COURT OF APPEALS
DECISION
DATED AND FILED

June 25, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2746-CR **Cir. Ct. No. 01-CM-425**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID E. SANDERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Winnebago County: THOMAS J. GRITTON, Judge. *Reversed and cause remanded for a new trial.*

¶1 SNYDER, J.[1] David E. Sanders appeals from a judgment of conviction of two counts of misdemeanor bail jumping, contrary to WIS. STAT.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

§ 946.49(1)(a), and one count of misdemeanor obstructing an officer, contrary to WIS. STAT. § 946.41(1), and from an order denying his postconviction motions. Sanders contends that he is entitled to an interest of justice reversal of his bail jumping convictions because the jury was not instructed as to his entrapment defense and that his trial defense counsel was ineffective in failing to request an entrapment instruction. He further contends that the prosecutor wrongly referred to him as a September 11, 2001 terrorist and that the evidence was insufficient to support his conviction of obstructing an officer.

¶2 We first address the lack of jury instruction on entrapment. If the evidence establishes the defense of entrapment, a defendant is entitled to request and receive WIS JI—CRIMINAL 780 (1991), the entrapment jury instruction. Entrapment is the inducement of one to commit a crime not contemplated by him or her for the mere purpose of instituting criminal prosecution against him or her. ***State v. Hochman***, 2 Wis. 2d 410, 413, 86 N.W.2d 446 (1957). Entrapment is an affirmative defense bearing upon the guilt or innocence of the defendant. ***Id***. at 418. It is a question for the jury to determine. ***Id.*** The defense of entrapment pertains to the merits of the case and affects the substance of the charge. ***Id.*** at 419. The defense of entrapment is not a collateral matter such as an unlawful search. ***Id.*** at 420.

¶3 In Wisconsin, under the "subjective" test adopted by our supreme court concerning the defense of entrapment, the police conduct of inducement is a triggering factor but the controlling question is whether the defendant is a person otherwise innocent. ***State v. Saternus***, 127 Wis. 2d 460, 470, 381 N.W.2d 290 (1986). The focus of the defendant's burden of persuasion is on his or her particular state of mind as affected by the police conduct in the particular case. ***Id***. at 470-71. WISCONSIN JI—CRIMINAL 780, the entrapment instruction, is triggered

only when the jury concludes that the elements of the crime charged have been proved beyond a reasonable doubt, that there is a completed crime, including the intent to commit the crime. ***Saternus***, 127 Wis. 2d at 468-69.

¶4 Here, the jury was presented with the following evidence relevant to Sanders's affirmative entrapment defense. On May 18, 2000, Sanders was subject to two Fond du Lac county misdemeanor bail bonds, with a common condition that he have no contact with Marie Ann Tunks.[2] Tunks conceded at trial that she called Sanders on May 19, 2000, and set him up to be arrested for bail jumping:

> Q [Assistant District Attorney Daniels]: [Ms. Tunks], to be blunt, you set Mr. Sanders up to get arrested that day?
>
> A [Tunks]: Yes.

¶5 Ample evidence exists in support of Tunks's concession. Tunks testified that on May 18, 2000, she contacted and met with Officer Timothy Bakri concerning phone conversations with Sanders. Tunks knew that Sanders was to have no contact with her. However, Tunks stated that she would retrieve messages from Sanders's cell phone by using his security code. Tunks called Sanders's cell phone, rather than calling Sanders directly, so that he would not have to call her residence directly. Tunks told Bakri that she initiated the phone calls to Sanders's phone number, put in his security code number, got his recorded message and then left her response for him.

[2] Tunks later married and was identified at trial as Marie Ann Schier Tunks. We will refer to her as "Tunks" in this opinion.

¶6 Tunks initiated a May 19 call to Sanders, tape recorded Sanders's message at Bakri's direction and provided the tape to Bakri. On the May 19 taped message, Sanders told Tunks to meet him at the Oshkosh Lodge.

¶7 After obtaining the May 19 phone message, Tunks met with Bakri for the purpose of proceeding to the Oshkosh Lodge to meet Sanders. When Tunks arrived at the Oshkosh Lodge, she observed Sanders standing in the motel room doorway, he motioned to Tunks to come over, and she locked her car and walked toward Sanders. Tunks entered the room, after which there was a knock on the door. Sanders opened the door and Officers Bakri and Kelly Kent were present. Bakri asked Sanders for identification and placed him under arrest for bail jumping.

¶8 Officer Bakri testified that during his interview with Tunks on May 18, and at his request, Tunks dialed Sanders's phone number, put in a PIN number, listened to the phone message, and then replayed the message, allowing Bakri to listen. The message contained "preliminary information" for setting up a meeting at the Oshkosh Lodge. During the afternoon of May 19, Tunks told Bakri that she had obtained another recorded message from Sanders, that Sanders was in Oshkosh and that Tunks should call him. Bakri testified that "I told [Tunks] that was fine. Go ahead and give him a call and see if you can set up the appointment to meet in Oshkosh." Bakri told Tunks to tape record the phone call and meet him at a restaurant parking lot with the tape.

¶9 Bakri admitted that he had set up a plan with Tunks to arrest Sanders because he was not satisfied that the tape recordings alone were sufficient to charge Sanders with bail jumping. On May 19, Bakri told Tunks to call Sanders and set up a time to meet with Sanders. Bakri admitted that he never told Tunks

that she should not call Sanders. Based upon this record, trial defense counsel argued to the jury in closing that Tunks had admitted that the bail jumping contact at the motel was a setup "orchestrated between Mr. Bakri and Ms. Tunks to get Mr. Sanders arrested."

¶10 Establishing the defense of entrapment is a two-step process. ***State v. Schuman***, 226 Wis. 2d 398, 403, 595 N.W.2d 86 (Ct. App. 1999). The defendant must show by a preponderance of the evidence that he or she was induced to commit the crime. ***Id.*** If the defendant meets that burden of persuasion, then the burden falls on the State to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime. ***Id.*** Only "slight evidence" is required to create a factual issue and put the defense before the jury. ***Id.*** at 404.

> The [entrapment] evidence may be "weak, insufficient, inconsistent, or of doubtful credibility," ***United States v. Sotelo-Murillo***, 887 F.2d 176, 178 (9th Cir. 1989) (quoted source omitted); but the defendant is entitled to the instruction unless the evidence is rebutted by the prosecution to the extent that "no rational jury could entertain a reasonable doubt as to either element." ***United States v. Hoyt***, 879 F.2d 505, 509 (9th Cir. 1989).

Schuman, 226 Wis. 2d at 404.

¶11 Whether there are sufficient facts to allow the giving of an instruction is a question of law we review de novo. ***State v. Head***, 2002 WI 99, ¶44, 255 Wis. 2d 194, 219, 648 N.W.2d 413. We are satisfied that sufficient record evidence exists for Sanders to request and obtain the entrapment instruction. A trial court errs when it fails to give an instruction on an issue raised by the evidence. ***Id.*** If the trial court has erred in failing to give a jury instruction, we must assess whether the substantial rights of the defendant have been affected. ***Id.*** at 220; WIS. STAT. § 805.18(2). An error does not affect the substantial rights

of a defendant if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. ***Head***, 255 Wis. 2d 194, ¶44.

¶12 Here, the entrapment defense was not only raised but conceded by the State through the testimony of its witnesses. Sanders was adamant in his desire, expressed through his attorney, to raise and present the entrapment evidence in his defense against the bail jumping charges. Whether the trial court's failure to give an instruction, where warranted but not requested, is error would depend upon whether Sanders's substantial rights were affected.

¶13 If the jury had been provided with instructions on the law applicable to Sanders's entrapment defense, its deliberations may have been more favorable to the defense and may have raised reasonable doubt of his being guilty of bail jumping based upon the conceded entrapment evidence. We are unable to conclude that the failure to give the entrapment instruction did not affect Sanders's substantial rights to have the jury fully address the entrapment defense. We are mindful, however, that Sanders did not raise the trial court's lack of providing the entrapment instruction in his appeal. The entrapment defense instruction was not given because it was not requested. We therefore turn to Sanders's contention of ineffective counsel, that had trial defense counsel requested the entrapment instruction be given to the jury, the trial court would have given the instruction.

¶14 Whether the failure to request the entrapment instruction is ineffective assistance of counsel requires a postconviction ***Machner***[3] hearing where the reasons for the instruction not being requested are addressed. A

[3] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

defendant claiming ineffective assistance of counsel must prove both that his or her lawyer's representation was deficient and, as a result, that he or she suffered prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Johnson***, 133 Wis. 2d 207, 216-17, 395 N.W.2d 176 (1986). To prove ineffective performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. We "strongly presume" counsel has rendered adequate assistance. ***Id***. To show prejudice, a defendant must demonstrate that the result of the proceeding was unreliable. ***Id***. at 687. If a defendant fails on either aspect—deficient performance or prejudice—the ineffective assistance of counsel claim fails. ***Id***. at 697.

¶15 Whether an attorney provides a defendant ineffective assistance of counsel is a mixed question of law and fact. ***Johnson***, 133 Wis. 2d at 216. The trial court's findings of fact will be upheld unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). Whether proof satisfies either the deficiency or the prejudice prong is a question of law that this court reviews de novo. ***Id.***

¶16 Trial counsel conceded at the ***Machner*** hearing that he "never made the request for an entrapment instruction in this case." Trial counsel stated that Sanders thought that he was entrapped and that Sanders "made a significant issue" about entrapment but that trial counsel did not discuss the entrapment jury instruction or the rationale concerning the propriety of the instruction with Sanders.

¶17 Trial defense counsel stated that while he had not discussed the request for an entrapment instruction with Sanders, he had discussed it with his

law associate who "advised [trial counsel] that it was, it's pretty difficult to get that instruction." To the contrary, we conclude above that the trial court would have been obligated as a matter of law to give the entrapment instruction to the jury and that the instruction would have been given if requested.

¶18 The trial court determined that trial defense counsel was aware of the entrapment defense, that he had discussed the entrapment defense with a legal colleague and that he had discussed the entrapment defense with Sanders. However, trial counsel had never shown Sanders the instruction and, without consulting Sanders, had decided that the burden imposed on Sanders by the instruction was too high. The trial court concluded that the decision to not request the instruction was a tactical decision "that should be made by the lawyer, not by the client." Accordingly, the trial court denied Sanders's ineffective assistance of counsel motion.

¶19 In ***State v. Divanovic***, 200 Wis. 2d 210, 224, 546 N.W.2d 501 (Ct. App. 1996), we acknowledged that counsel's requirement to consult with a defendant invokes an issue of whether the defendant was provided full advocacy representation. SUPREME COURT RULE 20:1.2, entitled "Scope of representation," recites in part that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation …." The comment to that Rule provides that such limits on the objectives of representation must follow consultation between the lawyer and the client. SCR 20:1.2 cmt.; ***Divanovic***, 200 Wis. 2d at 224. Here, Sanders was not consulted about the entrapment instruction decision in spite of the affirmative defense being established by the evidence and after Sanders had expressed a desire to his counsel that the entrapment defense be fully presented to the jury.

¶20 We conclude that requesting jury instructions specific to an established affirmative defense is necessary to obtain a fundamental defense objective. Counsel must follow a defendant's instructions on a fundamental defense objective. ***Divanovic***, 200 Wis. 2d at 224-25. Trial counsel was obligated to consult with Sanders concerning a request for the entrapment instruction. Because the entrapment defense was sufficiently raised by the evidence and expressed in trial counsel's argument to the jury, the lack of an instruction request was also a flag to the trial court to consider at the instruction conference. We are satisfied, however, that because Sanders is entitled to a new trial in the interest of justice, we need not address these appellate considerations any further.

¶21 Sanders is entitled to a new trial in the interest of justice because the failure to provide the jury with the entrapment defense instruction prevented the real controversy from being tried. WISCONSIN STAT. § 752.35 allows us to reverse a judgment if it appears from the record that the real controversy has not been fully tried or it is probable that, for any reason, justice has miscarried. Here, the jury was unable to fully deliberate on the issue of entrapment because it was never advised of the applicable law on entrapment. Had Sanders agreed to not advise the jury on the standards for entrapment, a different outcome might be compelled. But that is not the case here. This decision was made without consultation with Sanders.

¶22 Because the jury was unable to deliberate the issue of entrapment within the framework of the applicable law, we reverse and remand in the interest of justice. Furthermore, because the obstruction charge was so closely interwoven

with the bail jumping charges, and because we are vacating those convictions, we reverse the obstruction conviction as well and remand for retrial at the same time.[4]

By the Court.—Judgment and order reversed and cause remanded for a new trial.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

[4] Sanders also argues that the prosecutor wrongly referred to him as a September 11, 2001 terrorist and there was insufficient evidence to convict him of obstruction. Because we are reversing all the convictions in the interest of justice, we need not address these arguments. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).