

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 22, 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. 2005AP1459-CR**

**Cir. Ct. No. 2003CF195**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**BRADLEY G. GENRICH,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Manitowoc County: FRED H. HAZLEWOOD, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Bradley Genrich appeals from a judgment of conviction of first-degree intentional homicide and as a repeat offender, two counts of intentionally pointing a firearm at a person and felon in possession of a firearm. He argues the trial court should have given a voluntary intoxication

instruction and that the failure to do so violated his due process right to present a defense. We conclude that the evidence did not support the instruction and affirm the judgment of conviction.

¶2 Starting in the late afternoon of June 20, 2003, Genrich and a friend drank beer constantly for about ten hours. When Genrich returned home after 3:00 a.m. on June 21, he went downstairs to the apartment of his former girlfriend, Nichole Gagnon. Cindy Yang, Nichole's roommate, was also there. Genrich found Nichole asleep in her room. Rob Echlin was in her bed. Nichole's baby was also asleep in the room. Cindy was talking with Brenden Joyce on the couch in the living room. Around 6:00 a.m., Nichole got up to feed the baby. After the baby was put back to bed, Nichole, Cindy and Genrich sat at the kitchen table talking. Brenden was asleep on the couch. Nichole asked Genrich to get her some aspirin from his upstairs apartment. Genrich left and returned to the kitchen. When Nichole asked for the aspirin he said he did not bring any. Nichole put her hand in his pocket and found it full of bullets. Genrich asked her if she wanted a bullet.

¶3 Genrich then took a gun from his pants and pointed it at Cindy's head. He told Cindy he was going to kill her and her family. Genrich said he was also going to kill himself and the two other men in the apartment but would spare Nichole on account of her baby. When the three returned to the living room, Genrich told Nichole to choose whether Cindy or Rob Echlin would die first. Nichole went to the kitchen and dialed 911 but hung up. She did not answer the phone when the 911 dispatcher called back. After further telling Cindy he was going to kill her, Genrich commented, "This guy's from Boston, he can take it," and he shot the sleeping Brenden in the head, killing him. Nichole retreated to her bedroom, followed by Cindy and Genrich. Genrich pointed the gun at Rob and

pulled the trigger but it jammed. Genrich fiddled with the gun. At that point, the police came in through the backdoor of the apartment.

¶4 Genrich fled out the front door. A chase ensued which involved Genrich jumping two fences. The pursuing officer was not able to catch up with Genrich. Genrich was later found asleep in a nearby apartment. His blood alcohol level at 11:40 a.m. that morning was .203%.

¶5 Genrich's drinking companion testified that Genrich was drunk. The witness explained his earlier statement to police that Genrich looked "normal" when they parted company as: "for us a normal night is getting drunk and going home until you can't see pretty much." Nichole testified that she assumed Genrich was drunk because she knew he had been drinking all night. However, she thought he did not even seem to be drunk during the incident. Cindy testified that Genrich was drunk. A forensic toxicologist from the Wisconsin State Crime Lab estimated that Genrich's blood alcohol content was between .24 and .27% at the time of the shooting. The toxicologist testified that as with any person who's blood alcohol content exceeds .08%, Genrich's judgment was impaired. However, the witness could not say to what extent Genrich's judgment was impaired. Genrich argued that the jury should be given WIS JI—CRIMINAL 765, the voluntary intoxication instruction. The trial court determined that the instruction was not warranted because just prior to the shooting, Genrich was carrying on conversation with people, had control of his physical faculties, and announced his intent to kill the people in the room and executed his plan to do so.

¶6 On appeal Genrich argues that his constitutional due process right to present a defense was violated by the trial court's refusal to give the voluntary intoxication instruction. See *California v. Trombetta*, 467 U.S. 479, 485 (1984).

(“Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness.”). The State argues that Genrich waived the constitutional claim because it was not specifically argued to the trial court. *See State v. Huebner*, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 (“Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal.”). Our standard of review is the same whether we consider the issue to be one of constitutional significance or instructional error with respect to the defendant’s theory of the case. *See State v. Coleman*, 206 Wis. 2d 199, 212, 556 N.W.2d 701 (1996) (a criminal defendant is entitled to a jury instruction on a theory of defense). Addressing either claim we must determine whether there was sufficient evidence to warrant the intoxication instruction. *See id.* at 212-13 (the defendant is entitled to the instruction if supported by sufficient evidence). Therefore, we address that issue.

¶7 Whether the evidence at trial supports the submission of the intoxication instruction is a question of law, which we review de novo. *State v. Holt*, 128 Wis. 2d 110, 126-27, 382 N.W.2d 679 (Ct. App. 1985). Whether the trial court denied Genrich the right to present a defense is a question of constitutional fact which we review de novo. *State v. Heft*, 185 Wis. 2d 288, 296, 517 N.W.2d 494 (1994). We review the evidence in the light most favorable to Genrich. *State v. Schuman*, 226 Wis. 2d 398, 403, 595 N.W.2d 86 (Ct. App. 1999).

¶8 The intoxication instruction cannot be based merely on testimony that the defendant was drunk. *State v. Strege*, 116 Wis. 2d 477, 486, 343 N.W.2d 100 (1984). “There must be some evidence that the defendant’s mental faculties were so overcome by intoxicants that he was incapable of forming the intent

requisite to the commission of the crime.” *Id.* Genrich must point to some evidence of mental impairment sufficient to negate the existence of the intent to kill. *Id.* In *Strege*, our supreme court also favorably cited an Illinois decision that “the accused must show that the intoxication was so extreme as to suspend entirely the power of reason,” *id.* at 489 (citation omitted), and a Missouri court’s ruling that “evidence must be presented that tends to show defendant was so intoxicated that he did not know what he was doing.” *Id.* at 490 (citation omitted).

¶9 As evidence of his intoxication, Genrich relies on testimony that others considered him drunk as well as his blood alcohol content being in excess of .20%. Although that evidence establishes he was intoxicated, it does nothing to address the issue of impairment of his ability to form the requisite intent. Even the expert’s opinion that judgment is impaired at alcohol levels in excess of .08% did not address Genrich’s individual level of impairment.

¶10 “Where ... evidence as to the defendant’s conduct demonstrates a level of functioning inconsistent with the claimed level of intoxication, it may be held as a matter of law that even in the face of expert opinion testimony favoring the defendant’s claim, a jury could not have reached a different conclusion.” *Holt*, 128 Wis. 2d at 130. This is such a case. Genrich presented himself at Nichole’s apartment, carried on conversation with its occupants, left the apartment and returned. This demonstrates that he was orientated as to time, location and people. He returned to the apartment with the gun concealed in his pants. He then made a clear and unequivocal declaration of his plans to kill the people in the apartment while sparing Nichole. He shot one man and when the gun jammed at his attempt to shoot again, Genrich tried to fix the gun. He told his intended victim she was lucky the gun had jammed or she would be dead. Then when the police were coming in the apartment, Genrich had the forethought to hide the gun in the baby’s

dresser drawer. He fled from a pursuing police officer nimbly jumping over two high fences in the process. He was sufficiently oriented to run to a nearby friend's house and take cover. When he was taken into custody shortly thereafter, he did not have difficulty communicating with the officers or getting into the squad car.

¶11 There was no evidence that Genrich was so impaired that he was incapable of forming the intent to kill. His conduct was inconsistent with such a level of impairment. Evidence of his excessive blood alcohol content is not enough without some link to a level of impairment for a person of Genrich's size and possible alcohol tolerance. *See Strege*, 116 Wis. 2d at 487. The jury could not find a lack of intent due to intoxication. The instruction on intoxication was not warranted and Genrich's right to due process was not violated.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

