COURT OF APPEALS
DECISION
DATED AND FILED

May 17, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1001-CR **Cir. Ct. No. 2005CF4036**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KURT EDWARD PROCHASKA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Rock County: MICHAEL J. BYRON and RICHARD T. WERNER, Judges. *Affirmed*.

Before Lundsten, P.J., Vergeront and Blanchard, JJ.

¶1 PER CURIAM. Kurt Prochaska appeals a judgment convicting him of burglary to an occupied dwelling and criminal damage to property, as well as two postconviction orders. He argues that counsel provided ineffective assistance by failing to raise a defense of voluntary intoxication and that the

evidence was insufficient to support a felony level of damage to the burglarized home. For the reasons discussed below, we disagree and affirm.

BACKGROUND

¶2 Prochaska does not dispute the basic facts underlying the charges against him. He admits that late one evening he entered an occupied residence through a vent in the roof, and that, when he dropped though the vent opening into the attic, he broke through the ceiling of a room below. When an occupant confronted him, Prochaska said he needed to use the bathroom and he was looking for a place to sleep because it was cold outside.

¶3 There was some evidence presented at trial that Prochaska appeared heavily intoxicated on the night in question. However, counsel did not present evidence that a BAC test administered about two hours after the incident showed Prochaska's blood alcohol concentration to be 0.27, which meant that it was likely in the range of 0.31 at the time of the incident. If called, an expert witness would have opined that expected symptoms with a BAC level between 0.18 and 0.30 would be disorientation, mental confusion, dizziness, and exaggerated fear or other emotions, and that it would be "very difficult to formulate any coherent plan of action" at that level of intoxication and mental impairment. Counsel also did not request a jury instruction on voluntary intoxication.

¶4 During deliberations, the jury sent out a note asking whether the defendant had been tested for drugs or given a blood alcohol test and, if so, what the results were; what the temperature was at the time of the incident; and whether it had been raining that night. The court advised the jury that the evidence was closed.

¶5 With regard to damages, the homeowner and a contractor each testified that it would cost over $10,000 to repair the interior ceiling. There was no direct evidence of how much it had cost to repair damage to the roof vent caused by Prochaska's entrance. Repair to the vent was done right after the break-in.

STANDARDS OF REVIEW

¶6 Claims of ineffective assistance of counsel present mixed questions of law and fact. ***Strickland v. Washington***, 466 U.S. 668, 698 (1984). We will not set aside the circuit court's factual findings about what actions counsel took or the reasons for them unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel's conduct violated the defendant's constitutional right to have effective assistance of counsel is ultimately a legal determination, which this court decides de novo. ***Id.***

¶7 When reviewing the sufficiency of the evidence to support a conviction, this court will sustain the verdict "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that" it can be said as a matter of law that "no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." WIS. STAT. § 805.14(1) (2009-10);[1] ***State v. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (citation omitted). Thus, we will sustain a verdict that is supported by any credible evidence, even if we might consider contradictory evidence to be more persuasive, leaving the credibility of the witnesses and

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

drawing of inferences to the jury. ***Richards v. Mendivil***, 200 Wis. 2d 665, 670-72, 548 N.W.2d 85 (Ct. App. 1996).

DISCUSSION

Ineffective Assistance of Counsel

¶8 A claim of ineffective assistance of counsel has two parts: (1) deficient performance by counsel; and (2) prejudice resulting from that deficient performance. ***State v. Swinson***, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12. To prove deficient performance, a defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms and show that his or her attorney made errors so serious that he or she was essentially not functioning as the counsel guaranteed the defendant by the Sixth Amendment of the United States Constitution. ***Id.*** To prove prejudice, the defendant must show that counsel's errors rendered the resulting conviction unreliable in light of the other evidence presented. ***Id.*** We need not address both components of the test if the defendant fails to make a sufficient showing on one of them. ***Id.***

¶9 Prochaska contends that his trial counsel performed ineffectively by failing to request a jury instruction on voluntary intoxication, and failing to produce available evidence to support such an instruction. *See* WIS JI—CRIMINAL 765.[2] In Wisconsin, voluntary intoxication is a defense to a charged crime only

[2] Prochaska specifically suggests the following instruction:

(continued)

when it "[negates] the existence of a state of mind essential to the crime." WIS. STAT. § 939.42(2). In other words, the level of intoxication must have been so high as to render the defendant "utterly incapable of forming the intent requisite to the commission of the crime charged." ***State v. Guiden***, 46 Wis. 2d 328, 331, 174 N.W.2d 488 (1970).

¶10 Prochaska's defense at trial was that he entered the house with the intent to find a bathroom and/or a warm place to sleep, rather than with the intent to steal. We are satisfied that this was a reasonable defense strategy, given Prochaska's statements to the homeowner and the fact that he did not actually take anything once inside the home. This defense strategy would only have been undermined by an argument that Prochaska was so intoxicated that he lacked the ability to form an intent to steal. If he was so thoroughly drunk that he was "utterly incapable" of forming an intent to steal, he would have been, by the same token, "utterly incapable" of forming an intent to seek out a bathroom or a warm place to sleep. As the State points out, it is reasonable for counsel to avoid inconsistent defenses. *See* ***Lee v. State***, 65 Wis. 2d 648, 654, 223 N.W.2d 455 (1974).

> 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 [intent] required for this offense.
>
> If the defendant was so intoxicated that the defendant did not [intend to steal], you must find the defendant not guilty of [burglary].
>
> Before you may find the defendant guilty, the State must prove by evidence that satisfies you beyond a reasonable doubt that the defendant (describe mental state).

WIS JI—CRIMINAL 765.

¶11 Moreover, we are not persuaded that the evidence would have supported a voluntary intoxication defense. That is, even if Prochaska had introduced evidence of his actual BAC level and the general effects to be expected at that degree of intoxication, the fact remained that Prochaska had the wherewithal to climb up on a roof, remove a vent, and thereby enter a house. A contractor testified that removing an exhaust fan from the vent as Prochaska did would have involved considerable time and effort. In sum, Prochaska's actions did not show that he was "utterly incapable" of forming intent. To the contrary, they demonstrated that he had sufficient mental awareness to attempt to enter a house through a relatively strenuous break-in. Accordingly, we reject Prochaska's claim of ineffective assistance of counsel and his alternate theory that the real controversy was not tried because counsel did not attempt to present a voluntary intoxication defense.

Sufficiency of the Evidence

¶12 Prochaska concedes that there was sufficient evidence to convict him of misdemeanor damage to property. However, in order to rise to the level of felony damage to property, the amount of damages must exceed $2,500. WIS. STAT. § 943.01(2)(d). Prochaska argues that there was insufficient evidence for the jury to find that his admittedly intentional act of tampering with the roof vent resulted in more than $2,500 in damage, or in the alternative that his act of falling through an interior ceiling—which admittedly resulted in more than $2,500 in damages—was intentional.

¶13 The flaw in Prochaska's theory is that it was not necessary for the jury to find that Prochaska intended to do damage to the ceiling in particular when he dropped through the vent. A defendant need not "foresee or intend the specific

consequences of [an] act in order to possess the requisite intent." ***State v. Gould***, 56 Wis. 2d 808, 813, 202 N.W.2d 903 (1973). Rather, a defendant is "presumed to intend the natural and probable consequences of … acts voluntarily and knowingly performed." ***Id.***

¶14 A jury could conclude that a natural and probable consequence of jumping or dropping though a hole in a roof into the dark would be to exert a significant degree of force on whatever one landed upon. One foreseeable consequence was damage to the ceiling or anything else Prochaska landed on, even if he did not anticipate the specific consequence of breaking through the ceiling.

By the Court.—Judgment and orders affirmed.

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