COURT OF APPEALS
DECISION
DATED AND FILED

August 15, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1467-CR **Cir. Ct. No. 2008CF2428**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONYIL LEEITON ANDERSON, SR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: JAMES P. DALEY, Judge. *Reversed and cause remanded for further proceedings*.

Before Lundsten, Sherman and Gundrum, JJ.

¶1 PER CURIAM. Donyil Anderson appeals a judgment of conviction.[1] The dispositive issue is whether, in the context of a mental disease or defect defense, an overly broad jury instruction regarding the voluntary taking of drugs prevented the real controversy from being fully tried. We conclude it did, and reverse and remand.

¶2 Anderson was charged with one count of first-degree intentional homicide and one count of attempted first-degree intentional homicide, both arising out of the same incident. Anderson pled not guilty and not guilty by reason of mental disease or defect. After the State's case-in-chief, Anderson entered an ***Alford*** guilty plea to both counts, but continued to trial on his mental defect defense. Anderson's theory was that he had a temporary mental defect in which his self-control was impaired by a combination of four factors. Those factors were his own preexisting mildly impaired ability to exert self-control, a major depressive disorder that was not appropriately treated, a side effect of his taking the prescription medication Strattera, and his ingestion of alcohol. The jury found that Anderson did not meet his burden of proving he had a mental defect. Anderson was then convicted and sentenced.

¶3 The issues on appeal center entirely on the optional pattern instruction that was given to the jury as part of the meaning of "mental defect," which read: "A temporary mental state which is brought into existence by the voluntary taking of drugs or alcohol does not constitute a mental defect."

[1] Although Anderson's notice of appeal also states that he is appealing the order denying the postconviction motion, he does not make any argument on appeal about the one issue that was decided in that motion.

Anderson makes arguments about both the "drugs" and "alcohol" parts of the instruction. For clarity, we discuss them separately.

¶4 We first address the "drugs" portion of the instruction. Anderson argues that the circuit court erred because the instruction failed to distinguish between the voluntary use of a lawfully prescribed medication and the use of illegal drugs. His argument is based on an involuntary intoxication defense case, ***State v. Gardner***, 230 Wis. 2d 32, 601 N.W.2d 670 (Ct. App. 1999). In ***Gardner***, we held that a person should have recourse to an intoxication defense when a prescription drug renders the person unable to distinguish right from wrong, even if the person was forewarned of the prescription drug's intoxicating effect. ***Id.*** at 41. "Intoxication resulting from such compliance with a physician's advice should not be deemed voluntary just because the patient is aware of potential adverse side effects." ***Id.***

¶5 Anderson argues that this holding from ***Gardner*** should also apply in mental defect cases. He further argues that, by failing to incorporate the ***Gardner*** view that taking prescription drugs in accordance with a physician's advice is not "voluntary," the instruction here improperly allowed the jury to conclude that Anderson's consumption of Strattera was a "voluntary taking of drugs." That is, Anderson contends that, if the jury found that he took the Strattera voluntarily in the sense that he voluntarily put the pills in his mouth, which is not in dispute, that finding alone, under the erroneous instruction, would permit the jury to reject Anderson's mental defect defense.

¶6 The State responds that Anderson forfeited this argument by not objecting to the instruction at trial. According to the State, Anderson "never objected that it would be error for the trial court to give the optional standard

instruction" that was given. The State asserts that the only issues Anderson raised at the instructions conference are arguments Anderson does not make on appeal. More specifically, that Anderson only requested the addition of "street" to modify the instruction's reference to "drugs" and requested a sentence telling the jury it was up to them to define "voluntary," both of which the court rejected.

¶7 In reply, Anderson disputes the State's description of the instructions conference. According to Anderson, the court started by presenting a draft of the instructions in which it had already removed the optional provision on voluntary taking of drugs and alcohol. Anderson asserts that the prosecutor asked that the optional standard instruction be given, but Anderson opposed that request, instead arguing in support of the court's view—at least the court's view at that point in time—that the optional standard instruction was not proper here.

¶8 On appeal, neither party provides a helpful summary of the pertinent part of the instructions conference. The conference transcript shows that the court presented a modified version of the optional instruction, and that the parties then argued about whether the court's proposed modification was proper. However, neither the court nor the parties stated clearly during the conference what modification the court proposed, and we do not find that proposal in the record. Still, the only reasonable interpretation of the record is that the court proposed the optional standard instruction with the word "drugs" removed, leaving just an instruction on voluntary taking of alcohol.

¶9 Our interpretation is based on several statements by the court and parties at the conference, most notably a later comment in which the court indicates that it will put the word "drug" back into the instruction. We also note that our interpretation of the instructions conference comports with the one

advanced by Anderson at the postconviction hearing, where he sought to supplement the record by asking the court if the court could produce the original draft. The court did not have the original, but, notably, the court agreed with Anderson's interpretation.

¶10 Accordingly, so far as we can discern from the record, Anderson is wrong in asserting now that the court proposed to delete the *entire* drugs and alcohol provision. Similarly, the State is wrong to assert that Anderson never opposed the optional standard instruction; by arguing in favor of the court's modified version that deleted "drugs," Anderson was necessarily opposing the optional standard instruction.

¶11 However, in light of how the instructions conference unfolded, we nevertheless conclude that Anderson forfeited this issue. Anderson argued in support of removing "drugs" for reasons similar to the argument he makes on appeal. In response, the prosecutor argued that "drugs" should remain in the instruction because Anderson's use of Strattera should still be considered a voluntary taking of the drug if he knew he was having the side effect complained of. We conclude that, to preserve an argument that "drugs" should be removed, Anderson was required to make an argument specifically rebutting the prosecutor's explanation for why "drugs" should be included. It was not enough to simply repeat, as Anderson did, that voluntary drug use does not mean prescription drugs. Because Anderson did not offer a reason for why the prosecutor was wrong in asserting that the taking of prescribed drugs, with knowledge of occurring problems, can properly be considered a voluntary taking of drugs, Anderson forfeited his argument to keep "drugs" out of the instruction.

¶12 Although we reject Anderson's argument that he preserved his objection to the jury instruction, we must address Anderson's alternative argument that we should exercise our discretionary reversal authority under WIS. STAT. § 752.35[2] on the ground that the real controversy was not fully tried. We may use this authority when there was an error in the jury instructions, but the issue was forfeited at trial. ***Vollmer v. Luety***, 156 Wis. 2d 1, 20, 456 N.W.2d 797 (1990). If the real controversy was not fully tried, we may grant a new trial without finding that a different result would probably occur on retrial. ***Id.*** at 19. In this case, we agree with Anderson that the instruction on voluntary taking of drugs was erroneous and prevented the real controversy from being fully tried.

¶13 We first observe that the State does not dispute Anderson's contention that the "drugs" instruction, as given, was a potential problem. We find no place where the State disputes the proposition that the jury, using the everyday meaning of "voluntary," could have rejected the Strattera component of Anderson's defense based solely on a finding that Anderson took the drug voluntarily. Instead, the State makes three other arguments.

¶14 The State argues that the "drugs" instruction was legally correct because, under the State's view of case law, a mental defect defense based in part on a prescription drug is not available when a defendant's mental state was *also* partly brought into existence by the voluntary ingestion of alcohol. And in this case, the State argues, Anderson's own expert testified that both Strattera and the alcohol Anderson drank played a role in causing Anderson's mental state.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶15 To the extent that this argument might be read as contending that the given instruction was legal for purposes of this case, it fails. The given instruction was not consistent with the State's own view of the case law regarding alcohol. The instruction did not say that a mental state caused by a *combination* of prescription drugs *and* voluntary use of alcohol cannot be a mental defect. Instead, the instruction told the jury that a mental state brought into existence by "the voluntary taking of drugs *or* alcohol" is not a mental defect (emphasis added). The instruction given differs from the State's view of the law because it says that the effect of a drug taken "voluntarily," regardless of the effect of alcohol, defeats Anderson's mental defect defense. The given instruction directed the jury to reject the prescription drug as a basis for the defense in a situation, whereas the State's view of the case law does not.

¶16 It may be that the State is trying to make a point that goes beyond simply arguing that the instruction was legally sufficient for purposes of this trial. The State's discussion of the trial evidence suggests that the State's real argument is this: If the jury had been instructed with the State's view of the law on alcohol, and then the jury reviewed Anderson's own evidence, the jury would have been required to reject Anderson's mental defect defense because of the role of alcohol, regardless of any instruction relating to Anderson's use of Strattera. Stated differently, the State appears to be arguing that Anderson's mental defect defense should never have gone to the jury because *Anderson's own evidence* failed to rebut the portion of the jury instruction directed at the voluntary use of alcohol. In short, the State is trying to argue that it would have been entitled to a directed

verdict at the close of Anderson's case.[3] *See* ***State v. Leach***, 124 Wis. 2d 648, 663, 370 N.W.2d 240 (1985) (State is entitled to directed verdict when there is no evidence on which a reasonable jury could find that defendant was actually suffering from some kind of mental disease or defect); ***Shirley J.C. v. Walworth Cnty.***, 172 Wis. 2d 371, 380, 493 N.W.2d 382 (Ct. App. 1992).

¶17 For purposes of this opinion only, we will assume that, if the State can show that it would have been entitled to a directed verdict at trial, the State successfully refutes a claim that a jury instruction error prevented the real controversy from being fully tried. We now review the State's argument in that light, that is, to determine whether the State would have been entitled to a directed verdict.

¶18 To repeat, the State argues that a mental defect defense is not available to Anderson because Anderson's own expert testified that Anderson's mental state was brought into existence *partly* by his ingestion of alcohol. According to the State, case law holds that a mental defect defense is not available as a matter of law in this situation. We reject this argument because we disagree with the State's reading of the case law.

¶19 The State's argument is based in part on the ***Gardner*** case we describe above. As we explained, Anderson relies on ***Gardner*** to argue that prescription drug use should not be considered voluntary for purposes of a mental defect defense. Although ***Gardner*** was an involuntary intoxication defense case,

[3] If this is *not* what the State is arguing, then its discussion of the evidence of this specific case appears to be nothing more than a harmless error argument about the likelihood of a different result on retrial. Such an argument is not, as we explain in ¶12, a consideration when deciding whether the real controversy was fully tried.

the State appears to concede that our conclusion there about the involuntariness of prescription drug use applies with similar force to a mental defect defense. We accept that concession for purposes of this appeal, and thus proceed on the assumption that prescription drug use, in accordance with a physician's recommendation, is not the sort of "voluntary" use that precludes a mental defect defense. While seeming to acknowledge this legal proposition in ***Gardner***, the State relies on additional language in ***Gardner*** that it contends limits the availability of a prescription drug mental defect defense when alcohol also plays a role.

¶20 In ***Gardner***, after stating our conclusion that the intoxication defense should be available for prescription drug use, we wrote:

> We note that this does not include cases where a patient knowingly takes more than the prescribed dosage, [citation omitted], or *mixes a prescription medication with alcohol* or other controlled substances, *see* ***State v. Voorhees***, 596 N.W.2d 241 (Minn. 1999). Neither would the defense be available to one who voluntarily undertakes an activity incompatible with the drug's side effects. *See* ***City of Wichita v. Hull***, 724 P.2d 699 (Kan. Ct. App. 1986) (holding that involuntary intoxication defense was properly denied where defendant drove after taking sleeping pill).

Gardner, 230 Wis. 2d at 42 (emphasis added). Relying on this language, and especially the italicized clause, the State argues that we held in ***Gardner*** that the mixed and voluntary use of both prescription drugs and alcohol renders the mental disease or defect defense unavailable whenever there is undisputed evidence that alcohol contributed to the mental disease or defect. The State appears to take the view that, in such a mixed use situation, it is not necessary to allow a jury to reach a conclusion based on more specific evidence of the role of alcohol, such as the amount and timing of alcohol consumed or the defendant's prior knowledge about

possible side effects resulting from the interaction of alcohol and the prescription drug.

¶21 If this is the State's interpretation of ***Gardner***, it is not reasonable. We did not, in those six words, create a broad, blanket rule of law. The full passage quoted above is merely an illustrative list cautioning about possible situations where a defense based on the taking of a prescription drug might still properly be rejected. We see no intent in ***Gardner*** to say that a rejection of the mental defect defense on the grounds we listed should occur as a matter of law, without jury consideration of the facts of each case. Such an interpretation of ***Gardner*** would lead to patently unreasonable results, as we now explain.

¶22 All of the situations we described in ***Gardner***—excessive dosing, combined alcohol use, and incompatible activities—are fact-specific situations for which no easily applied blanket rule can be stated. With excessive dosing, there may be questions about how recently the dose was taken, how excessive it was, or what the effects of an excessive dose would be. As to incompatible activities, it would not be possible to state a broad rule describing all activities that might be incompatible with all prescription drugs. Similarly, our reference to the mixing of alcohol with prescription drugs was pointing out that a fact-based question may still be present about alcohol use in a given case. We see no reason to conclude from ***Gardner*** that the issue can be determined as a matter of law, rather than by allowing a jury to consider the specific evidence of the case.

¶23 The Minnesota case cited in ***Gardner***, ***State v. Voorhees***, 596 N.W.2d 241 (Minn. 1999), is further support for our interpretation of our commentary in ***Gardner***. We did not cite the Minnesota case in support of a blanket rule because the Minnesota court itself did not announce any blanket rule

regarding alcohol use and a defense involving prescription drugs. Instead, the court provided only a fact-specific discussion explaining that the defendant failed to make a prima facie case that his intoxication was not caused by other, non-prescription substances, including alcohol.

¶24 The State also argues that, even if we do not agree with its interpretation of ***Gardner***, the supreme court in ***State v. Kolisnitschenko***, 84 Wis. 2d 492, 267 N.W.2d 321 (1978), already held years earlier that a mental responsibility defense cannot be based on a temporary mental condition that results from the interaction of a person's personality and the voluntary use of illegal drugs or alcohol. ***Id.*** at 501-03. However, ***Kolisnitschenko*** does not state a blanket rule either.

¶25 In ***Kolisnitschenko***, the defendant claimed he had a mental disease or defect in the form of a temporary psychotic mental state brought into existence by a combination of his "stormy personality," use of amphetamines and alcohol, and sexual abstinence. ***Id.*** at 497. Stormy personality, according to Kolisnitschenko's experts, was a mental disorder rather than a mental disease, and was a non-temporary pre-psychotic condition in which any unexpected moderate to moderately severe stress could trigger a psychotic response. ***Id***. Kolisnitschenko argued that the court erred by giving, essentially, the same instruction as the one Anderson challenges here: "'A mental disease which is the product of a voluntarily induced state of intoxication by drugs or alcohol or both does not constitute a mental disease which is recognized as a defense by the law.'" ***Id.*** at 495. Kolisnitschenko argued that, where voluntary intoxication and a preexisting mental disorder interact to cause a mental disease, the voluntariness of the intoxication is irrelevant and will not defeat a mental defect defense. ***Id.*** at 496.

¶26 The supreme court held that it was not error to give the instruction. However, in doing so the court did not state the blanket rule of law that the State argues for here. The court did not hold that a mental disease or defect defense is unavailable if illegal drugs or alcohol play *any* role in causing the defendant's condition. Although the court discussed broad policy considerations underlying the reasons why intoxication does not qualify as a mental disease, the language the court ultimately used to decide the case shows that it was reaching a fact-based conclusion specific to that case, not stating a broad rule of law.

¶27 For example, in a portion of the ***Kolisnitschenko*** opinion that was omitted from a lengthy quotation in the State's brief, the court focused specifically on the evidence of his case, contrasted it with evidence from another published case, and concluded that, in the situation at hand, "the evidence clearly demonstrates that intoxication was *a significant precipitating factor*, thus distinguishing the situation from that in ***Maik*** where the testimony was that intoxication was one possible precipitating factor among various possibilities." ***Id.*** at 502 (emphasis added). Still later, the ***Kolisnitschenko*** court noted that individual volition in illegal drug and alcohol use played a "major part" in causing Kolisnitschenko's condition, and ultimately concluded: "*Under the facts of this case* the jury instruction on criminal responsibility and voluntary intoxication was not erroneous." ***Id.*** at 503 (emphasis added).

¶28 In contrast to the evidence in ***Kolisnitschenko***, Anderson's expert did not testify that alcohol was a major or even significant factor. The State itself recognizes that Anderson's expert testified that alcohol played a role "[i]n small measure." Accordingly, we do not read ***Kolisnitschenko*** as supporting the view that Anderson's particular defense should not have reached the jury.

¶29 Beyond the argument that Anderson's mental defect defense should have failed as a matter of law because voluntarily consumed alcohol contributed to Anderson's alleged mental state, the State also makes two other arguments.

¶30 The State asserts that we may summarily reject Anderson's complaint about the drug portion of the instruction because his expert did not testify that Anderson's mental state was brought into existence *only* by Strattera. As above, this appears to be an argument that Anderson's own evidence was insufficient to meet the applicable legal standard. However, the State does not explain what law requires that a prescription drug be the *only* cause of the defendant's mental state, or what law otherwise limits a defendant from arguing that his mental state was caused by multiple factors. Therefore, we reject this argument.

¶31 In addition, the State argues that Anderson's defense must be rejected because there was no evidence that Anderson took the Strattera *as directed*. Again, this appears to be an argument that Anderson's own evidence was insufficient to meet the legal standard and, therefore, there was no voluntariness question for the jury to resolve. On this issue, we disagree with the State's view of the evidence. While it may be true that there was evidence raising uncertainty about the timing and amount of Anderson's Strattera use, there was evidence from which his use in the period before the incident could be inferred. That evidence includes Anderson's having filled a prescription for thirty pills approximately twenty-one days before the incident and testimony by a person Anderson lived with who said that he saw Anderson take a pill in the morning about three times per week. While far from conclusive, this evidence permits a factual inference that Anderson took Strattera as directed.

¶32 Although the State has not argued that the claimed instructional problem was cured by statements Anderson's counsel made during closing arguments, we note that in some circumstances the nature of closing argument along with other factors might persuade us that, despite instructional error, the real controversy was fully tried. Accordingly, we choose to address this topic.

¶33 During his closing argument, Anderson's trial counsel spent several pages of transcript arguing that it was up to the jury to define "voluntary" for purposes of applying this instruction. Counsel argued that to be "fair" and "just" the jury should conclude that use of the prescription drug was not voluntary unless Anderson had been warned of the possible side effects at issue in this case. Counsel argued that Anderson had not been so warned.

¶34 In the prosecutor's rebuttal closing argument, the prosecutor did not endorse Anderson's proposed interpretation of the instruction. We note that the prosecutor did not endorse this view even though he had advanced much the same position when arguing during the instructions conference that such an interpretation of "voluntary" made the inclusion of "drugs" in the instruction fair. As we described above in our forfeiture discussion, the prosecutor argued at the instructions conference that Anderson's continued use of Strattera could properly be considered voluntary *if* Anderson knew he was having negative side effects.

¶35 Instead, as to voluntariness, the prosecutor's closing mainly emphasized the voluntary nature of Anderson's alcohol consumption, arguing that "there's nobody here saying he was forced to consume the alcohol. He voluntarily consumed it." The prosecutor discussed the voluntary taking of Strattera only briefly. He noted Anderson's argument that nobody told Anderson about the side effects, and then the prosecutor appeared to argue that Anderson was not really

experiencing side effects. Such argument did not expressly endorse or oppose Anderson's interpretation of the instruction.[4] Most significantly, for purposes of the issue now before us, the prosecutor said nothing that would discourage the jury from rejecting the Strattera portion of Anderson's defense simply because Anderson voluntarily put the pills in his mouth, in the same way he did the alcohol.

¶36 We conclude that the closing arguments do not cure the instructional problem because the jury had no obligation to accept Anderson's counsel's interpretation of the challenged instruction. Anderson's counsel was trying to persuade the jury to adopt his view on what is essentially a legal question. Counsel was asking the jury to define "voluntary" to mean something more than its everyday meaning. Instead of that everyday meaning, he was asking the jury to make a policy determination based on what is "fair" and "just." The instruction itself says nothing that supports this specialized meaning of "voluntary."

¶37 In summary, as to the drugs portion of the instruction, we conclude that the real controversy was not fully tried. On its face, the "voluntary taking of drugs" instruction told the jury that, to the extent Anderson's defense was based on the taking of Strattera, the jury must reject that defense if Anderson took the Strattera voluntarily, in the sense that he voluntarily consumed the pills. That sensible interpretation of the instruction is contrary to case law holding that the use of prescription drugs, in keeping with medical directions, is generally not voluntary. We are unable to say with confidence that such an understanding of the

[4] In fact, this argument is precisely the *opposite* of the argument the prosecutor made at the instructions conference. There, the prosecutor said Anderson's use should be considered voluntary because Anderson knew he *was* having side effects.

instruction did not lead the jury to bypass the central controversy in this case, namely, whether Anderson took Strattera pursuant to his doctor's advice and whether such prescribed consumption of Strattera caused Anderson to have a qualifying mental defect, as advanced by Anderson's expert witness.

¶38 We turn now to Anderson's arguments about the alcohol portion of the instruction. He makes several arguments about that portion, but none were preserved at trial. As we discussed above, Anderson asserts in his appellate briefing that he sought removal of the *entire* drugs and alcohol provision. However, the record of the instructions conference shows that he argued for removal of only the drug portion of the instruction. Therefore, his appellate arguments about the alcohol portion were forfeited. Because we are reversing on other grounds, we discuss this part of Anderson's argument no further.

¶39 Although we are reversing and remanding for retrial, we acknowledge that the mental defect defense in this case was weak. First, there are problems with Anderson's various assertions of fact relating to Strattera. For example, Anderson told his expert that he complained strenuously to his prescribing doctor about side effects he was experiencing from taking Strattera, but Anderson's doctor noted in Anderson's medical records that Anderson reported no side effects.

¶40 Second, from Anderson's perspective, there are problems with the testimony of his expert witness. For instance, Anderson's expert based his opinion that Anderson could not control his behavior in significant part on Anderson's account of the events prior to and during the homicide and attempted homicide, but Anderson's assertions in that regard are inconsistent with what appear to be more reliable sources. An example is the expert's reliance on Anderson's

assertion that, when he entered the home, Anderson found his ex-girlfriend and her boyfriend naked or near naked and "in or near a sexual liaison" and that his ex-girlfriend "taunted, ridiculed, and humiliated" him.

¶41 More specifically, Anderson asserted that his ex-girlfriend and her boyfriend laughed at Anderson. She taunted him by saying that the boyfriend would be Anderson's son's daddy. Anderson said the ex-girlfriend "was just ranting and raving and down on me. Called me a fucking nigger." Anderson said something in response about them "fucking" with him, them knowing "this moment was going to be here," and Anderson putting his ex-girlfriend through college. Anderson said the boyfriend pushed the ex-girlfriend toward Anderson and then "that little bitch [the boyfriend] ran and hid in the bathroom."

¶42 According to Anderson's expert, this would have been an "intensely provocative situation" that, in combination with Anderson's preexisting problem with self-control, his Strattera-altered brain, and his alcohol intoxication, prevented Anderson from being able to control his anger. Anderson's account of his entry into the house, however, is at odds with a neighbor's testimony that, "[a]lmost immediately" after Anderson kicked in the back door, the neighbor heard the ex-girlfriend say "get out, get out" and, a few seconds after that, the ex-girlfriend started screaming. Anderson's account is also at odds with the boyfriend's testimony that the boyfriend was not with the ex-girlfriend when Anderson entered the house, but rather he heard her screaming, came out of a bedroom, and saw Anderson kicking and punching her. This discrepancy is important because Anderson's expert's opinion was plainly based on the

proposition that Anderson's homicidal rage was a response to an antagonizing event that Anderson experienced after entering the residence.[5]

¶43 However, the question is not whether the instructional error was harmless. Under the real-controversy-not-fully-tried test, the question before us is not whether a properly instructed jury would have been likely to reach the same verdict. Thus, although we regard Anderson's mental defect defense as weak, it was for the jury, not this court, to make that call. The problem here is that the instruction that was given effectively told the jury that it did not need to concern itself with the strength of Anderson's Strattera defense. Therefore, we exercise our discretion to reverse and remand for retrial.

¶44 In closing, we acknowledge that this opinion does not describe the jury instruction that should have been given. We choose not to do so because we lack adversarial briefing on that topic. On appeal, the parties were not focused on proposing a better instruction. Instead, understandably, they attacked and defended the instruction given. Still, with respect to prescription drugs and with respect to the combination of prescription drugs and alcohol, we believe the legal

[5] Peppered in the expert's testimony are what appear to us to be transparent examples of spin and bias. For example, it was clear from the evidence that Anderson approached the residence shortly after 3:00 a.m. uninvited, knowing that his ex-girlfriend and her boyfriend were inside. Anderson parked his car a block away, vandalized the boyfriend's car, knocked on the front door, and then kicked in the rear door to gain entry. Yet, when Anderson's expert described this situation, he told the jury that Anderson "*accidentally stumbled upon* a situation that required an extraordinary measure of self-control" (emphasis added). As the expert described the situation, Anderson inadvertently walked in on his recent ex-girlfriend during a sexual encounter with her new boyfriend, and what these two people did then would have caused "just about any of us [to] ... experience an impulse to do all sorts of things." It seems highly unlikely that this jury or a new jury would accept the expert's assumption about what occurred just before Anderson killed his ex-girlfriend and attempted to kill the new boyfriend.

discussions in this opinion provide guidance. And on remand, hopefully, the parties will present improved arguments and proposed instructions.

By the Court.—Judgment reversed and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.