COURT OF APPEALS
DECISION
DATED AND RELEASED

August 15, 1995

No. 94-2881-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN J. KEIZER,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Steven J. Keizer appeals from the judgment of conviction for first-degree intentional homicide, and from the trial court's denial of his motion for postconviction relief. He argues that the trial court's modification of the involuntary intoxication jury instruction was improper and relieved the State of its burden of proving intent. He also argues that trial counsel was ineffective for failing to present expert testimony on intoxication. We affirm.

At his jury trial, Keizer did not dispute that he had strangled his wife, put her in a closet, and waited two or three days before telling the police. His defense, however, was that he had ingested large amounts of cocaine and alcohol that had caused him to suffer a "blackout." He maintained that he did not remember killing his wife and did not intend to do so.

The trial court instructed the jury on first-degree intentional homicide and first-degree reckless homicide. However, the trial court declined to give the standard jury instruction on voluntary intoxication as Keizer had requested. As tailored to this case, the standard instruction would have read:

> In deciding whether the defendant acted with the intent to kill, you must consider the evidence that he was intoxicated at the time of the alleged offense. If the defendant was so intoxicated that he did not intend to kill, you must find him not guilty of first-degree intentional homicide. Before you may find the defendant guilty, the State must prove by evidence that satisfies you beyond a reasonable doubt that the defendant intended to kill.

WIS J I—CRIMINAL 765. Instead, the trial court instructed:

> In deciding whether the defendant acted with the intent to kill, you *may* consider any evidence that he *may have been intoxicated or in a drugged condition* at the time of the alleged offense. *However, the fact that the defendant's intoxicated or drugged condition may have reduced his inhibitions or made it easier for him to commit the crime is not, by itself, material.* On the other hand, if the defendant was so intoxicated *or* drugged that he was incapable of forming the intent to kill, then he is not guilty of first degree intentional homicide. It is up to you to determine the extent, *if any*, to which the defendant's intoxicated *or* drugged condition *may have* affected his ability to form the necessary intent. You are the sole judges of the facts, and you must not

> find the defendant guilty unless you are satisfied beyond a reasonable doubt that the defendant intended to kill.

(Emphasis added to those portions Keizer challenges on appeal.)

Keizer variously argues that the modified instruction relieved, shifted, or lowered the State's burden of proving intent to kill. Specifically, he contends that the trial court erroneously (1) changed the word "must" to "may;" (2) converted "that he was intoxicated" to "that he may have been intoxicated or in a drugged condition;" (3) added an instruction telling the jury that "the fact that the defendant's intoxicated or drugged condition may have reduced his inhibitions or made it easier for him to commit the crime is not, by itself, material;" (4) used rhetorical and comparative words, "however," "on the other hand," "if any," and "may have" that conveyed skepticism about the intoxication defense; and (5) misstated evidence by twice referring to "intoxicated *or* drugged" when his theory of defense depended on the "synergistic effect" of alcohol and cocaine in combination.

Recently we considered a similar challenge to a modification of the standard voluntary intoxication instruction where the trial court also converted "must" to "may." As we explained:

> A trial court has wide discretion in developing the specific language of jury instructions. Further, the trial court's instructions do not have to conform exactly to the standard jury instructions. Nevertheless, the work of the Criminal Jury Instructions Committee is persuasive and, generally, it is recommended that trial courts use the standard instructions because they do represent a painstaking effort to accurately state the law and provide statewide uniformity. Because the standard instructions are not infallible, it is appropriate for a trial court to modify them when necessary to fully and fairly state the law.

State v. Foster, 191 Wis.2d 14, 26-27, 528 N.W.2d 22, 27 (Ct. App. 1995) (citations omitted). Here, as in ***Foster***, we conclude that the modified instruction provided an inaccurate statement of law. The proper instruction would have instructed the jury that it "'must consider the evidence regarding *whether* the defendant was intoxicated at the time of the alleged offense.'" ***Foster***, 191 Wis.2d at 28, 528 N.W.2d at 28 (emphasis in original).

We are not convinced, however, that any other portions of the trial court's modified instruction misstated the law. The words that Keizer considers to be rhetorical, comparative, and skeptical actually brought the modified instruction closer to the meaning of an accurate instruction—i.e., the jury must consider evidence of "whether" the defendant was intoxicated, not "that" he was intoxicated. Further, the words, "by itself," preserved the legal accuracy of the trial court's instruction on the materiality of the evidence of intoxication.

Finally, given that Keizer's evidence and argument repeatedly pointed to the combined effect of alcohol and cocaine, the trial court properly could have instructed the jury regarding Keizer's alleged intoxication from alcohol *and* cocaine. Given, however, that there was never any issue of whether Keizer's alleged intoxication resulted from alcohol *or* cocaine rather than from the two combined, we do not see how the jury could have been misled in any way by the trial court's references to his "intoxicated *or* drugged condition."

Thus, we conclude that the trial court's modified instruction was erroneous because it told the jury that it "may consider any evidence that he may have been intoxicated or in a drugged condition" instead of that it "must consider the evidence regarding whether the defendant was intoxicated and/or drugged at the time of the alleged offense." We also conclude, however, that the trial court's other modifications to the standard instruction brought the modified instruction's meaning closer to an accurate statement of the law under ***Foster***.

Whether an erroneous instruction violates a defendant's right to due process presents a question of law subject to *de novo* review. ***State v. Pettit***, 171 Wis.2d 627, 639, 492 N.W.2d 633, 639 (Ct. App. 1992). As we explained in ***Foster***:

> In reviewing an error in the instructions, we do not view the challenged word or phrase in isolation. Rather, jury instructions "must be viewed in the context of the overall charge." Relief is not warranted unless the appellate court is "persuaded that the instructions, when viewed as a whole, misstated the law or misdirected the jury" in the manner asserted by the challenger. Where a criminal defendant claims that the jury instructions violated constitutional due process, the issue is whether there is a reasonable likelihood that the jury applied the instruction in a way that violates the defendant's rights. In making that assessment, we consider the challenged portion of the instructions in context with all other instructions provided by the trial court.

Foster, 191 Wis.2d at 28, 528 N.W.2d at 28 (citations omitted).

The variations from the standard instruction did not undermine the jury's understanding of the burden of proof. Within the modified instruction the trial court accurately explained that "you must not find the defendant guilty unless you are satisfied beyond a reasonable doubt that the defendant intended to kill." The trial court also instructed that the State had the burden of proof. The instruction clearly did not prejudice Keizer. Therefore, we conclude that there is no reasonable likelihood that the jury applied the modified instruction in a way that violated Keizer's rights.

Keizer next argues that trial counsel was ineffective for failing to investigate and present expert testimony to support his voluntary intoxication defense. It is important to clarify, however, that Keizer does not challenge the trial court's ruling excluding potential testimony from treatment professionals or experts who worked directly with him.[1] Rather, although he also refers to

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[1] At the post-conviction hearing, the issue was clarified:

> THE COURT: Excuse me. If I understood [defense counsel], the challenge here is to the attorney's failure to offer general expert testimony on the issues of drug use and the effects of particular drugs. Is there any claim here ... or any challenge to the decision not to offer testimony of experts who specifically worked with Mr.

counsel's failure "to present expert testimony on [his] addiction," Keizer actually contends that counsel should have called an expert to testify on more general subjects: "memory effects during blackout, the combined effects of cocaine and alcohol and the relationship of intoxication to intent." The trial court concluded that counsel's performance was not deficient and, further, that the absence of such evidence "did not prejudice the defendant in any meaningful way."

To demonstrate ineffective assistance, a defendant must show both that counsel's performance was deficient and that the deficiency prejudiced the defense. ***State v. Moffett***, 147 Wis.2d 343, 352, 433 N.W.2d 572, 575 (1989). Questions of deficient performance and prejudice are questions of law independently reviewed on appeal. ***Id.*** at 352-353, 433 N.W.2d at 575.

The State offers detailed, persuasive arguments to refute Keizer's arguments regarding both deficient performance and prejudice. We note that Keizer's reply brief makes no attempt to counter any of the State's many convincing arguments on the ineffective assistance issue. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec.***, 90 Wis.2d 97,109, 279 N.W.2d 493, 499 (Ct. App. 1979) (opponent's arguments not refuted deemed admitted). We need not address each point because, clearly, the failure to adduce general expert testimony in this case could not have been prejudicial. Such testimony would not have addressed whether Keizer intended to kill his wife.

(..continued)

Keizer?

[DEFENSE COUNSEL]: No, Your Honor.

Later in the hearing, the trial court also explained:

> Well, just so it's clear, ... I understood the issue discussed at trial was the defendant's desire to present people who worked with him to testify to their opinion about his ability to form an intent or his ability to intend what he did here. So that dispute is different than the claim now that there should have been some general testimony offered on the issue of cocaine use and arguably some kind of hypothetical along the lines.

At the postconviction hearing, the defense offered testimony from Dr. Robert H. Verwert, a psychologist with expertise in drug and alcohol abuse. Although Dr. Verwert testified that an intoxicated person may experience blackouts, he could not say whether Keizer experienced a blackout during the time in question. Further, without specific information on the quantity of alcohol and cocaine Keizer had ingested, Dr. Verwert could not offer testimony to assist a jury in determining the likelihood that Keizer experienced a blackout. Most importantly, Dr. Verwert testified that although a blackout can affect one's memory of an event, a blackout does *not* deprive a person of his or her intent.[2] *See* ***State v. Flattum***, 122 Wis.2d 282, 296 n.5, 361 N.W.2d 705, 713 n.5 (1985) ("We are cognizant of the fact, as are many commentators, that alcohol[3] dampens inhibitions, but does not generally impair the ability to act purposively.").

Thus, as trial counsel testified at the postconviction hearing, the jury's less-informed assumptions about blackouts could have been far more favorable to the defense theory than an expert's testimony that would have disabused the jury of any notion that a blackout vitiates one's intent. Accordingly, we conclude that because general expert testimony in this case would not have precluded or even militated against Keizer's intent to kill, there was no reasonable possibility that the outcome of the trial would have been different had such an expert testified. ***State v. Dyess***, 124 Wis.2d 525, 370 N.W.2d 222 (1985). Thus, the absence of such evidence was not prejudicial.[4]

By the Court. – Judgment and order affirmed.

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

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[2] Dr. Verwert explained that a blackout is "the inability to recover stored memories," not the inability to initially perceive what later is forgotten.

[3] Dr. Verwert also testified that he had not heard of the combination of alcohol and cocaine producing any condition precluding one's intent.

[4] Keizer also argues that the expert testimony would have bolstered his credibility by confirming that his lack of memory of some of the events could have been the result of blackouts. In the absence of expert testimony that Keizer in fact did suffer blackouts, however, we are not convinced that such bolstering would have rendered a reasonable possibility that the outcome would have been different.