

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 3, 2010

David R. Schanker
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. 2008AP2278-CR

Cir. Ct. No. 2006CF900

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK DAVID TOTZKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
LEE S. DREYFUS, JR., Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Mark David Totzke has appealed from a judgment convicting him of first-degree intentional homicide by use of a dangerous weapon. We affirm the judgment.

¶2 Totzke was charged with attacking and killing his mother with an ax while she slept in her bed. Totzke initially entered a plea of not guilty by reason of mental disease or defect (NGI defense) pursuant to WIS. STAT. § 971.15 (2007-08).¹ He subsequently entered a guilty plea in the first phase of the bifurcated NGI proceeding, and requested a trial to the court on his NGI defense. *See* WIS. STAT. § 971.165(1)(b). At the conclusion of the trial, the trial court found that Totzke did not meet his burden of proving the NGI defense.

¶3 A person is not responsible for his criminal conduct if, at the time of the conduct, as a result of mental disease or defect he lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. WIS. STAT. § 971.15(1). When a NGI defense is raised, the critical inquiry is whether, as a result of a certain mental condition, the defendant lacks substantial capacity to either appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law. *State v. Duychak*, 133 Wis. 2d 307, 316, 395 N.W.2d 795 (Ct. App. 1986). “The legislature intended to excuse a defendant from criminal liability only where a mental condition has the requisite effect, i.e., the inability to appreciate wrongfulness or to conform conduct.” *Id.* at 316-17.

¶4 A NGI defense is an affirmative defense that must be established by the defendant to a reasonable certainty by the greater weight of the credible evidence. WIS. STAT. § 971.15(3). Whether the defendant has met his burden of proving a NGI defense presents a question of fact. *State v. Leach*, 124 Wis. 2d 648, 660, 370 N.W.2d 240 (1985); *State v. Pautz*, 64 Wis. 2d 469, 475-76, 219

¹ All references to the Wisconsin Statutes are to the 2007-08 version.

N.W.2d 327 (1974). The credibility of the witnesses and the weight to be given their testimony is for the factfinder. *Pautz*, 64 Wis. 2d at 475. When, as here, trial is to the court, the trial court's finding that the defendant did not meet his burden will not be disturbed unless it is clearly erroneous. WIS. STAT. § 805.17(2).

¶5 On appeal, the State and Totzke agree that Totzke had a mental illness when he killed his mother. In addition, Totzke concedes that he had the substantial capacity to conform his conduct to the requirements of the law. He contends, however, that he lacked the substantial capacity to appreciate the wrongfulness of his conduct. He contends that the trial court's finding to the contrary is clearly erroneous.

¶6 In challenging the trial court's decision, Totzke argues that the trial court essentially determined that because Totzke knew his actions were illegal, he therefore appreciated the wrongfulness of his conduct. Totzke contends that the trial court's decision reflects a misunderstanding of the law, and that his ability to appreciate the wrongfulness of his conduct was impaired despite the fact that he appreciated the illegal nature of his acts. He contends that he killed his mother because he believed he needed to do so to end a CIA conspiracy. He contends that, because he acted for an irrational purpose and believed that his conduct was justified, he did not appreciate that the conduct was wrongful.

¶7 Totzke's argument provides no basis for disturbing the trial court's findings. Nothing in the law supports the proposition that merely because a defendant commits a crime for an irrational purpose or under the irrational belief that it is justified, he is automatically incapable of appreciating the wrongfulness of his actions. A mentally ill defendant who acts for incomprehensible or irrational reasons is nevertheless criminally responsible if he was substantially

capable of conforming his conduct to the requirements of the law and appreciating the wrongfulness of his conduct.

¶8 The evidence at trial was sufficient to support the trial court's finding that Totzke appreciated the wrongfulness of his conduct. Consistent with the testimony of the expert witnesses who testified at trial, the trial court found that Totzke had a mental illness in the form of a delusional disorder-persecutory type. Consistent with the testimony of forensic psychiatrists Robert Rawski and Erik Knudson, and the testimony of forensic psychologist Deborah Collins, the trial court also found that Totzke possessed the capacity to conform his conduct to the requirements of the law. However, the trial court rejected Dr. Rawski's opinion that Totzke lacked the substantial capacity to appreciate the wrongfulness of his conduct. Instead, it concluded that the opinions of Drs. Collins and Knudson were more persuasive. Drs. Collins and Knudson both opined that Totzke possessed the substantial capacity to appreciate the wrongfulness of his conduct.

¶9 In addition to being supported by the expert opinions of Drs. Collins and Knudson, the trial court's finding that Totzke appreciated the wrongfulness of his conduct is supported by evidence in the record regarding Totzke's statements to the police and the mental health experts who evaluated him. Totzke's statements indicated that he was angry at his mother because he believed she was involved in a government-led conspiracy that had manipulated him throughout his life. He believed that his mother was preventing him from breaking free of this conspiracy and that she belittled him. He blamed her for his joblessness and failures in life. He determined that killing her was justified to end his persecution.

¶10 While this evidence demonstrates an irrational thought process, it does not follow that Totzke did not appreciate that his conduct was wrong. As found by the trial court, the record supports a determination that he appreciated the wrongfulness of his conduct.

¶11 At the time of the crime, Totzke called 911 and reported that he had killed his mother with an ax. He told the authorities that he would be cooperative, he acknowledged that he knew he was being taken into custody because he had murdered his mother, and he told the police that he felt “horrible” about the incident. He told Dr. Knudson that he expected to be found guilty and sent to prison for the rest of his life.

¶12 In statements made after his arrest, Totzke also reported that, prior to the murder, he consciously did a number of things to fuel his anger and overcome his reluctance to kill. Specifically, he watched violent and disturbing videos, listened to music that he believed would increase his anger, put on face paint like that used in army maneuvers, and intentionally avoided contact with people like his sister and nephew who might calm him and lessen his inclination to kill his mother. Totzke also told the police and mental health evaluators that he decided to kill his mother in her sleep because it would make it easier to overcome his inhibition against killing her. He stated that by killing her in her sleep, he would not have to see her expression, and that he did not want to deal with seeing “that look in her face” for the rest of his life. Totzke also indicated that he wanted to kill his mother quickly to minimize her pain and avoid being confronted by her.

¶13 Evidence at trial also indicated that Totzke told Dr. Knudson that if he had spent more time planning the murder, he might have been able to devise a way to cover up the crime, dispose of the body, and escape. Totzke stated that he

chose to surrender instead of fleeing because he did not want to live the lifestyle of a person attempting to elude the police.

¶14 Totzke’s efforts to steel himself to commit the murder, his focus on committing the act quickly while his mother slept so that he could overcome his inhibition against it, the “horrible” feeling he experienced after the murder, and his belief that he would spend the rest of his life in prison all permit the inference that Totzke appreciated the wrongfulness of his conduct. Based on this evidence and the opinions of Drs. Collins and Knudson, the trial court was clearly entitled to find that Totzke did not meet his burden of proving that he lacked the substantial capacity to appreciate the wrongfulness of his conduct. Totzke’s judgment of conviction is therefore affirmed.

By the Court.—Judgment affirmed.

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

