COURT OF APPEALS
DECISION
DATED AND FILED

May 21, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1219-CR **Cir. Ct. No. 00-CF-1011**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SIMONE S. RUSSELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: WILBUR W. WARREN, Judge. *Judgment affirmed in part and reversed in part; order reversed and cause remanded.*

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

¶1 PER CURIAM. Simone S. Russell has appealed from a judgment convicting her of one count of battery by a prisoner in violation of WIS. STAT.

§ 940.20(1) (1999-2000);[1] one count of resisting an officer in violation of WIS. STAT. § 946.41(1); and one count of obstructing an officer in violation of § 946.41(1). The judgment also convicted Russell of one count of disorderly conduct in violation of WIS. STAT. § 947.01. She does not challenge the disorderly conduct conviction on appeal, and that portion of the judgment of conviction is affirmed. We reverse the portions of the judgment convicting her of battery by a prisoner, resisting an officer, and obstructing an officer. We also reverse the order denying her postconviction motion for a new trial. We remand the matter for further proceedings consistent with this decision.

¶2 The four charges arose from Russell's arrest outside a tavern in the early morning hours of October 13, 2000, and from her behavior during transport to the county jail and while being processed in the jail. Both Russell and the State acknowledge that Russell was intoxicated, wild and out of control during the entire process. The felony battery charge was filed after she bit a correctional officer on the forearm at the county jail.

¶3 Russell's only defense at trial was voluntary intoxication. With some exceptions which are inapplicable here, voluntary intoxication is a defense if the condition "negatives the existence of a state of mind essential to the crime." WIS. STAT. § 939.42(2). Intoxication is a "negative defense." ***State v. Schulz***, 102 Wis. 2d 423, 431, 307 N.W.2d 151 (1981). The defendant must come forward with evidence that he or she was intoxicated to an extent that materially affected his or her ability to form the requisite intent for the crime charged, or that negated

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

the existence of some other required mental state. ***Id.*** at 430. If the defendant comes forward with sufficient evidence of his or her impaired condition to place intoxication in issue, the State must prove that the defendant's consumption of alcohol did not negate the existence of a state of mind necessary to fix criminal liability. ***Id.***

¶4 As acknowledged by the State, the battery, resisting, and obstructing charges all contained mental state elements that could be negated by the defense of voluntary intoxication. Battery by a prisoner, the most serious of the charges against Russell, contains two mental state elements. First, to convict a defendant under WIS. STAT. § 940.20(1), the State is required to prove that the defendant "intentionally" caused bodily harm to the officer, which means that the defendant had the mental purpose to cause bodily harm to the officer or was aware that his or her conduct was practically certain to cause bodily harm to the officer. WIS JI—CRIMINAL 1228 (2002).[2] Second, the State is required to prove that the defendant knew that the victim was an officer of the detention facility and knew that the victim did not consent to the bodily harm. ***Id.***

¶5 The resisting and obstructing charges also contained a mental state element. To convict Russell of resisting an officer in violation of WIS. STAT. § 946.41(1), the State was required to prove that she knew that the officer was an officer acting in an official capacity and with lawful authority, and that she knew that her conduct would resist the officer. WIS JI—CRIMINAL 1765. Similarly, to convict Russell of obstructing an officer in violation of § 946.41(1), the State was required to prove that she knew that the officer was an officer acting in an official

[2] All references to the Wisconsin Jury Instructions are to the 2002 version.

capacity and with lawful authority, and that she knew that her conduct would obstruct the officer. WIS JI—CRIMINAL 1766.

¶6 The Criminal Jury Instructions Committee recommends that the instruction on the defense of voluntary intoxication be combined with the instruction on the crime charged, and that it be inserted at the point where the required mental state is defined. WIS JI—CRIMINAL 765 n.2.

¶7 At trial, the trial court instructed the jury on the charges of resisting and obstructing an officer, battery by a prisoner, and the lesser-included offense of simple battery. It also determined that an instruction on the voluntary intoxication defense was warranted. It instructed the jury on the defense as follows:

> As to Counts 1, 2 and 3 only you are instructed that evidence has been presented which if believed by you tends to show that the defendant was intoxicated at the time of the alleged offense. You must consider this evidence in deciding whether the defendant acted with the knowledge required for this offense. If the defendant was so intoxicated that the defendant did not have the required knowledge, you must find the defendant not guilty of the crime charged in that count. Before you may find the defendant guilty the State must prove by evidence that satisfies you beyond a reasonable doubt that the defendant had the knowledge as required for this offense.

¶8 The trial court read this one-paragraph instruction after it had instructed the jury on the elements of battery by a prisoner, the lesser-included offense of simple battery, resisting an officer, obstructing an officer, and disorderly conduct. Russell's trial counsel did not object to the instruction as given, nor to the trial court's failure to give the instruction in conjunction with the instruction for each offense to which it applied.

¶9 Following conviction, Russell moved for postconviction relief based on ineffective assistance of trial counsel, contending that her trial counsel

performed deficiently and prejudicially when she failed to object to the voluntary intoxication instruction on the ground that it addressed only the issue of knowledge, and did not advise the jury that it must also consider whether Russell was so intoxicated that she did not have the intent required for the offenses of battery by a prisoner or simple battery. Russell also contended that her trial counsel rendered ineffective assistance when she failed to object to the trial court's decision to read the voluntary intoxication instruction only after it read the substantive instructions for all of the charges, including the disorderly conduct charge to which the voluntary intoxication defense did not apply. Alternatively, Russell requested a new trial in the interest of justice on the ground that the real controversy was not fully tried. The trial court denied her request for postconviction relief and a new trial, albeit acknowledging that if it were doing it again, it probably would have included a separate reference to intent in the intoxication instruction. The trial court also acknowledged that it was probably "better form" to give the voluntary intoxication instruction following each element to which it applied.

¶10 Although this court may not directly review a jury instruction absent a timely objection, instructions may be revisited under claims of ineffective assistance of counsel and WIS. STAT. § 752.35, when the defendant claims that the real controversy has not been fully tried. ***State v. Marcum***, 166 Wis. 2d 908, 916, 480 N.W.2d 545 (Ct. App. 1992). To establish a claim of ineffective assistance, an appellant must show that counsel's performance was deficient and that it prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, an appellant must show that his or her counsel made errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. ***Id.*** "Even if deficient performance is found, judgment will

not be reversed unless the appellant proves that the deficiency prejudiced his defense." ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland***, 466 U.S. at 694.

¶11 Determining whether there has been ineffective assistance of counsel presents a mixed question of law and fact. ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 609, 516 N.W.2d 362 (1994). A trial court's findings of fact will be upheld unless they are clearly erroneous. ***State v. Krueger***, 2001 WI App 14, ¶5, 240 Wis. 2d 644, 623 N.W.2d 211. However, the final determinations of whether counsel's performance was deficient and prejudicial are questions of law which this court decides independently of the trial court. ***Id.***

¶12 On appeal, the State concedes that Russell's trial counsel performed deficiently when she failed to object to the voluntary intoxication instruction on the ground that it addressed only the issue of knowledge, and failed to advise the jury that it must also consider whether Russell was so intoxicated that she did not have the intent required to convict her of battery. However, the State disputes whether counsel's deficient performance prejudiced Russell's defense. We conclude that because the evidence as to Russell's intoxication was sufficient to raise an issue for the jury as to whether Russell was capable of forming the requisite intent to commit a battery, and because voluntary intoxication was Russell's sole defense, counsel's failure to object to the content of the instruction was both deficient and prejudicial.

¶13 In contending that counsel's deficient performance was prejudicial, Russell relies on ***Krueger***, 240 Wis. 2d 44, ¶15, which held that when defense counsel fails to object to a jury instruction which erroneously relieves the State of the burden of proving an essential element of the crime charged, prejudice exists under the ***Strickland*** test. Russell contends that ***Krueger*** is analogous because even though the jury was instructed on the intent element of the battery charge, it was not told that it was required to consider whether Russell was so intoxicated that she did not have the intent required for that crime.

¶14 After ***Krueger*** was decided, the Wisconsin Supreme Court held that a jury instruction which omits an element of the charged crime is not per se prejudicial and is subject to a harmless error analysis. ***State v. Harvey***, 2002 WI 93, ¶¶35-36, 254 Wis. 2d 442, 647 N.W.2d 189. We are bound by decisions of the Wisconsin Supreme Court. ***Livesey v. Copps Corp.***, 90 Wis. 2d 577, 581, 280 N.W.2d 339 (Ct. App. 1979). However, even though we reject Russell's argument that the defect in the voluntary intoxication instruction was per se prejudicial, we conclude that prejudice has been shown because there is a reasonable probability that, absent the error, the result of the proceeding would have been different.

¶15 As previously noted, a "reasonable probability" is a probability sufficient to undermine confidence in the outcome. ***Strickland***, 466 U.S. at 694. Prejudice exists for purposes of the ineffective assistance of counsel test if the facts presented at trial would have justified the submission of a defense to the jury, and counsel's failure to submit the defense is not the result of a rational determination based on the pertinent law and facts. *See* ***State v. Felton***, 110 Wis. 2d 485, 507, 329 N.W.2d 161 (1983).

¶16 In this case, voluntary intoxication was Russell's sole defense. It is also undisputed on appeal that the evidence was sufficient to warrant submitting the defense to the jury.

¶17 The State acknowledges that Russell was intoxicated, verbally abusive, and sometimes violent from the time of her arrest outside the tavern until she was physically carried into a cell. However, it points to other evidence indicating that Russell was capable of understanding the officers and cooperating. It asserts that the evidence therefore does not show a level of intoxication which would give rise to a reasonable probability that the jury would have found that she lacked the requisite intent to commit the battery.

¶18 Russell responds by referring to evidence indicating that she was highly intoxicated, out of control, acting crazily, and continued to act out even after being sprayed with pepper spray. Viewing the evidence in its totality, we conclude that the evidence is conflicting as to the degree and impact of Russell's intoxication. Because the evidence would have permitted the jury to find that Russell's intoxication negated the element of intent, the failure to properly instruct the jury on this issue undermines our confidence in the outcome of the trial and renders counsel's lack of objection prejudicial. *See* ***Felton***, 110 Wis. 2d at 513. Because Russell was therefore denied effective assistance of counsel when her attorney failed to object that the voluntary intoxication instruction did not refer to the intent element of battery, we reverse the portion of the judgment convicting her of battery by a prisoner.

¶19 As previously noted, Russell also contends that she was denied effective assistance of counsel when her attorney failed to object that the voluntary intoxication instruction was read only once, separated from the instructions

regarding the mental elements of each offense to which it applied, including the resisting and obstructing charges. Alternatively, she contends that she is entitled to a new trial on those charges in the interests of justice under WIS. STAT. § 752.35.

¶20 A new trial may be ordered under WIS. STAT. § 752.35 whenever the real controversy has not been fully tried, or whenever it is probable that justice has for any reason miscarried. ***State v. Wyss***, 124 Wis. 2d 681, 735, 370 N.W.2d 745 (1985). When the real controversy has not been fully tried, this court may exercise its power of discretionary reversal without first finding that there is a probability of a different result on retrial. ***Id.***

¶21 As already discussed, the voluntary intoxication instruction as given did not inform the jury that it was required to consider whether Russell was so intoxicated that she did not have the intent required to commit a battery. Moreover, contrary to the recommendation of the Criminal Jury Instructions Committee as set forth in WIS JI—CRIMINAL 765 n.2, the voluntary intoxication instruction given by the trial court was not combined with the instruction on the crime charged and inserted at the point where the required mental state was defined.[3] Rather than being inserted at the point where knowledge was defined in the resisting and obstructing charges, and where knowledge and intent were defined in the battery charges, the instruction was given after the trial court read the substantive instructions for all of the offenses, including the disorderly conduct

[3] Although trial courts are not compelled to follow the standard jury instructions, this court noted in ***State v. Foster***, 191 Wis. 2d 14, 26-27, 528 N.W.2d 22 (Ct. App. 1995), that the work of the Criminal Jury Instructions Committee is persuasive, and it is generally recommended that trial courts use the standard instructions.

charge to which the voluntary intoxication defense did not apply. As contended by Russell, the trial court's act of reading the instruction once, removed from the elements to which it applied, obscured the elements and offenses to which it applied.[4]

¶22 The voluntary intoxication instruction went to the heart of Russell's defense to the battery, resisting and obstructing charges, all of which arose from the same fact situation and involved related evidence. Because the placement of the instruction could have confused the jury as to which offenses it applied to, and did not clearly inform the jurors that they were required to consider whether Russell's intoxicated condition negated the knowledge required to convict her of resisting or obstructing an officer, we are not convinced that the real controversy has been fully tried. We therefore reverse the convictions for resisting an officer and obstructing an officer, and remand those matters for a new trial, along with the new trial on the battery charge.

By the Court.—Judgment affirmed in part and reversed in part; order reversed and cause remanded.

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

[4] The confusion was further compounded because the voluntary intoxication instruction as given by the trial court referred to three counts, even though the defense applied to four of the five offenses before the jury, namely, the offenses of battery by a prisoner, simple battery, resisting an officer, and obstructing an officer.