COURT OF APPEALS
DECISION
DATED AND FILED

September 24, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2758-CR **Cir. Ct. No. 2012CF708**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JACOB G. MAYER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County: ALLAN B. TORHORST, Judge. *Affirmed.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 REILLY, J. Jacob Mayer appeals his convictions for criminal damage to property and attempted burglary. Mayer argues that the court erred in refusing to give a voluntary intoxication instruction given the facts presented at his

jury trial. Mayer also argues "plain error" occurred when the prosecutor engaged in unprofessional conduct. We affirm Mayer's convictions. While the prosecutor's comments during closing arguments were unprofessional and improper, and warrant review by the Office of Lawyer Regulation, both the comments and the court's refusal to give the voluntary intoxication instruction were harmless as to their effect upon Mayer.

FACTS

¶2 On June 24, 2012, Mayer drank two to four bottles of rum with some friends. Hours later, video surveillance footage showed Mayer trying to enter a McDonald's and a closed BP gas station in Waterford. Police found damage to the McDonald's rear freezer door and to the glass front door leading into the BP. The latch on the freezer door was broken and pulled almost entirely out of the door. The front door to the gas station had been cracked by a cinderblock brick that was found lying next to the door.

¶3 Police responded to the McDonald's and then, on a witness's tip, to a nearby hotel where they found Mayer. Mayer appeared heavily intoxicated and emitted a heavy odor of intoxicants. Mayer swayed while standing and his answers to questions "were slurred, slow, he would stop his—his statement … half-way through … as if he forgot or lost track, and then he would either complete it with some prompting or by himself, you know, after a few seconds." Mayer "had to search for [an answer] in his mind" for "a couple of seconds" in response to police questions. Mayer's intoxication presented itself "from the initial contact" with officers "all the way through the arrest." Mayer "didn't make a whole lot of sense" and "didn't even know where he was." Mayer was charged

with two counts of attempted burglary and two counts of criminal damage to property.

¶4 Prior to trial, Mayer requested the court provide an instruction on voluntary intoxication to the jury. *See* WIS JI—CRIMINAL 765. The court refused, finding the evidence in the case was insufficient to give the instruction. The court, however, told Mayer he could "submit [intoxication] and argue it because your case is certainly built on that.… I'm not saying intoxication can't be argued."

¶5 At trial, Mayer offered his intoxication as a defense for the actions caught on video and as an explanation for why he lacked intent to commit the charged crimes despite those actions. Mayer's defense counsel told the jury in opening statements:

> The one thing that *I want the jury to focus on when looking at all the evidence, was there an intent on my client to enter the McDonald's and the BP? Was there an intent to steal?*
>
> Now, as I've indicated my client did throw a brick at the BP gas station. The reason is he was intoxicated, drunk, went up to the McDonald's windows first to see if they were open. Got frustrated, as a lot of drunk individuals, you know, have that in them. Throws a brick at—goes around to the BP, sees if they're open, frustrated, throws a brick. That's all. There's no further attempts. There's no further manipulation of the locks or anything of that sort.
>
> So the bottom line in this, is the duty—is the State has a duty to prove every element of every charge beyond a reasonable doubt. Now, if there is any doubt you would have to look at the evidence and figure that out.
>
> So as I'm wrapping this up, I'm telling you right up front my client did throw a brick. But he wasn't trying to get in; it's out of frustration. You have a drunk individual, barefoot, no socks, no nothing, running around. Nobody knows where he came from, nobody knows where he was going. And what we're going to be looking at is this individual is just there, frustrated. So as the State indicated, this is not evidence and what the State stated is

> not evidence either. But I want you to really focus on the videos and the pictures, and make a determination if the State has met its burden. I don't—the evidence I don't think meets the burden of attempted burglaries. (Emphasis added.)

¶6 When the time came for Mayer to testify, Mayer stated that he did not remember the actions or the motivations behind the actions for which he was criminally charged. Assistant District Attorney James D. Newlun took extreme exception to this testimony and sought to impeach Mayer by challenging him with the substance of defense counsel's opening statement:

> Q Did you hear your attorney's opening argument?
>
> A Yes, sir.
>
> Q Did you hear him say that you admit that you had walked around McDonald['s]?
>
> A I did.
>
> Q So you remember walking around McDonald's?
>
> A I do not.
>
> Q Okay. You heard him say that you were hungry and that you were looking for food. Did you tell him that?
>
> A I do not recall.
>
> Q Did you tell him that or did he lie to the jury when he said that you were there looking for food?
>
> A I did tell my attorney I was probably there for food.
>
> Q Okay. You're saying now you really don't remember.
>
> A I have no recollection after I'd started drinking up until I was in the back of the squad car.
>
> Q Do you remember throwing a brick?
>
> A No, sir.

> Q Did you hear your attorney say that you threw it because you were frustrated you couldn't get any food?
>
> A Yes, I do.
>
> Q Did you tell him that?
>
> A I told him I most likely did throw it.
>
> Q So when he said your intent was to get food, you really don't have a clue as you're testifying today, you don't know if you were trying to break that window or you were just throwing it because you were mad, right?
>
> A Correct.
>
> Q And if you were just mad, you could have thrown it anywhere except at a door, couldn't you have?
>
> A I suppose so.

¶7 Newlun moved for a mistrial after this exchange, claiming that defense counsel "flat out misrepresented [on opening] what he had been told by the Defendant." Newlun told the court that defense counsel said in his opening statement "this is what the evidence is going to show, this is what the evidence is going to show, this is what the evidence is going to show, when he knew full well that his client had no memory and his client told him he had no memory." According to Newlun, Mayer's counsel had committed "blatant, intentional misconduct."[1] The circuit court denied the motion for mistrial after reviewing the

[1] ADA Newlun needs to use and/or work on his listening skills. As noted by our emphasis of defense counsel's opening statement, defense counsel asked the jury to focus on Mayer's "intent" when "looking at all the evidence." "All the evidence" included the surveillance video showing Mayer trying to enter the BP and McDonald's.

We see little difference between defense counsel's statement and Newlun's characterization of the videotape evidence when he stated in his opening, "[W]hat the videos are going to show is the Defendant coming from the area of the broken freezer latch, trying both drive-through windows, throwing a block at a door, ultimately unsuccessful getting into any building, but—and then *realizing that the sound would have put people on to him*, taking off." (Emphasis added.) Both opening statements made inferences of alternate states of mind to explain Mayer's actions in the video evidence.

court reporter's notes of opening statements. The court concluded that defense counsel's opening statement "[f]airly presented what the evidence would show and that evidence showed what would be—what was stated by [defense counsel] in the opening."

¶8 Undeterred by the court's denial of his motion for a mistrial, Newlun began his closing argument by attacking Mayer's defense counsel:

> Ladies and gentlemen, if you remember, yesterday I started my opening telling you that nothing that I say during the trial is evidence, nothing [defense counsel] says is evidence. And I say that because the opening is intended to tell you what the evidence will show. And sometimes the evidence doesn't always come in exactly as expected. But I never expected such a whole-hearted fabrication of an opening as was given by the defense. Never expected that.
>
> He told you, Well, the evidence you hear is that the Defendant was there but, well, he was just looking for food. That evidence didn't come in.
>
> He told you, Yeah, the Defendant was there but he threw the brick out of frustration, not because he was intending to come in. That never came in. There was no evidence of that. Where would he have gotten what the Defendant's intent was? From the Defendant, where else? It wasn't in any report, it wasn't in any cop—cop's report or testimony.
>
> And how would he know the Defendant's intent except from the Defendant and the Defendant testified he didn't remember the event.
>
> So, in short, either [defense counsel] flat out lied to you on opening as to what the evidence would show or the Defendant lied to you on the stand in testifying that he had no memory. It's one or the other. There's no other way to look at it.
>
> Either way, I wouldn't believe either of them as far as I can throw them.

¶9 Defense counsel did not object to this closing argument. Mayer was found guilty of one count of attempted burglary and two counts of criminal damage to property.

VOLUNTARY INTOXICATION

¶10 Voluntary intoxication as recognized by WIS. STAT. § 939.42(2) (2011-12) at the time of Mayer's trial provided that an "intoxicated or drugged condition" is a defense if it "[n]egatives the existence of a state of mind essential to the crime."[2] A criminal defendant is entitled to a jury instruction on voluntary intoxication "only where, viewing the evidence in the light most favorable to the defendant, a jury could reasonably have found that he [or she] was so intoxicated that he [or she] lacked the intent" to commit the crime. ***Larson v. State***, 86 Wis. 2d 187, 195, 271 N.W.2d 647 (1978). We review de novo whether the evidence requires giving a jury instruction, ***State v. Mayhall***, 195 Wis. 2d 53, 57, 535 N.W.2d 473 (Ct. App. 1995), but we will not order a new trial due to a court's erroneous instruction if it was harmless, i.e., if it is clear beyond a reasonable doubt a rational jury would have convicted the defendant absent the error, ***State v. Harvey***, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189.

¶11 Mayer argues that the court erred in not giving the instruction as there was sufficient evidence of his intoxication and the error was harmful "in light of the limited evidence produced at trial to prove Mayer's intent." We do not quibble with the court's refusal to give the instruction; however, even if we were to find the court erred, the jury was not misled by the error. Mayer was permitted

[2] 2013 Wis. Act 307 eliminated voluntary intoxication as a criminal defense as of April 18, 2014.

to argue exactly what the instruction provides, and the evidence presented supported an inference that Mayer intended to commit the crimes for which he was convicted.

¶12 Voluntary intoxication is a "failure of proof" defense that acknowledges that evidence of intoxication should be considered in determining whether a defendant acted with the required state of mind for a criminal act. *See* WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 9.1(b) at 11 (2d ed. 2003). State of mind, however, is always an issue for the jury where it is an element of the crime; intoxication will always be relevant when it goes to an element of the charged crime; and juries can naturally be expected to consider the effect of a defendant's intoxication on his or her state of mind. *See* ***State v. Flattum***, 122 Wis. 2d 282, 295, 361 N.W.2d 705 (1985) ("Exposure to the effects of … intoxicants upon state of mind is a part of common human experience which fact finders can understand and apply; indeed, they would apply them even if the state did not tell them they could." (citation omitted)). The voluntary intoxication instruction thus simply emphasizes that the defendant's mental state is the ultimate issue to which the jury must direct its attention.[3]

[3] WISCONSIN JI—CRIMINAL 765 reads as follows:

> 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 (describe mental state) required for this offense.
>
> If the defendant was so intoxicated that the defendant did not (describe mental state), you must find the defendant not guilty of (charged crime).

(continued)

¶13 In the present case, the State had the burden to prove beyond a reasonable doubt that Mayer had the mental purpose to damage BP and McDonald's property or was aware his conduct was practically certain to cause that result and that Mayer had the mental purpose to enter and to take and carry away property from BP and McDonald's. *See* WIS JI—CRIMINAL 1400, 1421. The jury was instructed on this standard. Mayer's lack of mental purpose was the crux of defense counsel's opening statement: "The one thing that I want the jury to focus on when looking at all the evidence, was there an intent on my client to enter the McDonald's and the BP? Was there an intent to steal?"

¶14 The jury was instructed to find intent "from all the facts and circumstances in this case bearing upon intent." The jury heard undisputed testimony regarding Mayer's heavy level of intoxication, and Mayer argued to the jury that his intoxication clouded his judgment such that his actions represented his frustration at his failure to get into the McDonald's and BP rather than an intent to perform criminal acts. The jury also had plenty of evidence from which to infer Mayer's intent. Mayer's intent was demonstrated by four separate attempts to get into the BP and McDonald's through doors and windows that were locked and closed and by his having "to travel a ways to get the block that he attempted to throw through the [BP] window." The witnesses's testimony as well as video surveillance evidence of Mayer's actions—which showed him pushing at McDonald's drive-through windows and throwing a brick at BP's glass door—was strong evidence that Mayer intended to enter the property and steal. It is clear

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> 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).

beyond a reasonable doubt given the physical evidence presented, the surveillance video, and witnesses' testimony that a rational jury would have convicted Mayer if given the voluntary intoxication instruction.

PROSECUTORIAL MISCONDUCT

¶15 Supreme Court Rule 62.02(1)(c) provides that lawyers shall "[a]bstain from making disparaging, demeaning or sarcastic remarks or comments about one another." Furthermore, a prosecutor may not "go[] beyond reasoning from the evidence and suggest[] that the jury should arrive at a verdict by considering factors other than the evidence." ***State v. Neuser***, 191 Wis. 2d 131, 136, 528 N.W.2d 49 (Ct. App. 1995). ADA Newlun violated these principles during his closing argument when he told the jury that (1) defense counsel's opening statement was "a whole-hearted fabrication;" (2) "either [defense counsel] flat out lied to you on opening as to what the evidence would show or [Mayer] lied to you on the stand in testifying that he had no memory;" and (3) "Either way, I wouldn't believe either of them as far as I can throw them." Newlun disparaged an officer of the court (defense counsel) by improperly questioning his honesty.

¶16 Newlun's unprofessionalism is compounded by the fact that he made the comments after the circuit court, which had reviewed the transcript of opening statements, told Newlun he was wrong about what defense counsel had said in his opening. The court was correct. The purpose of an opening statement is to advise the jury of the questions of fact in the case so as to prepare them for the evidence they will hear. ***Beavers v. State***, 63 Wis. 2d 597, 606, 217 N.W.2d 307 (1974). This may include inferences to be drawn from the evidence presented at trial. *See* ***State v. Nemoir***, 62 Wis. 2d 206, 213, 214 N.W.2d 297 (1974). Defense counsel's theory presented in his opening statement that Mayer may have thrown the brick

out of frustration because he could not get food was based on Mayer's pretrial statements to counsel that "I was probably there for food" and "I most likely did" throw the brick. Defense counsel made a proper inference based on the evidence likely to be introduced at trial, and Newlun was wrong to call this opening statement "a whole-hearted fabrication" and defense counsel a liar.

¶17 Mayer did not object to Newlun's closing argument at trial, and therefore, he asks us to review Newlun's comments for plain error. *See* ***State v. Mayo***, 2007 WI 78, ¶42, 301 Wis. 2d 642, 734 N.W.2d 115. To constitute plain error, the defendant must show that the unobjected-to error is "fundamental, obvious, and substantial," after which the burden shifts to the State to show the error was harmless. ***State v. Jorgensen***, 2008 WI 60, ¶45, 310 Wis. 2d 138, 754 N.W.2d 77. We find the unobjected-to statements by Newlun to be fundamentally, obviously, and substantially improper, but the statements do not constitute plain error as they were harmless. *See* ***Mayo***, 301 Wis. 2d 642, ¶¶42-43. We surmise that Newlun's comments only resulted in making Newlun appear unprofessional in the discharge of his duties.

¶18 We set forth the facts showing guilt in ¶14. Additionally, jurors were instructed that the remarks of attorneys are not evidence and "[i]f the remarks suggest certain facts not in evidence, disregard the suggestion"; that closing "arguments and conclusions and opinions are not evidence" and that they should draw their own conclusions from the evidence; that they are the sole judges of the credibility and believability of the witnesses and the weight to be given each witness's testimony; and that the defendant's testimony should be judged by the same factors as the testimony of other witnesses. We presume the jury followed the instructions given to it. ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989). Given the evidence before the jury and the reasonable

inferences that could be made from that evidence as well as the instructions given to the jury on how to treat closing arguments and issues regarding credibility, we find beyond a reasonable doubt that a rational jury would have come to the same conclusion regardless of Newlun's improper remarks.

¶19 We are bound by the code of judicial conduct, which requires that "[a] judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the rules of professional conduct for attorneys should take appropriate action." SCR 60.04(3)(b). Therefore, we direct the clerk of this court to send a copy of this opinion to the Office of Lawyer Regulation for any action it deems appropriate.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.