**COURT OF APPEALS DECISION DATED AND FILED**

**October 19, 2006**

**Cornelia G. Clark**
**Clerk of Court of Appeals**

**NOTICE**

**This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.**

**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. 2004AP2686-CR**

**Cir. Ct. No. 2003CF14A**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS**
**DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**GREGORIO R. VARGAS, JR.,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Grant County: ROBERT P. VAN DE HEY, Judge. *Reversed and cause remanded with directions*.

Before Dykman, Deininger and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. Gregorio Vargas, Jr. appeals a judgment of conviction entered upon a jury verdict for battery by prisoners as a habitual offender in violation of WIS. STAT. § 940.20(1) (2003-04),[1] assault by prisoners as a habitual offender in violation of WIS. STAT. § 946.43(1m)(b), and attempted escape in violation of WIS. STAT. § 946.42(3)(a). He also appeals an order denying his motion for postconviction relief.

¶2 This appeal raises the following issues: (1) whether Vargas is entitled to a new trial in the interest of justice of the mental responsibility phase on all the charges, pursuant to WIS. STAT. § 752.35, to afford him an opportunity to present a "not guilty by reason of insanity" (NGI) defense;[2] (2) whether he is entitled to a new trial in the interest of justice of the guilt determination as well as the mental responsibility phase on the attempted escape charge under § 752.35 because the real controversy has not been fully tried; (3) whether he is entitled to a new mental responsibility trial due to ineffective assistance of trial counsel; (4) whether he is entitled to sentence modification based on a new factor; and (5) whether there was sufficient evidence for the jury to find him guilty of the attempted escape charge.

¶3 We conclude that Vargas is entitled to a new mental responsibility trial in the interest of justice pursuant to WIS. STAT. § 752.35 on all the charges; we also conclude that Vargas is entitled to a new trial in the interest of justice

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[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] A party may request a new trial of only the second phase of a bifurcated proceeding, i.e., the mental responsibility phase. *See* ***State v. Koput***, 142 Wis. 2d 370, 418 N.W.2d 804 (1988).

pursuant to § 752.35 on the attempted escape charge because the issue relating to his bipolar disorder was not presented to the jury. We further conclude that there was sufficient evidence for the jury to find Vargas guilty of attempted escape. Because these conclusions are dispositive, we need not address the other issues Vargas raises. Accordingly, we reverse and remand for a new trial on the attempted escape charge and the responsibility phase on all charges.

## BACKGROUND

¶4 The following facts are taken from testimony at the hearing on Vargas's postconviction motion, trial testimony and the court's judgment and order. At all times pertinent to this case, Gregorio Vargas was an inmate at the Grant county jail. Alan Blanchard was also an inmate of the jail. On the night of February 8, 2003, Daniel Morgan, a jailer, was doing garbage rounds at the jail. While he was holding a garbage bag open, waiting for the inmates to empty their wastebaskets into it, Vargas threw his wastebasket at Morgan, grabbed the jailer by the arm and slammed him into a wall. Blanchard joined in the attack, searched through Morgan's pocket and tried to pull Morgan's belt off as Vargas held Morgan down and gouged his eye. The attack, described in more detail in our discussion relating to sufficiency of the evidence, was cut short when another jail employee came to investigate the incident. Prior to the other jailer's arrival, Vargas and Blanchard had returned to their jail cells.

¶5 At trial, the State argued that the only rational explanation for Vargas's behavior was Vargas's intent to aid Blanchard in obtaining Morgan's keys and escaping. Vargas's trial counsel countered during closing argument that there was no evidence establishing Vargas's intent, and that numerous inferences other than intent to escape could be drawn from the evidence, including the

possibility that Vargas just erupted from the pressure of being in jail. Vargas did not testify, and his attorney called no witnesses in Vargas's defense.

¶6 After he was convicted on all counts, Vargas filed a postconviction motion arguing in part that there was insufficient evidence for his attempted escape conviction. Vargas also requested that the court grant a new trial in the interest of justice on the attempted escape conviction on the grounds that the case had not been fully tried because the jury heard no evidence of Vargas's bipolar disorder, which could possibly explain his volatile behavior. Vargas also wanted to present potentially exculpatory testimony from Blanchard, who testified at his own trial that Vargas was not attempting to escape when he attacked Morgan. In the alternative, Vargas moved for sentence modification on the basis of new evidence relating to Vargas's bipolar disorder. Attached to Vargas's motion were exhibits supporting his assertion that he told jail employees of his bipolar disorder and requested medication, but the jail failed to provide the medication.

¶7 At the hearing on Vargas's postconviction motion, Dr. Louis Fulton, a psychiatrist who diagnosed and treated Vargas for bipolar disorder before Vargas was in prison, provided extensive testimony not heard by the jury at trial. Fulton testified about treating Vargas's bipolar disorder; he also testified that, in his professional opinion, Vargas was incapable of appreciating the wrongfulness of his conduct or conforming his conduct to the requirements of the law when he attacked Morgan, and that Vargas's attack on Morgan was a manifestation of the disorder.

¶8 Although the trial court denied Vargas's motion, the court noted that it was "intrigued" by Fulton's testimony and invited Vargas to file a motion addressing the issue of whether Vargas might have a viable NGI defense.

However, after supplemental briefing and argument on that issue, the court denied the supplemental motion as well. Vargas appeals.

## DISCUSSION

### *I. Sufficiency of the Evidence*

¶9 We turn first to determine whether there was sufficient evidence to sustain the jury's verdict on the attempted escape charge.[3] Vargas argues that there was insufficient evidence to establish his unequivocal intent to attempt the crime of escape from custody. We disagree.

¶10 In reviewing the sufficiency of the evidence, we will "not substitute [our] judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). If any possibility exists that the jury could have drawn the appropriate inference from the evidence presented at trial that the defendant was guilty, we may not overturn that verdict even if we believe the jury should not have found guilt based on the evidence before it. ***State v. Shanks***, 2002 WI App 93, ¶24, 253 Wis. 2d 600, 644 N.W.2d 275.

¶11 Vargas was convicted of attempted escape, in violation of WIS. STAT. §§ 939.32 and 946.42(3)(a). Before the jury could find Vargas guilty of

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[3] Although we reverse on other grounds, we address this issue because a reversal on the grounds of insufficient evidence would result in a dismissal of the charge. Instead, we reverse on the basis that the real controversy was not fully tried and order a new trial in the interest of justice pursuant to WIS. STAT. § 752.35.

attempted escape, the State was required to prove beyond a reasonable doubt that Vargas intended to commit the crime of escape from custody and that Vargas

> did acts toward the commission of the crime of escape which demonstrate unequivocally,[[4]] under all of the circumstances, that the defendant intended to and would have committed the crime of escape except for the intervention of another person or some other extraneous factor.

*See* WIS JI—CRIMINAL 1773 and 580.

¶12 The following evidence was introduced at trial. Five witnesses testified at Vargas's trial, only two of whom witnessed the attack: Morgan, the victim, and Jeremy Vosberg, another inmate. In describing how the attack began, Morgan testified that while Blanchard was standing nearby waiting for medicine, Vargas approached Morgan with a garbage can, threw it at Morgan, and slammed Morgan against a wall. Morgan called for help on his radio and then hit the ground. Vargas then pinned Morgan's arms behind his back while Blanchard jumped into the fray, standing over Morgan, digging through the jailer's front pocket and trying to undo his belt, apparently looking for something, while Vargas gouged Morgan's eye. As he was held down by Vargas and being searched by Blanchard, Morgan was lying on his side, on top of a key pouch on his right hip which contained three keys that opened some of the jail doors. Morgan testified that Blanchard managed to unlatch Morgan's belt. Vosberg testified that from his vantage point it appeared that Blanchard was reaching or looking for something around Morgan's waist. When the attack was interrupted by another correctional

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[4] The court included the proper definition of "unequivocally" in the jury instructions, informing the jury that "'[u]nequivocally' means that no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts under the circumstances." WIS JI—CRIMINAL 580 at 2.

officer, Vargas and Blanchard released Morgan; Morgan left the area and locked the door. Neither inmate ever left the vestibule area of the cellblock where the attack on Morgan occurred.

¶13 The jury also watched a videotape taken from the jail security cameras of the events as they unfolded. We have also reviewed the videotape and conclude that the jury could have reasonably inferred from the tape that Vargas and Blanchard were acting in concert.[5] The videotape contains evidence, which if believed by a reasonable jury, would be consistent with the theory that Vargas and Blanchard were acting together in an effort to escape.

¶14 Deferring to the jury on the weight of the evidence and viewing that evidence most favorably to the State and the conviction, we conclude that the jury had sufficient evidence to find Vargas guilty of attempted escape. *See* ***Poellinger***, 153 Wis. 2d at 501. First, the jury could reasonably infer that Blanchard was searching for the jailer's keys when Blanchard reached and looked around the jailer's waist, searched his pocket, and unfastened his belt. Second, the jury could also reasonably infer that Vargas restrained the jailer's arms while Blanchard looked for the jail keys in an effort to escape. Third, the jury could reasonably infer that the most plausible reason Blanchard might have for wanting the keys was to use them to escape custody—regardless of whether the keys would actually have enabled him to do so. Fourth, Vargas presented no defense; thus the jury had no conflicting evidence from which to draw any competing inferences. Therefore, the jury could reasonably have determined that Vargas's conduct in restraining

[5] The video does not clearly show the faces of Vargas or Blanchard, but defense counsel did not object to the authenticity or admission of the video or argue that it was not his client on the video.

Morgan while Blanchard searched for the keys demonstrated his unequivocal intent to escape. We are satisfied that the evidence was sufficient to support the verdict on the attempted escape charge.

*II. New Trial in the Interest of Justice*

¶15 Vargas urges us to exercise our statutory discretion authorized under WIS. STAT. § 752.35 to reverse his convictions in the interest of justice and remand the case for a new trial on the mental responsibility phase of all charges. More specifically, Vargas asserts that he was prevented from entering an NGI plea to the charges because, although he had a viable mental responsibility defense, defense counsel was not able to find the doctor who treated Vargas in the past for the disorder, Dr. Fulton, and therefore the defense was never presented. Vargas also asserts that he is entitled to a new trial in the interest of justice on the attempted escape charge because evidence of his bipolar disorder was not presented to the jury, which, in his view, would have refuted the State's theory that Vargas attacked Morgan for the singular purpose of escaping.[6] Vargas contends that Dr. Fulton will testify that Vargas's violent outburst toward Morgan stemmed from his bipolar disorder and did not evince an attempt by Vargas to escape.

¶16 The State argues that Vargas is not entitled to a new trial in the interest of justice because the psychiatric evidence is not newly discovered evidence and because Dr. Fulton's testimony fails to support Vargas's contention that he has a viable NGI defense. The State also asserts that Dr. Fulton's

[6] Vargas also argues that Blanchard's potentially exculpatory testimony during Blanchard's trial on an attempted escape charge serves as an additional basis for granting him a new trial in the interest of justice. Because we conclude that Dr. Fulton's testimony is sufficient standing alone to demonstrate that the real controversy has not been fully tried, we do not address this point.

testimony, when compared against Vargas's criminal record and Vargas's failure to assert the NGI defense in other criminal prosecutions, did not support his opinion that Vargas likely was not attempting to escape when he attacked Morgan. We conclude that the real controversy was not fully tried because the jury was not afforded the opportunity to consider evidence relating to Vargas's bipolar disorder, which we consider to be central in determining whether Vargas was mentally responsible for his actions and in countering the State's theory that Vargas attacked Morgan for the singular purpose of attempting to escape.

¶17 Under WIS. STAT. § 752.35,[7] we have the discretionary authority to grant a new trial in the interest of justice if we are persuaded that the real controversy has not been fully tried. *See* ***State v. Barton***, 2006 WI App 18, ¶6, 289 Wis. 2d 206, 709 N.W.2d 93. We have held that the real controversy has not been fully tried when the jury was precluded from considering important testimony that bore on an important issue. ***State v. Tainter***, 2002 WI App 296, ¶18, 259 Wis. 2d 387, 655 N.W.2d 538; *see also* ***State v. Wyss***, 124 Wis. 2d 681, 735, 370 N.W.2d 745 (1985), *overruled on other grounds by* ***State v. Poellinger***,

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

153 Wis. 2d 493, 505, 451 N.W.2d 752 (1990). We may exercise our power of discretionary reversal based on a real controversy not being fully tried even where it has not been shown that the result would be different at a new trial, ***Barton***, 289 Wis. 2d 206, ¶6, or even where the "new" evidence was known to the defense prior to trial. *See* **Garcia v. State**, 73 Wis. 2d 651, 655, 245 N.W.2d 654 (1976) (granting a new trial even where the evidence was not new, but was testimony from a friend who could identify the real suspect, but whom the defendant did not call as a witness to protect him). However, we exercise our discretion sparingly and only in exceptional cases. ***Id***.

¶18 Vargas contends he has a viable mental responsibility defense. However, because his trial counsel was unable to find Dr. Fulton, Vargas asserts he was unable to pursue an NGI defense in a bifurcated trial. Consequently, Vargas argues, "[t]he interests of justice demand giving a jury an opportunity to consider that defense now that Dr. Fulton's diagnosis and opinion is known and available."

¶19 In the mental responsibility phase of a bifurcated trial the crux of an NGI defense is the defendant's proof that "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." WIS. STAT. § 971.15(1); *see also* ***Storm v. Legion Ins. Co.***, 2003 WI 120, ¶44 n.27, 265 Wis. 2d 169, 665 N.W.2d 353. We conclude that Vargas has demonstrated that he has a viable NGI defense.

¶20 During the hearing on Vargas's postconviction motion, Dr. Fulton testified that since childhood Vargas had exhibited symptoms of severe bipolar disorder, a mental disorder that can cause dramatic and volatile mood shifts.

Fulton described bipolar disorder as a severe and disabling condition that can cause those affected by it "to get in a lot of trouble ...." Fulton explained that

> [t]he most common symptom seen is irritability. In other words, they are in a constant state of anger and ... they typically are very oppositional. They are hostile.... [I]n some people their mood is so fragile ... that with the slightest provocation they can become very angry, have temper tantrums and explode, and some of them can become physically violent and aggressive ….

Fulton testified that those suffering a manic episode describe it "like watching it from a distance on a television with a foggy screen. It is sort of like a bystander observing their behaviors and typically they don't think or process thought or reason at all during the period of the mood swings ...."

¶21 Fulton described Vargas's bipolar disorder as "severe," because Vargas's manic phases include violent behavior. He testified that "whenever [Vargas's] mood was in an elevated state he almost always would get into a fight" and "[d]uring a sudden explosion he wouldn't be thinking of anything at all ...." Without treatment, according to Fulton, Vargas's bipolar disorder may manifest itself through violence upon minor provocations, which "can happen very suddenly and …. be quite dramatic, ... I mean I would almost guarantee that without medication he would be violent." Fulton testified that Vargas needs two medications to control his mood swings because of the severity of his illness. While Vargas was enthusiastic about taking the medications and responded well to them, Fulton testified, "without his medications it is almost a guarantee that he would get violent very suddenly for very little provocation and he wouldn't care who he fought, where he was, or ... how much trouble he would get into ...." Fulton also indicated that at the time of the incident, with Vargas's bipolar disorder having gone untreated, Vargas would have been incapable of appreciating

the wrongfulness of his conduct or conforming his conduct to the requirements of the law.

¶22 The State first counters that the psychiatric evidence was not newly discovered evidence. However, Vargas's arguments do not rest on a claim of newly discovered evidence. Vargas makes clear that his request for a new trial in the interest of justice rests on the assertion that the real controversy was not fully tried. Therefore, we do not address this argument any further.

¶23 The State next argues that Dr. Fulton's testimony "does not square with the facts of the case …." More specifically, the State argues that Fulton's conclusion that Vargas's violent attack was a result of his bipolar disorder is inconsistent with evidence that suggests that Vargas was not acting as a result of uncontrollable rage. The State points to Blanchard's testimony at his own criminal trial for attempted escape that Vargas became upset earlier in the day upon hearing that the jail was feeding pork to an inmate who did not eat pork. Blanchard also testified that at dinner time the inmate was once again fed pork, resulting in some of the inmates, including Vargas, kicking the metal sliding door in order to get the attention of the correction officers. The State explains that Blanchard testified that on that same evening Vargas became upset when another inmate told Vargas that Morgan referred to Vargas as "a piece of shit."

¶24 We see no inconsistencies between Blanchard's testimony and Dr. Fulton's conclusion that Vargas's violent outburst at the jail was a manifestation of his bipolar disorder. A reasonable jury could draw the reasonable inference that Vargas's attack on Morgan was consistent with Fulton's opinion that the bipolar disorder could trigger violent behavior upon minor provocations, which "can happen very suddenly and … be quite dramatic …." Fulton also

testified that without his medication, it is virtually guaranteed that Vargas would become violent very suddenly with little provocation "and he wouldn't care who he fought, where he was, or … how much trouble he would get into …." It is undisputed that Vargas had gone a considerable period of time without his medication at the time of this incident.

¶25 The State next argues that Fulton's diagnosis does not explain Vargas's violent history. Vargas's violent history dates back to juvenile adjudications in 1999 for physical assault of family members and physical threats towards his mother in 1999. He was also adjudicated for battery to a non-family member in 1999 and 2000 and had recently been convicted of battery to a prisoner in a separate incident. According to Vargas's trial attorney, one of the batteries was provoked; Vargas intervened in a fight when his best friend was being assaulted. We fail to recognize the problem the State attempts to highlight. Dr. Fulton testified that Vargas's records appear to indicate that he has been suffering from the bipolar disorder since the third grade. Thus, it is not surprising that Vargas has an extensive history of violence. Moreover, Fulton testified that Vargas will become violent with just about anyone, regardless of who that person is. Thus, it is immaterial that Vargas was violent with family members and non-family members. As for the provoked attack, that has no relevance to the issue of whether Vargas's violent outburst toward Morgan was a result of the bipolar disorder.

¶26 The essence of the State's arguments is that it has doubts as to the strength of Dr. Fulton's testimony that Vargas's conduct at the jail was a manifestation of the bipolar disorder. We recognize that those doubts may be valid. However, that is a matter to be decided by a jury. The State will have ample opportunity to test Fulton on his opinions at the new trial, as well as to

present competing expert testimony if a second evaluator reaches a different conclusion.

¶27 Turning to the attempted escape charge, Vargas contends that the jury could not fairly decide what explained his attack on Morgan without the opportunity to consider the effect of Vargas's severe, untreated bipolar disorder. We agree that evidence exists indicating that Vargas's bipolar disorder may have contributed to his violent outburst, which is central to the issue of whether Vargas attacked Morgan for the singular purpose of attempting to escape.

¶28 At the postconviction motion hearing, Fulton testified that Vargas's illness rendered him so impulsive and unpredictable he would have been unable to control his behavior. Fulton also indicated that Vargas's attack was likely a manifestation of his bipolar disorder and that his mental health history was inconsistent with a planned escape. Fulton testified that he was "fairly convinced" that Vargas's attack on Morgan was a manifestation of the bipolar disorder. More significantly, Fulton further stated that an escape by Vargas would not be consistent with the symptoms of his disorder, since "[d]uring a sudden explosion he wouldn't be thinking of anything at all; … I can't say as to whether he was planning anything or not but I just kind of know him as a person and he never really did anything of that nature that I know of before."

¶29 This evidence goes directly to the core of the State's case against Vargas on the attempted escape charge: whether Vargas planned to escape when attacking Morgan. Indeed, during its closing arguments at trial, the State emphatically argued that the only explanation for Vargas's actions was that he was attempting to escape. Fulton's testimony offers another explanation for Vargas's actions and consequently is essential for a full consideration of this charge.

¶30 In addition, in order to convict Vargas of attempted escape, the State must prove beyond a reasonable doubt that Vargas intended to commit the crime of escape from custody, and, more significantly, that Vargas's actions demonstrated *unequivocal* intent to escape and that he would have escaped but for an extraneous factor. Not only is intent the crux of both prongs of the required proof, but the legal definition of "unequivocally," that "no other inference or conclusion can reasonably and fairly be drawn from the defendant's acts, under the circumstances," underscores the importance of Dr. Fulton's testimony to the attempted escape charge. WIS JI—CRIMINAL 580 at 2.

## CONCLUSION

¶31 We conclude that there was sufficient evidence for the jury to convict Vargas of attempted escape. However, we also conclude that, based on Dr. Fulton's testimony at the hearing on Vargas's postconviction motion, Vargas may have a viable NGI defense which he was prevented from presenting. We further conclude that the jury was not given an opportunity to consider important evidence, which, if presented at a new trial, could counter the State's theory that Vargas attacked the jail guard solely in an effort to escape from the jail. Accordingly, we reverse the trial court and, in the interest of justice, order new trials on the attempted escape charge and the responsibility phase on all charges.

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

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