COURT OF APPEALS
DECISION
DATED AND FILED

December 9, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-1154

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

COUNTY OF ADAMS,

PLAINTIFF-RESPONDENT,

V.

DANIEL M. CIESLA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Adams County: DUANE H. POLIVKA, Judge. *Affirmed.*

¶1 DEININGER, J.[1] Daniel Ciesla appeals a judgment convicting him of operating a motor vehicle while under the influence of an intoxicant (OMVWI). The trial court determined that, under a stipulation of the parties, the elements of OMVWI had been proven, and further that Ciesla was not entitled to have a jury

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

determine whether he had been entrapped into committing the offense. Ciesla contends that the trial court erred in refusing his request for a jury instruction on the defense of entrapment. After reviewing the evidence of the alleged entrapment in the light most favorable to Ciesla, we conclude that the trial court did not err in directing a guilty verdict. Accordingly, we affirm.

BACKGROUND

¶2 Ciesla and his girlfriend traveled from Chicago to the Federal Correctional Institution (FCI) in Oxford, Wisconsin, to visit an acquaintance who was incarcerated there. The girlfriend drove Ciesla's automobile, and during a stop along the way, Ciesla drank a "couple beers" and a "few shots." After arriving at the institution and undergoing the prison's screening process, they were ushered into a waiting room. A waiting room officer noticed that Ciesla smelled of alcohol and contacted his supervisor. The supervising lieutenant approached Ciesla and asked him if he had been drinking. After Ciesla admitted to consuming "a couple of beers," the lieutenant informed him that, pursuant to prison policy, he would not be allowed to remain on the institution's grounds.

¶3 Ciesla informed his companion that he had to leave the institution, asked her for the car keys and said he would wait for her in the car. The lieutenant told Ciesla that he would not be allowed to wait in the car and that he must leave the institution's premises. Ciesla then told his friend that he would meet her back at the institution later.

¶4 The lieutenant escorted Ciesla to the front entrance of the institution and watched him as he walked away from the building. Ciesla did not walk off the institution's grounds as the lieutenant had expected him to do; instead, Ciesla got into his car and drove away. Aware that Ciesla was probably intoxicated, the

lieutenant became concerned that Ciesla might injure someone while driving and contacted the Adams County Sheriff's Department. A county deputy located Ciesla, stopped him, and arrested him for OMVWI.

¶5 Ciesla moved to dismiss the citation on the grounds of entrapment, but the trial court denied the motion following evidentiary hearings on the issue. At the beginning of the trial to a jury, the parties stipulated that Ciesla had driven a vehicle on a county highway while under the influence of alcohol.[2] After admitting the transcripts of testimony from the two previous hearings on the entrapment issue, Ciesla again moved to dismiss, and in the alternative, requested that the jury be instructed on the entrapment defense. The County moved for a directed verdict of guilty. The trial court denied Ciesla's motion to dismiss and directed a verdict finding Ciesla guilty of OMVWI. Ciesla appeals the subsequent judgment convicting him of OMVWI.

ANALYSIS

¶6 Ciesla was charged with violating a county traffic ordinance. A proceeding to enforce a municipal ordinance is a civil action, and a directed verdict of guilty may be entered if the elements of the offense are indisputably proven and there is no evidence to sustain a defense. *See* ***City of Omro v. Brooks***, 104 Wis.2d 351, 358-59, 311 N.W.2d 620, 624 (1981); *see also* ***City of Milwaukee v. Bichel***, 35 Wis.2d 66, 68-69, 150 N.W.2d 419, 421 (1967). A

[2] The unusual trial procedure—a jury trial on stipulated documentary evidence and transcripts of prior hearings—was apparently undertaken so that Ciesla could preserve for appeal his claim that he was entitled to have a jury decide whether he had been entrapped. The trial court had already ruled, based on the facts adduced during pretrial hearings, that Ciesla would not be allowed to present an entrapment defense at trial. The County apparently agreed to the truncated trial procedure in order to allow Ciesla to avoid the guilty-plea-waiver rule. *See* ***County of Racine v. Smith***, 122 Wis.2d 431, 437, 362 N.W.2d 439, 442 (Ct. App. 1984).

motion for a directed verdict may not be granted "unless the court is satisfied that, considering all credible evidence … in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party." Section 805.14(1), STATS.

> Because a circuit court is better positioned to decide the weight and relevancy of the testimony, an appellate court "must also give substantial deference to the trial court's better ability to assess the evidence." … An appellate court should not overturn a circuit court's decision [granting a directed verdict] unless the record reveals that the circuit court was "clearly wrong."

Weiss v. United Fire & Cas. Co., 197 Wis.2d 365, 388-89, 541 N.W.2d 753, 761 (1995) (citations omitted). In determining whether the trial court was "clearly wrong" in directing a verdict, we consider whether the evidence is "so clear and convincing that a reasonable and impartial jury … could reach but one conclusion." ***Liebe v. City Fin. Co.***, 98 Wis.2d 10, 18-19, 295 N.W.2d 16, 20 (Ct. App. 1980).

¶7 In order to find a defendant guilty of OMVWI, a fact finder must conclude that the defendant was (1) operating a vehicle on the highway, and (2) under the influence of an intoxicant while doing so. *See* ***Monroe County v. Kruse***, 76 Wis.2d 126, 131, 250 N.W.2d 375, 377 (1977). In addition, the fact finder must be convinced that the defendant has not established a defense to the charge. Ciesla insists that he was entrapped into driving under the influence of alcohol, and that the trial court erred in refusing to allow him to present his defense of entrapment to the jury. Specifically, Ciesla argues that the court should have given an instruction on entrapment to the jury and allowed the jurors to decide whether he had been entrapped into OMVWI. We conclude, however, that Ciesla presented no credible evidence from which a jury could find that he was

entrapped, and accordingly, the trial court did not err in refusing to submit the entrapment issue to the jury.

¶8 The defense of entrapment is available "whenever a law enforcement officer has used improper methods to induce [a defendant] to commit an offense and by the use of such methods has succeeded in inducing him to commit an offense which he was not otherwise disposed to commit." WIS J I—CRIMINAL 780. In order to establish a defense of entrapment at trial, a defendant must show by a preponderance of the evidence that he was induced to commit the offense. *See* ***State v. Hilleshiem***, 172 Wis.2d 1, 8, 492 N.W.2d 381, 384 (Ct. App. 1992). A defendant is induced to commit an offense when the intent behind the offense originated in the mind of the law enforcement officer. *See* ***State v. Saternus***, 127 Wis.2d 460, 469, 381 N.W.2d 290, 293-94 (1986).

¶9 A court is not required to submit a jury instruction on entrapment if the evidence does not reasonably require it. *See* ***State v. Schuman***, 226 Wis.2d 398, 403, 595 N.W.2d 86, 89 (Ct. App. 1999). While we view the evidence in the light most favorable to the defendant, we will only reverse a trial court's denial of a requested jury instruction if there is "some evidence" to support the elements of the defense. *See* ***id***. at 403-04, 595 N.W.2d at 89-90. Considering the evidence in the light most favorable to Ciesla, we conclude that there is no evidence to support the defense of entrapment because there is no evidence that a law enforcement officer induced Ciesla to drive under the influence of alcohol. The FCI lieutenant did not induce Ciesla's intoxicated state: Ciesla was already intoxicated when he arrived at the institution. Neither did the lieutenant induce Ciesla to drive in that condition. The lieutenant simply informed Ciesla that he could not remain on the institution's grounds. Ciesla's decision to retrieve the car keys and drive away was his and his alone.

¶10 Ciesla argues that being asked to leave the institution's grounds is tantamount to being induced to drive under the influence, and he insists that he was left with no other choice after being asked to leave the premises. After reviewing the record, however, we conclude that there were several other options available to Ciesla. He could have asked his companion to drive him to a place where he could wait for her to finish her visit. He could have used the pay phone near the front entrance of the institution to call a taxicab, or he could have walked 150 yards to the edge of the institution's grounds to wait for his friend to complete her visit.

¶11 In short, the lieutenant did not induce Ciesla to get into his car and drive off the institution's grounds. The lieutenant did not order or even suggest that Ciesla drive away, and he testified that he had "no idea that [Ciesla] was going to drive off in [his] vehicle."[3] The lieutenant simply informed Ciesla that he would not be permitted to remain on the institution's premises. We conclude that no jury could reasonably have found that Ciesla was induced by "excessive incitement, urging, persuasion, or temptation" which was "likely to induce the commission of an offense by a person not already disposed to commit an offense

[3] Ciesla's testimony on direct examination was that "I was told to leave. Just got in my vehicle and left." On cross-examination, however, Ciesla at one point said that "[the lieutenant] told me to get in my vehicle and leave." When pressed on the lieutenant's exact statements, however, Ciesla returned to his initial version of the exchange with the lieutenant:

> Q. …[Y]ou're saying now that [the lieutenant] told you that you had to drive that car?
>
> A. That's what I, that's the way I took it …. I was told to leave and I felt I had no choice but to do that.

Ciesla does not argue on appeal that the lieutenant's statements to Ciesla were in dispute and thus subject to the jury's determinations of credibility. Rather, Ciesla accepts the lieutenant's version of the conversation, arguing only that it was for the jury to determine whether entrapment could be "inferred" from the facts adduced in the hearing transcripts.

of that kind." WIS J I—CRIMINAL 780. Thus, the trial court correctly concluded that Ciesla had failed to produce even "some evidence" of entrapment, and the court did not err in directing a guilty verdict based on the parties' stipulation that the elements of OMVWI were proven.

¶12 Before concluding, we note the presence of a potentially dispositive issue that was not raised by the parties in this appeal. The pattern instruction on entrapment employs the term "law enforcement officer" for the person or entity that must improperly induce an individual to commit an offense. Courts sometime refer to "the government" or "government agents" as being the necessary actors. *See, e.g.,* ***State v. Hilleshiem***, 172 Wis.2d 1, 8, 492 N.W.2d 381, 384 (Ct. App. 1992). Ciesla's proffered entrapment defense assumes that the FCI lieutenant was a "law enforcement officer" or "government agent" for entrapment purposes. The lieutenant was a correctional officer employed by the federal government. There is nothing in the record to indicate that the lieutenant was performing anything other than his regular duties at FCI when he directed Ciesla to leave the premises, or that he acted at the behest of or in concert with the Adams County Sheriff's Department in directing Ciesla to leave the grounds.[4]

¶13 We question, therefore, whether the FCI lieutenant would qualify as a "law enforcement officer" or "government agent" who induced Ciesla to violate the Adams County traffic ordinance. The County did not raise the issue in either this court or the trial court, and accordingly, we do not address the issue.

[4] The lieutenant testified that he was "an officer of the Federal government"; that he was neither deputized in Adams County nor a state-certified law enforcement officer; and that he had "no association … with the Adams County Sheriff's Department."

CONCLUSION

¶14 For the reasons discussed above, we affirm the judgment of the trial court.

By the Court.—Judgment affirmed.

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