavern and found that the voices were still there. One occasion he had visual perceptual disturbances where he believed that his mother and father’s eye would change. He said that they looked like they were possessed. He states that at times, their behavior seemed normal and at other times it seemed unusual.... He finds himself talking to the voices and asking them to “keep the volume down.”

(Some formatting altered.)

Kucharski shoots his parents at the direction of the voices.

¶10 Kucharski's hallucinations began more frequently to involve his parents, with whom he lived. When his father spoke, Kucharski sometimes heard a friend's voice instead. Kucharski also became confused by what he thought was his mother's death wish. Kucharski explained that his mother would sometimes tell him that she wanted to die, and that she wanted someone to shoot her, but that she told nobody about this except himself. He also reported that he was unsure about whether his mother's death wish came from his mother or whether it was from one of the voices.

¶11 Kucharski tried to distinguish between what he considered "real" voices and other voices that he considered hallucinations. To this end, he began keeping a journal in about 2009, which, by 2010, consisted of about forty to fifty pages of notes and diagrams. Dr. Rawski characterized Kucharski's writings as "very bizarre and inexplicable." According to Dr. Rawski, Kucharski had some difficulty explaining some of the writings because "each one of these represented specific content of his auditory hallucinations." Dr. Rawski's report explained that Kucharski frequently made notes in his journal "in order to decipher the message or deduce some direction." Likewise, Dr. Pankiewicz described the writings as "bizarre and incoherent, but consistent with an individual attempting to sort out psychotic thought content."

¶12 According to Dr. Rawski's report, Kucharski's decision to shoot his parents came at the direction of a voice that was very clear among the confusion. Earlier in the day, Kucharski had, in response to the voices, purchased a bottle of Jack Daniels at the liquor store. He then went home and had "cocktail hour" with his dad, in which he consumed a few drinks. In the early evening, Kucharski's

parents began to argue—which, in his estimation, was an extremely rare occurrence happening only once every ten years. After his father had an angry outburst about the countertops being messy, Kucharski heard a voice saying, “I told you not to buy JD and Coke.” He became confused because earlier the voices had told him to buy Jack Daniels, and he came to believe that his decision to buy Jack Daniels was what caused the argument. Kucharski decided to get away from the argument and went to his bedroom at about 6:00 p.m. When he woke up from a nap several hours later, “he began to hear voices telling him that he should simply end it.” At trial, Dr. Rawski explained that the voices telling him to “end it” were clear and made sense of all the voices he had been hearing in the previous months:

So on the evening of [the] alleged incident this clear voice commanding him to kill his parents I believe resulted in a – forthright directive for him that began to offer some guidance as to all of the other information that had been – that had been stewing around in his brain and he had been experiencing delusionally for some period of time.

¶13 Following the voices, Kucharski loaded his gun with nearly 200 rounds, planning to kill his parents and then to be killed in a shoot-out with police. Dr. Rawski explained:

When asked if he considered simply killing himself instead of shooting his parents and having a gun fight with the police, Mr. Kucharski stated he held the gun in his mouth for 20 minutes but could not pull the trigger. In deciding to kill his parents, he reportedly expected the voice to stop because he would ultimately do what the voice wanted.

¶14 After Kucharski shot both his parents, he made a “mistake” from the original plan; he forgot to have the shootout with police. According to Dr. Rawski, Kucharski “stated that he gave himself up and forgot the plan to shoot

it out with police while the gun continued to sit on the table.” According to Dr. Pankiewicz, Kucharski considered taking his own life again after police arrived, but the gun was out of reach. Dr. Pankiewicz also reported the voices scolded Kucharski for not correctly executing the plan and told him that the only thing he did correctly was waiting for a period of time before calling 911.

Experts diagnose Kucharski with schizophrenia and opine that he lacked substantial capacity to appreciate the wrongfulness of his actions and/or to conform his behavior to the requirements of law.

¶15 Both Dr. Rawski and Dr. Pankiewicz opined that Kucharski was suffering from schizophrenia when he killed his parents. Dr. Jurek reported that his opinion was “that Mr. Kucharski does suffer from genuine mental illness and it does not appear that he is malingering.” Dr. Rawski opined that Kucharski lacked substantial capacity to appreciate the wrongfulness of his actions, and Dr. Pankiewicz opined that Kucharski lacked substantial capacity to appreciate the wrongfulness of his acts and to conform his behavior to the requirements of law. Dr. Jurek reported, “Given my understanding of [Kucharski’s] history and the circumstances of the pending charges it is unlikely that my conclusions regarding Mr. Kucharski’s criminal responsibility would differ from Dr. Rawski’s findings as they were expressed in his report.”

¶16 Dr. Rawski explained that his conclusion that Kucharski lacked substantial capacity to appreciate the wrongfulness of his actions was based on the fact that Kucharski was truly mentally ill, and that Kucharski’s understanding of the illegality of his actions was overridden by his psychotic experiences.

¶17 As to the conclusion that Kucharski was truly mentally ill, Dr. Rawski cited several factors. He explained that Kucharski went into very vivid detail about the voices, whereas malingerers will often describe them more

vaguely. Additionally, Kucharski was at first reluctant to share his symptoms, where as malingerers will often call them to an interviewer's attention. Also, Dr. Rawski noted that Kucharski actually hallucinated during his interview with him. Finally, Dr. Rawski relied on Kucharski's responses in the SIRS-II test, noting that his "scores were strongly characteristic of an individual with a genuine disorder who is making no efforts to overstate" his condition. His classification of genuine responding was "greater than 90%."

¶18 Regarding the conclusion that Kucharski's understanding of the illegality of his actions was overridden by his psychotic experiences, Dr. Rawski again pointed to numerous factors.

¶19 Dr. Rawski explained that Kucharski clearly knew, given his comments during the 911 call, that he did something illegal, yet there was no attempt to evade responsibility. Dr. Rawski opined, "What is glaringly absent from these interviews is a denial of wrongdoing, a minimization of his role, inconsistent statements and details questioning his veracity or an emphasis on his mental illness as an exculpatory defense." Additionally, Dr. Rawski noted that Kucharski did not "blame his behavior on his mental illness ... but instead ambivalently describe[d] his symptoms as contemporary experiences," "further adding to the validity of his reports."

¶20 Dr. Rawski also pointed to evidence of Kucharski's irrational, and most likely psychotic, mental state during and after the shooting. In his report he explained:

[Kucharski's] schizophrenic mind ... considers that it may be altruistic and honorable to do what his parents "could not do for themselves," but it is the uncharacteristic argument between his parents for which the voices blame the defendant that render the command hallucinations that

later tell him to kill his parents to reveal the answer for which he has searched. He followed his father's wish to wait an hour before calling 911 if he was found in a medically compromised position. When asked why he decided to follow the command, he stated that he felt that it was what he was supposed to do, to end it for them so that they did not have to. He stated that ... killing his parents would be good for them but bad for him because he would then have to shoot it out with police. *His emotional expression since the 911 call is odd at best and reflective of the split between emotions and thought often seen in schizophrenics.* While the defendant reportedly felt some relief from the voices if he followed their commands, *I believe that the main impetus for following the voices was a clear message in the otherwise disorganized mess of his psychotic experiences* represented by the transcripts of his voices, within the context of the evident sadness of the lives of all three people within the household.

(Emphasis added.)

¶21 Dr. Rawski also emphasized the role Kucharski's writings played in supporting his conclusion:

One diagram in particular identifies ... that he struggled with interpreting the meaning behind his mother's verbalized death wishes, which could have in reality ranged from depressive clichés to auditory distortions or hallucinations of her voice. Mr. Kucharski reportedly struggled with understanding the meaning behind those comments while also absorbing his father's misery over his medical problems.

¶22 Finally, Dr. Rawski ruled out other possible motives for the shootings. He explained that they were not "mercy killings" of elderly or terminally ill relatives because "[b]oth parents were independent and one worked during retirement while the other maintained the household. Rather, the distortion of their dire situation and his mother's death wish is likely the product of irrational distortion by the victim consistent with Schizophrenia." Similarly, Dr. Rawski stated there were no concerns about alcohol having an effect because Kucharski

reported stopping drinking several hours prior to the shooting and there were no reports indicating concerns about alcohol during the aftermath.

¶23 Similar to Dr. Rawski, Dr. Pankiewicz pointed to numerous factors supporting his conclusion that Kucharski lacked substantial capacity to appreciate the wrongfulness of his actions and to conform his behavior to the requirements of law.

¶24 Like Dr. Rawski, Dr. Pankiewicz stated in his report that he believed Kucharski was truly mentally ill. Dr. Pankiewicz pointed to the “long series of writings over the past year,” which were “consistent with a chronic psychotic condition”; the SIRS-II test by Dr. Lundbohm, which concluded that Kucharski was most likely not malingering; and his own clinical observations to opine that Kucharski “continued to demonstrate continuing psychosis” and that there was no reason to believe he was feigning or exaggerating his symptoms. Dr. Pankiewicz also noted that, “Interviews with neighbors described Mr. Kucharski as isolative and strange. Neighbors expressed discomfort being around him.”

¶25 Dr. Pankiewicz also thought, given the evidence, that Kucharski was actively psychotic before, during, and after the incident in which he killed his parents. He reported:

Mr. Kucharski’s report of his behavior is consistent with continuing psychotic thought process as he expressed great distress when the voices told him that he carried out their commands incorrectly. He expressed a perplexed understanding that the voices told him that he had committed his acts in the wrong order.

Dr. Pankiewicz further explained that, even though Kucharski knew he had broken the law, he “did not express the perception that what he had done was wrong.” According to Dr. Pankiewicz, Kucharski “described a committed belief that he had

honored his parents' wishes, put them out of their misery and followed the commands of persistent auditory hallucinations experienced over the course of months." Dr. Pankiewicz also noted that "Mr. Kucharski has not made any attempts to deny, minimize or deflect responsibility for taking his parents' lives. He has been consistent during examination in presenting a motivation of irrational altruism in the context of persistent command hallucinations."

¶26 Finally, like Dr. Rawski, Dr. Pankiewicz ruled out other possible motives for the shootings. He said there was no evidence showing that Kucharski shot his parents out of anger or ill will: "By all accounts, Mr. Kucharski had a good relationship with his parents. There is no evidence to indicate there was prior conflict resulting in aggressive or violent behavior." In addition, although Kucharski had drunk alcohol in the hours prior to the offense, there was no evidence that he was acutely intoxicated when he shot his parents. Also, there was no evidence that his parents were terminally ill or crippled to the extent that the shooting could be characterized as a "mercy killing."

The trial court finds Kucharski mentally responsible for the homicides.

¶27 The trial court concluded that Kucharski met his burden to prove that he had a mental disease or defect at the time of the offense, but did not meet his burden to prove that he lacked the capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law at the time of the offenses. The trial court noted that there was not "even a doubt, much less a reasonable doubt, that Mr. Kucharski suffered from a mental illness at the time that he committed these crimes, and the name of that mental illness is schizophrenia." The second question, however—whether he lacked the capacity

to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law at the time of the offenses—was a “close call.”

¶28 The trial court noted that Kucharski did appear to understand that his actions were illegal, and that at one point he mentioned that he would be “rotting in jail.” According to the trial court, comments like these showed that Kucharski appreciated the wrongfulness of his conduct. The trial court also noted that while Kucharski appeared to have killed his parents at the direction of the voices in his head, he failed to respond to the voice that told him to commit suicide. According to the trial court, this showed that Kucharski was able to conform his behavior to the requirements of law.

¶29 The trial court further explained that while it agreed with Dr. Rawski and Dr. Pankiewicz that there was no rational, alternative motive for Kucharski’s behavior, it could not agree with their opinions regarding Kucharski’s mental responsibility because they were “speculating” when they opined that Kucharski was in a state of psychosis before, during, and after the shootings. The court further stated, “We’re all speculating because all we have is the Defendant’s behavior itself and a few statements made in varying degrees of closeness in time.” The trial court found that Kucharski’s motives “remain hidden and a source of speculation.” It concluded:

I have the speculative, interesting opinions and very thoughtful, professional opinions of these two psychiatrists, but the basis of those opinions in part, or in large enough part to leave me with being at an unpersuaded level, is that they’re speculating about what happened.

There’s no speculation about the fact of the murders. There’s no speculation, there’s full agreement, that it was planned and purposeful, that he did not kill himself, or allow himself to be killed....

What the speculation is, is whether in killing his parents[] he could not appreciate, he lacked capacity to appreciate, the wrongfulness of his conduct.

I'm not convinced that he did.

¶30 After he was convicted, Kucharski filed a postconviction motion, which was denied. He now appeals. Additional facts will be developed as necessary below.

ANALYSIS

¶31 On appeal, Kucharski argues he is entitled to a new trial in the interest of justice.² See WIS. STAT. § 752.35 (The court of appeals has the discretionary power to reverse a conviction in the interest of justice.); *State v. Armstrong*, 2005 WI 119, ¶113, 283 Wis. 2d 639, 700 N.W.2d 98 (same). Specifically, he contends that justice has miscarried because the trial court's verdict in the responsibility phase was against the great weight of the evidence presented at trial.

¶32 WISCONSIN STAT. § 752.35 provides:

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

² Kucharski also argues that the trial court misapplied WIS. STAT. § 971.15 and that its conclusions regarding his mental responsibility lack support in the record. We need not address these issues because they are not dispositive. See *State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (we decide cases on narrowest possible grounds).

with statutes or rules, as are necessary to accomplish the ends of justice.

¶33 Under WIS. STAT. § 752.35, we may grant a discretionary reversal “if it is likely for any reason that justice has miscarried.” *State v. Murdock*, 2000 WI App 170, ¶31, 238 Wis. 2d 301, 617 N.W.2d 175. “We may conclude that justice has miscarried if we determine that there is a substantial probability that a new trial would produce a different result.” *Id.* We exercise our discretion only in exceptional cases. *See Armstrong*, 283 Wis. 2d 639, ¶114; *State v. Avery*, 2013 WI 13, ¶38, 345 Wis. 2d 407, 826 N.W.2d 60.

¶34 At trial, Kucharski had the burden to establish that he was not guilty by reason of mental disease or defect “to a reasonable certainty by the greater weight of the credible evidence.” *See* WIS. STAT. § 971.15(3). This required that he affirmatively prove that he (1) had a “mental disease or defect” at the time the offense was committed; and (2) “[a]s a result of the mental disease or defect,” lacked “substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.” *See* WIS JI—CRIMINAL 605 (2011).

¶35 We agree 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). *See Murdock*, 238 Wis. 2d 301, ¶31. 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, as we will discuss more fully below, very strong, and certainly comprised “the greater weight of the credible evidence.” *See* § 971.15(3).

¶36 First, there is no dispute that Kucharski was in fact suffering from schizophrenia when he killed his parents. While Kucharski was not formally diagnosed with schizophrenia until after he was arrested, both Dr. Rawski and Dr. Pankiewicz found to a reasonable degree of medical certainty that he suffered from the illness at the time of his parents' death. As noted above, the trial court agreed with this diagnosis. Moreover, as in other cases where courts have granted new trials on the issue of a defendant's mental responsibility, there was no suspicion that Kucharski was malingering. *See Murdock*, 238 Wis. 2d 301, ¶¶8, 41; *see also State v. Kemp*, 61 Wis. 2d 125, 137-38, 211 N.W.2d 793 (1973).

¶37 Second, the expert testimony was uncontroverted. *See Murdock*, 238 Wis. 2d 301, ¶40. Both Dr. Rawski and Dr. Pankiewicz opined that Kucharski lacked substantial capacity to appreciate the wrongfulness of his actions and/or to conform his behavior to the requirements of law. Dr. Jurek reported, "Given my understanding of [Kucharski's] history and the circumstances of the pending charges it is unlikely that my conclusions regarding Mr. Kucharski's criminal responsibility would differ from Dr. Rawski's findings as they were expressed in his report."

¶38 While the trial court discounted this evidence on the basis that it was speculative, in doing so, it appeared to conclude that because the psychiatrists could not know *for certain* what was going through Kucharski's mind when he killed his parents, their opinions were invalid. However, this is not the standard to which we hold medical experts. *See Pucci v. Rausch*, 51 Wis. 2d 513, 518, 187 N.W.2d 138 (1971) ("The term 'medical certainty' is misleading if certainty is stressed to mean absolute certainty or metaphysical certainty. Medicine is not based upon such certitude but rather upon the empirical knowledge and experience in the area of cause and effect.").

¶39 In fact, Dr. Rawski and Dr. Pankiewicz based their conclusions on myriad data, including lengthy interviews with Kucharski, the criminal file, the audio recordings of Kucharski's 911 call to police and interviews with detectives, numerous writings and diagrams that police found among Kucharski's possessions, Kucharski's medical records from the Milwaukee County Jail, a disability report from 2009, and the findings of psychologist Dr. Brooke Lundbohm, who administered the SIRS-II test to Kucharski. As detailed more fully above, the doctors' opinions were well-supported, well-reasoned, and uncontradicted. *Cf. Murdock*, 238 Wis. 2d 301, ¶40 (reversal warranted where expert opinions did not directly conflict); *Kemp*, 61 Wis. 2d at 135, 138 (reversal warranted where two of six experts would not express an opinion about whether defendant lacked substantial capacity to either appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law, and where one expert concluded there were too many variables to allow such a conclusion).

¶40 Third, there was a complete lack of evidence of alternative explanations for Kucharski's behavior. *Cf. Murdock*, 238 Wis. 2d 301, ¶44. As noted, the evidence did not support a conclusion that Kucharski harbored any sort of anger, resentment, or ill-will against his parents. Nor was there, conversely, evidence to support a theory that Kucharski conducted "mercy killings," as his parents were neither severely physically disabled nor terminally ill; in fact, his father was still working and his mother was maintaining the family home. Furthermore, although Kucharski did consume a few drinks several hours prior to the incidents, there was no evidence that the homicides were fueled either by alcohol or other drugs. Indeed, the trial court agreed with the experts' conclusion:

I think both Dr. Pankiewicz and Dr. Rawski opined that they could not find evidence of a rational, alternative motive for the Defendant's behavior. I don't disagree with

that. I think shooting your parents to death with a gun, is conduct that we might not find quote unquote rational.

¶41 Fourth, we conclude that evidence that Kucharski appeared to understand the legality of his actions and did not commit suicide as the voices directed does not mean that he was generally able to control his behavior or appreciate its wrongfulness at the time of the shooting. See *Murdock*, 238 Wis. 2d 301, ¶44. As noted, both Dr. Rawski and Dr. Pankiewicz opined that the fact that Kucharski made no attempts to deny, minimize, or deflect responsibility provides evidence that Kucharski was acting upon the delusional belief that killing his parents was in their best interests. And, as Dr. Pankiewicz noted, Kucharski “expressed great distress” when the voices told him that he had carried out their commands incorrectly, further strengthening the conclusion that he was acting upon a delusion.

¶42 Moreover, we are not persuaded by the State’s contention that a new trial is not in the interests of justice in this case because certain facts differ from those in *Kemp*, a case in which the supreme court granted a new trial to a man convicted of murdering his wife. In *Kemp*, the defendant was a Vietnam veteran who developed battle-related neurosis. *Id.*, 61 Wis. 2d at 133-34. He was intermittently seen at the Veterans Administration Hospital on an inpatient and outpatient basis for treatment of his mental and emotional problems. *Id.* at 134. “He complained of ... recurring dreams of [Vietnam] violence, suspicion and hostility [toward] others, alcoholism, and drug use.” *Id.* Shortly after being released from outpatient status, Kemp shot his wife. *Id.* at 132. He had no recollection of shooting her, but explained that while he was sleeping he had a dream that he was being attacked by the Viet Cong, that he killed some of them, that the sound of the shots awoke him, and that when he awoke, his wife was in

bed with him, dead. *Id.* at 134. The supreme court reversed Kemp’s conviction, concluding that he lacked the capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law. *Id.* at 138-39.

¶43 Contrary to what the State argues, the differences between this case and *Kemp* are not fatal to Kucharski’s case. While Kucharski did not have a long history of mental illness as Kemp did, *see id.* at 137-38, the fact that Kucharski was in fact suffering from schizophrenia was undisputed. Moreover, as in *Kemp*, there was no concern that Kucharski was malingering. *See id.* Additionally, while Kucharski could recollect the crimes he committed whereas Kemp could not, the evidence, as detailed more fully above, overwhelmingly shows that Kucharski was in a psychotic state when he planned and carried out his parents’ executions. Furthermore, we note that some differences between Kucharski’s case and *Kemp* are in fact more favorable to Kucharski. For example, in *Kemp*, the experts did not all agree that the defendant was not mentally responsible for his actions, *see id.* at 135, but in this case, the experts *did* agree that Kucharski was mentally ill and that he should not be held mentally responsible for his crimes. Likewise, in *Kemp*, there was evidence, albeit somewhat weak, of alternative motives to explain the defendant’s behavior, *see id.*, whereas in Kucharski’s case there was none. Therefore, we conclude that *Kemp* supports our decision to reverse and remand Kucharski’s case for a new trial.

¶44 In sum, “[c]onsidering the evidence as a whole, we conclude it predominates quite heavily on the side of the defendant on the issue of his mental responsibility,” and that, consequently, “justice has miscarried and ... a new trial will probably bring a different result.” *See id.*, 61 Wis. 2d at 138. Therefore, we reverse the conviction and remand for a new trial on the issue of Kucharski’s mental responsibility. *See* WIS. STAT. § 971.165(1)(c)3.

By the Court.—Judgment and order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

No. 2013AP557-CR(D)

¶45 BRENNAN, J. (*dissenting*). The Majority reverses and grants Kucharski a new trial in the interest of justice, saying: “justice has miscarried and ... a new trial will probably bring a different result.” Majority, ¶44 (citing *Kemp*, 61 Wis. 2d at 138) (ellipses in Majority). I respectfully dissent because in my view the Majority has simply substituted its judgment for that of the trial court on issues that are the province of the trial court alone, namely, the credibility of witnesses, the weight of the evidence and the determination of whether the defendant has met his burden of establishing the defendant’s lack of mental responsibility. See *State v. Sarinske*, 91 Wis. 2d 14, 47-48, 280 N.W.2d 725 (1979). Regardless of how a reviewing court, acting as a trial court, might have decided those issues below, it is not the reviewing court’s role to second-guess the trial court. As the Wisconsin Supreme Court has stated:

This court has held that it 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 jury. 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 jury’s finding, the jury’s verdict will not be upset.

See id.

¶46 By saying that “We agree 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),” see Majority, ¶35, the Majority is saying that if *it* had decided the case, it would have weighed the experts’ opinions more

heavily than did the trial court and would have found that Kucharski met his burden on mental responsibility. Notably, the Majority is *not* saying that the trial court applied the wrong law or failed to consider the evidence. Despite acknowledging that a trier of fact need not accept even uncontradicted opinions of an expert, *see* Majority, ¶39; *see also Pautz v. State*, 64 Wis. 2d 469, 476, 219 N.W.2d 327 (1974), the Majority reverses the trial court’s judgment because it did just that. But weight of the evidence and the finding on burden of proof are issues of fact for the trier of fact. *See Sarinske*, 91 Wis. 2d at 48. Thus, reversal here is unwarranted.

¶47 The trial court gave reasoned explanations for its findings on the second prong of mental responsibility. It found that Kucharski was able to appreciate the wrongfulness of his conduct, quoting the experts that Kucharski thought killing his parents was the right thing to do and quoting Dr. Rawski as saying Kucharski knew right after the shooting that he needed a lawyer. And the trial court found that Kucharski failed to meet his burden of showing that he lacked the substantial capacity to conform his conduct to the rules of law because he obeyed part of what the voices commanded and chose not obey other parts:

He had command voices about killing himself, and he did not follow through with that before or after he killed his parents. ... Dr. Pankiewicz’s opinion ... in essence said he was responding to the command voices of his hallucinatory experience. And yet he doesn’t respond to the command voice, especially the derogatory one that he was the cause of the fight, and he should kill himself and so on, whether directly, or through a shootout with the police.

....

I’m finding him legally responsible because I’m not persuaded beyond a level scale. I can’t -- It’s not tipping, even slightly, that he lacked substantial capacity to conform his conduct to the law.

¶48 The trial court drew proper inferences from the evidence and found those inferences more reliable than the doctors' opinions as to the second prong of mental responsibility. The trial court explained that it distrusted the self-report basis for the doctors' opinions:

I have the speculative, interesting opinions and very thoughtful, professional opinions of these two psychiatrists, but the basis of these opinions in part, or in large enough part to leave me with being at an unpersuaded level, is that they're speculating about what happened.

There's no speculation about the fact of the murders. There's no speculation, there's full agreement, that it was planned and purposeful, that he did not kill himself, or allow himself to be killed. Those we all know without -- without a doubt, frankly.

What the speculation is, is whether in killing his parents, he could not appreciate, he lacked substantial capacity to appreciate, the wrongfulness of his conduct.

I'm not convinced that he did. ...

It's because of the burden of proof here, I can't -- I can't see this -- the scales at any different level. They're level. And it's my obligation on level scales, to deny the if you will, affirmative defense, and instead to find him legally responsible, to adjudge him convicted of both crimes, and order entries of conviction as to counts 1 and 2, entered into the record.

¶49 In questioning the basis for the experts' opinion, the trial court was engaging in the same evidence weighing process that the Wisconsin Supreme Court approved in *Sarinske*. There the Wisconsin Supreme Court rejected the defendant's argument for a new trial in the interest of justice saying:

Because the defense doctors relied substantially on information provided by Sarinske, the basis of their opinion and their diagnoses could be questioned by the jury on this ground alone.

In light of the record, it cannot be said that the jury's finding that the defendant did not meet his burden of proof must be set aside.

Id., 91 Wis. 2d at 49 (internal citation omitted).

¶50 Yet the Majority seeks to support its reversal by relying on *Kemp*. Majority, ¶¶42-43. However, *Kemp* is distinguishable from this case on its facts, for the same reason that our supreme court found it distinguishable from the facts in *Sarinske*. See *id.*, 91 Wis. 2d at 49 (“The facts in the case at bar are appreciably different from those in *Kemp*. Prior to the shooting[,] Sarinske, unlike Kemp, had no history of mental or emotional difficulties.”). Kucharski does not have Kemp’s well-documented and long history of mental illness, which included delusions, blackouts and hallucinations. See *id.*, 61 Wis. 2d at 137-38. In fact, he has *no* documented mental health history. Instead, the two experts in this case base their opinions on Kucharski’s self-reports, made *after* the shooting, including his descriptions of his past symptoms and of his prior good relationship with his parents. Notably, Kucharski never reported hearing the voices tell him to kill his parents until the day of the shooting. As such, *Kemp* is inapposite.

¶51 A discretionary reversal should only be granted in exceptional cases. *Avery*, 345 Wis. 2d 407, ¶38. We approach a request for a new trial with great caution. *Armstrong*, 283 Wis. 2d 639, ¶114. It is hard to see how the Majority can state that it is “substantially probable” that another trial judge, looking at the same evidence would conclude Kucharski met his burden. See Majority, ¶1. It is possible, maybe. But the standard on review is not “possibility.” As such, I would affirm the trial court.

