COURT OF APPEALS
DECISION
DATED AND RELEASED

FEBRUARY 11, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

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

No. 96-2752-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LEONARD R. MILLER,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Pierce County: DANE F. MOREY, Judge. *Affirmed.*

LaROCQUE, J. Leonard Miller appeals a misdemeanor hit and run conviction, in violation of § 346.67(1)(a)(b), STATS. Miller, who pleaded not guilty and not guilty by reason of mental disease or defect, claims the trial court erred by refusing to admit certain evidence at the guilt phase of a bifurcated trial allegedly relevant to Miller's statutory defense of intoxication.[1] Miller

[1] Section 939.42, STATS., provides:

An intoxicated or a drugged condition of the actor is a defense only if such condition:

(1) Is involuntarily produced and renders the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act is committed; or

sought to introduce the testimony of a psychiatrist, who would testify regarding Miller's psychiatric condition. Miller also sought to admit the testimony of his wife, who would give similar testimony. This court affirms the judgment.

The trial evidence indicates that Miller backed his pickup truck into another vehicle in a parking lot causing minor damage, stopped long enough to offer money for the damages, which was refused, and then drove away without identifying himself. Miller was stopped and arrested for OWI a short time later in Red Wing, Minnesota. He tested .31 BAC and pleaded guilty to the OWI offense.

Miller was prosecuted in Wisconsin for the hit and run accident. The trial court refused to allow Miller to present certain psychiatric evidence concerning his intoxication at the guilt phase of his trial. The essence of Miller's offer of proof relating to the psychiatric testimony was that his intoxication was involuntary because he was "self-medicating" his post traumatic stress disorder (PTSD), a recognized form of mental illness. Miller's wife was prepared to testify that she was intimately familiar with the symptoms of PTSD, and was aware that her husband suffered from that disorder as well as a chemical dependency, and was so suffering on the date of the incident.

This court concludes that self-induced intoxication, even where the consumption is attributable to a mental illness or psychiatric condition, is not "involuntary" within the meaning of § 939.42(1), STATS. The statute does not define the term "involuntary." However, our supreme court has held that intoxication is not involuntary unless it is the result of force or fraud on the part of a third person because of mistake by the defendant, such as where he lacks knowledge of a substance's intoxicating effects. ***Loveday v. State***, 74 Wis.2d 503, 512, 247 N.W.2d 116, 122 (1976).

The evidence here does not support a claim of involuntary intoxication as the term is explained in ***Loveday.*** Miller complains of no force or fraud upon him by a third person, and does not assert that his intoxication

(..continued)

(2) Negatives the existence of a state of mind essential to the crime, except as provided in s. 939.24(3).

was the result of a mistake. This court concludes that Miller's claim in this case is no different from that of a person who suffers from alcoholism and drinks as a result of that illness. Thus, the trial court properly excluded the evidence as it related to the defense of involuntary intoxication under § 939.42(1), STATS.

This court concludes that Miller has waived any argument that the excluded evidence relates to the defense described in § 939.42(2), STATS.[2] Miller made only passing reference to this subsection in both his arguments to the trial court and in his brief to this court. The substance of his offer of proof, however, reveals that the excluded evidence relates solely to whether Miller's intoxication was involuntary, a concept that relates to subsec. (1) alone. For example, Miller's trial counsel argued:

> That's essentially our defense to the first phase of the trial. Under the statute, we would be required to present evidence which I have just indicated the wife would produce, as would Dr. Marshall, and it would indicate--their testimony goes to the involuntariness of this alcohol consumption. A person who is mentally ill and psychotic does not have the volition or the free will to choose to drink alcohol.

Furthermore, Miller does not argue that the psychiatric evidence is required to show how his intoxication alone negatived the existence of the necessary mens rea. Rather, he apparently argues that the psychiatric testimony was required to show how his PTSD drove him to drink, resulting in an intoxicated condition where he was unable to form the required state of mind. The latter testimony is not admissible in the guilt phase:

> We hold that a psychiatrist, properly qualified as an expert on the effects of intoxicants, may render an expert opinion as to whether a defendant's voluntary intoxicated condition negatived the defendant's capacity to form

[2] The parties on appeal do not adequately discuss whether a violation of § 346.67, STATS., requires that the State prove a specific mens rea on the part of the defendant. For purposes of this appeal, we assume without deciding that intent is an element of the offense.

> the requisite intent, but only if that opinion is based solely on the defendant's voluntary intoxicated condition.

... Trial courts must carefully scrutinize such testimony to ensure

> that a defendant's mental health history is not being considered by any expert, psychiatrist or not, in reaching his or her conclusion that the defendant lacked the capacity to form the requisite criminal intent due to his or her voluntary intoxication.

State v. Flattum, 122 Wis.2d 282, 297-98, 361 N.W.2d 705, 713 (1985).

By the Court.—Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.