OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

December 12, 2018

To:

Hon. Angela W. Sutkiewicz
Circuit Court Judge
615 N. 6th Street
Sheboygan, WI 53081

Joel Urmanski
District Attorney
615 N. 6th Street
Sheboygan, WI 53081

Melody Lorge
Clerk of Circuit Court
Sheboygan County Courthouse
615 N. 6th Street
Sheboygan, WI 53081

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Dennis M. Melowski
Melowski & Associates LLC
524 S. Pier Drive
Sheboygan, WI 53081

You are hereby notified that the Court has entered the following opinion and order:

2017AP2428-CR State of Wisconsin v. Benjamin J. Kerpe (L.C. #2016CF272)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Benjamin J. Kerpe appeals from his conviction for battery to a law enforcement officer, contending the circuit court erred by rejecting Kerpe's proposed modification to a special jury instruction requested by the State. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21

(2015-16).[1] Because Kerpe's proposed modification was both unnecessary and confusing, the court did not err. We affirm the judgment.

In April 2016, after his arrest and booking for drunken driving, Kerpe was led to a holding cell to await his release. As Sheboygan Police Officer Christopher Stephen held the cell door open and Kerpe entered, Kerpe struck Stephen in the mouth. Stephen's lip split and bled.

Kerpe was charged with battery to a law enforcement officer. *See* WIS. STAT. § 940.203(2).[2] To convict, the State had to prove Kerpe acted intentionally. Intoxication that negates the existence of intent can be a defense if it is involuntary; intoxication is not a defense if it is voluntary, as Kerpe's intoxication undisputedly was. *See* WIS. STAT. § 939.42.[3] Although the defense was not available to Kerpe, the State anticipated Kerpe would nonetheless attempt to link his voluntary intoxication with a lack of intent and therefore filed a motion in limine asking

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] Kerpe was also charged with operating a vehicle while under the influence, WIS. STAT. § 346.63(1)(a), operating a vehicle with a prohibited blood alcohol concentration, § 346.63(1)(b), and obstructing an officer, WIS. STAT. § 946.41(1). These offenses are not part of this appeal.

[3] At one time voluntary intoxication could be a defense under certain circumstances. *See* WIS. STAT. § 939.42 (2011-12). That defense was eliminated effective April 18, 2014. 2013 Wis. Act 307, §§ 2-4.

The current statute reads as follows:

> An intoxicated or a drugged condition of the actor is a defense only if such condition is *involuntarily* produced and does one of the following:
>
> **(1)** Renders the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act is committed.
>
> **(2)** Negatives the existence of a state of mind essential to the crime.

Sec. 939.42 (emphasis added).

the court to prohibit "any argument regarding voluntary intoxication as a defense for intent." The court took no action on this request before trial.

In opening statements, Kerpe's counsel told the jury that "[w]e are here today because there is a legitimate dispute between Mr. Kerpe and the [State] as to whether Mr. Kerpe battered a law enforcement officer, whether he intentionally acted with the mental capability to cause harm to Mr. Stephen." His counsel then raised Kerpe's intoxication:

> You're going to hear evidence of extreme intoxication in Mr. Kerpe's blood and you're going to see evidence of Mr. Kerpe's intoxication and you're going to hear from Mr. Kerpe that at the time he was interacting with Officer Stephen, he was intoxicated. But those go hand in hand. They provide a totality of the scenario as it existed on that night. And each and every one of those facts are important, they matter.

Outside the presence of the jury, the State reminded the court of its motion "that intoxication cannot be argued to nullify intent," and the State now planned to request a special jury instruction to that effect. Kerpe's counsel countered: "I indicated that Mr. Kerpe did not intend to cause harm to Officer Stephen, but I never said that was due to any level of intoxication."

Kerpe testified to drinking heavily that night before his arrest. He admitted being intoxicated when he struck Stephen. Kerpe denied, however, any criminal intent, calling his punch

> a miscalculated mistake…. Well, my intent—I mean, as somebody is opening up the door, it's very common for me to reach out and grab the door that's opening. I happen to, you know, open doors with the back of my hand because I have an issue with germs and I certainly don't want to be touching door knobs in the jail cell.
>
> ….

> You know, this is customary for me. I don't touch things with the open face of my hand with doors in public places.

After the close of evidence, the State asked for a special jury instruction because, without it, the jury might conclude Kerpe's voluntary intoxication left him incapable of forming the specific intent to cause Stephen bodily harm. Kerpe's counsel replied, "We are not arguing that Mr. Kerpe was so intoxicated that he couldn't form a mental state or an intent to have contact with Officer Stephen. What we're saying is he actually did have an intent; his intent was to have contact with the door, as opposed to Officer Stephen."

The circuit court believed that an instruction would be appropriate: "It does appear that his intoxication level is part of his defense, as he kept saying that many times, and that is the reason that he has given for what [Kerpe] would classify as a mistake." The State prepared and proposed the following instruction: "You are not to consider the Defendant's voluntary intoxication or his level of intoxication as a defense for the intent element of the crime charged."

Kerpe's counsel asked "to add a few lines," specifically proposing: "as a defense for the element of the crime charged negating the existence of the intent essential to the crime." Kerpe's counsel asserted that the State's proposed instruction "completely bars us from saying anything in regards to Mr. Kerpe intending to have contact with the door, which is readily distinguishable from having no intent whatsoever under the voluntary intoxication statute."

> [KERPE'S COUNSEL:] [Kerpe] didn't have an absence of a state of mind due to intoxication. He was able to recall the event, he was able to recall his intent and what his intent was; it just wasn't to have contact with the officer. So we are not saying he didn't have the intent.
>
> THE COURT: I think that's perfectly fine for you to make that argument, but I also think that this instruction is fine. I don't think it will confuse the jury.

Kerpe's counsel argued in closing that Kerpe lacked criminal intent:

> And [Kerpe] tells you, I remember that moment. I remember the officer telling me my dad was coming. I remember the officer telling me to go into that room. And I remember trying to push that door open with my knuckles because I don't like touching doors with my fingers because I'm a germaphobe.
>
> Now, you heard evidence that voluntary intoxication is not a defense. If Mr. Kerpe was so intoxicated that he could not form an intent to harm Officer Stephen, that is absolutely the case. And that is not a defense here. Mr. Kerpe recalls exactly what he was doing in that instance. He recalls walking up to the door, he recalls trying to push it open and he missed.

The jury found Kerpe guilty.[4] Kerpe now appeals.

Giving jury instructions based on the facts of the case is within the wide discretion of the circuit court. ***State v. Morgan***, 195 Wis. 2d 388, 448, 536 N.W.2d 425 (Ct. App. 1995). That discretion extends to both the language and emphasis of the instructions. ***State v. Dodson***, 219 Wis. 2d 65, 86, 580 N.W.2d 181 (1998). We uphold such decisions unless the discretion is erroneously exercised. ***Morgan***, 195 Wis. 2d at 448.

Instructions should fully and fairly inform jurors of the applicable rules of law and assist them in reasonably analyzing the evidence. ***Dodson***, 219 Wis. 2d at 86. If the instructions adequately cover the applicable law, it is not error to refuse a requested instruction even though that instruction was not erroneous. ***Morgan***, 195 Wis. 2d at 448.

Kerpe argues his defense centered on attacking the element of intent. He sought to show that he in no way intended to harm Stephen, but instead intended "to grasp the cell door." Kerpe

[4] Kerpe was also found guilty on two other charges and acquitted on another.

contends the given instruction may have led the jury to believe "that it could not consider intent because of [his] state of voluntary intoxication." His proposed modification to the instruction, Kerpe asserts, would have informed the jury that it should still consider Kerpe's intent, including Kerpe's claimed intent to grab the door.

Kerpe's argument makes little sense, as it addresses a problem that does not exist. Putting aside, for the moment, his proposed modification, we see nothing in the instruction given to the jury that was problematic, certainly nothing that barred Kerpe from presenting, or deterred the jury from accepting, his defense to the charge. Kerpe's defense was that he was able to form an intent and that his intent was to grab the door, negating any intent to punch and injure the officer. The instruction merely informed the jury that, as it was weighing the evidence on the element of intent, it was "not to consider" Kerpe's intoxication "as a defense for the intent element." That is, for the purpose of this crime and its element of intent, Kerpe's voluntary intoxication was not a defense for the intent element. The instruction did not minimize or eliminate intent as a necessary element, nor did it suggest that Kerpe was incapable of either forming an intent or forming the specific intent he offered in his defense—grasping at the cell door. The instruction was appropriate given Kerpe's arguments and factual focus on his intoxication, and the instruction was plain, unambiguous, and legally correct.

Moreover, we fail to see how his proposed modification or some version of it would have added clarity. With Kerpe's modification, the instruction would have provided as follows (modification in italics): "You are not to consider the Defendant's voluntary intoxication or his level of intoxication as a defense for the intent element of the crime charged *negating the*

existence of the intent essential to the crime." We are uncertain what this actually means.[5] We recognize the difficult and fast-paced circumstances trial counsel must work under generally and when drafting such proposed instructions specifically. But even viewing the proposed language in a way most favorable to Kerpe, at best it is redundant. The language is confusing and misleading, and would not have clarified the instruction, specifically as it related to Kerpe's factual defense.[6]

Kerpe's concern that the jury would avoid addressing the dispute over his intent is also unfounded because the other instructions adequately told the jury it must address it and how to do it: after listing each of the elements, the court explained Kerpe's not guilty plea required the State to prove every element beyond a reasonable doubt; the court then described in more detail each element, including the element of intent ("This requires that [Kerpe] acted with the mental purpose to cause bodily harm to Officer Christopher Stephen"); the court explained that the jury "cannot look in a person's mind to find intent," but that intent must be found, if at all, "from

[5] It appears that counsel believed the current statute, addressing only *involuntary* intoxication, was somehow applicable, given that the proposed language essentially tracked the statutory language. Kerpe's counsel argued that the proposed instruction "deviates from the statute when the statute is specifically addressing the state of mind." She argued that they be "able to insert … something regarding an actual state of mind as negating or incapable of distinguishing." Counsel further noted, "Because the way I read the intoxication statute, it clearly says that either the person has to be so intoxicated involuntarily that they're either rendered incapable of distinguishing right and wrong in regards to their actions or completely negating any existence of a state of mind essential to the crime." *See supra* footnote 3; *see also* WIS. STAT. § 939.42.

[6] For the same reasons we reject Kerpe's contention that he was denied an opportunity to present a theory of defense—the instruction given did not preclude him from presenting, and the jury from considering, his factual defense—that he intended to grab the door and not strike the officer. Moreover, Kerpe was merely reacting to a special instruction being requested by the State. While Kerpe suggests he may have offered further clarification of the proposed language, other than proposing that revision to the State's request, Kerpe does not point to any requests initiated by him for instructions on a theory of defense.

[Kerpe's] acts, words, and statements … and from all the facts and circumstances"; and the court informed the jury Kerpe is presumed innocent and it is the State's burden to prove him guilty beyond a reasonable doubt. *See* ***Morgan***, 195 Wis. 2d at 448 (it is no error to refuse a requested instruction if the other instructions adequately cover the applicable law).

Because we presume the jury followed these instructions, *see* ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989), Kerpe's denial of criminal intent and his related testimony were given due consideration by the jury. It simply chose not to believe him.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals