COURT OF APPEALS
DECISION
DATED AND FILED

June 24, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-0352-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

EDDIE L. QUINN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed.*

VERGERONT, J.[1] Edward Quinn appeals a judgment of conviction on two counts of battery contrary to § 940.19(1), STATS., one count of disorderly conduct contrary to § 947.01, STATS., and one count of dissuading a victim from

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

reporting a crime contrary to § 940.44(1), STATS.[2] He contends we should reverse the convictions and order a new trial because he was prevented from presenting a defense of impairment due to intoxication, and the real controversy was therefore not tried. We conclude the trial court rulings challenged by Quinn were not error and did not prevent him from presenting a defense. We are also not satisfied that the real controversy was not tried, and therefore decline to exercise our discretionary power of reversal. We affirm.

The incident giving rise to the charges occurred at Debra Scott's apartment, where Quinn, Scott, and a third person, Marvin Pierce, were drinking vodka and ingesting cocaine. Scott testified at trial that Quinn became angry and hit her on the side of the face, at which point Pierce left. Quinn then threw objects around the apartment, repeatedly kicked and hit Scott, and dragged her around by her hair. When she picked up the phone to call the police, Scott testified, Quinn grabbed the phone from her and broke it. Scott's neighbor, Robert Stettenbenz, heard Scott's calls for help and came to her apartment. Stettenbenz testified that he told Quinn to leave or he would call the police. Since Quinn refused to leave, Stettenbenz went back to his own apartment and called 911. When he returned to Scott's apartment, Quinn was putting his coat on. Stettenbenz testified that he motioned for Quinn to stop and told him to stay until the police came. As Quinn walked away, Stettenbenz said, "Yeah, run away, you cowardly woman beater." Quinn punched Stettenbenz in the face and knocked him to the floor.

Quinn was initially represented by counsel, but subsequently discharged his attorney, waived his right to counsel and proceeded pro se, with

[2] Each count was enhanced under the habitual criminality statute, § 939.62(1)(a), STATS.

standby counsel to assist him. In his opening argument to the jury, Quinn told the jury that for his defense he was relying on § 939.42(2), STATS., which provides that the intoxicated condition of the actor is a defense if it negates the existence of a state of mind essential to the crime.[3] Quinn did not present any expert testimony with respect to impairment due to intoxication and did not testify himself.

In addition to Scott's and Stettenbenz's testimony on Quinn's behavior, Officer Brad Armstrong, who arrived at the apartment as Quinn was leaving, testified. He saw Quinn "rapidly" walking away and took him into custody. He testified that Quinn smelled of alcohol, but "in no way appeared to be incapacitated" by alcohol or drugs. Officer Armstrong testified that he had had contact with about fifty persons incapacitated by alcohol and had observed some of the symptoms of incapacitation due to alcohol to be: the person cannot walk without assistance, the person is vomiting, and the person is unable to take care of himself or herself. Quinn, the officer testified, did not show any of these symptoms; and the jail, which by policy does not accept anyone who appears incapacitated or has a blood alcohol level above .3, accepted custody of Quinn.[4] On cross-examination Officer Armstrong acknowledged that he did not know how much alcohol or cocaine Quinn had consumed the day of the incident.

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[3] Section 939.42, STATS., provides:

> **Intoxication**. An intoxicated or a drugged condition of the actor is a defense only if such condition:
>
> (1) Is involuntarily produced and renders the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act is committed; or
>
> (2) Negatives the existence of a state of mind essential to the crime, except as provided in s. 939.24 (3).

[4] Persons not accepted for these reasons are taken to the detoxification center.

At the close of evidence, Quinn requested that the instruction based on § 939.42(2), STATS., be given to the jury. The trial court denied the request, concluding that there was no evidence that would allow a jury to determine that Quinn was sufficiently impaired due to the consumption of alcohol to negate the existence of intent.[5]

DISCUSSION

On appeal, Quinn contends that the trial court erroneously prevented him from presenting his defense of voluntary intoxication. As Quinn recognizes, voluntary intoxication is not a legal excuse for a crime, but, when intent is an element of a crime, evidence that the defendant was intoxicated may constitute evidence that the requisite intent was lacking. ***State v. Strege***, 116 Wis.2d 477, 486, 343 N.W.2d 100, 105 (1984). An instruction on voluntary intoxication requires that "[t]here … be some evidence that the defendant's mental faculties were so overcome by intoxicants that he was incapable of forming the intent requisite to the commission of the crime." ***Id.*** According to Quinn, the court prevented him from presenting this defense by making three erroneous rulings. First, the court ruled that certain questions Quinn was attempting to ask Scott were not relevant:

> QUESTION: I was going to ask in regards to the supposed alleged arguments or whatever before, do you recall that on occasion you would have to tell me why we were -- why you were angry with me or why you were giving me the cold shoulder, so to speak, because of something I had allegedly done or said the night before, but didn't remember having done?
>
> ANSWER: I don't understand.

[5] The trial court also denied Quinn's request for a jury instruction on self-defense regarding the charge of battery to Stettenbenz, but that ruling is not an issue on this appeal.

> QUESTION: Did you ever have to tell me something that I supposedly had said or done the night before, and I didn't remember?
>
> THE COURT: I'm going to rule that that's not relevant, Mr. Quinn, what the arguments on other occasions were about.[6]

(Footnote added.)

Second, the court sustained the State's objections to two of Quinn's questions to Officer Armstrong:

> QUESTION: Yes. Officer Armstrong, you -- are you an expert on alcoholics and alcoholism, in any way an expert in that field?
>
> [PROSECUTOR]: Objection; relevance. And it's beyond the scope of the question. I didn't ask him about alcoholism or alcoholics. I just asked about --
>
> THE COURT: I'll overrule the objection. Go ahead.
>
> ANSWER: I have had college education specifically dealing with alcohol and other drugs. And as a police officer, I work with people who are intoxicated or incapacitated pretty much every night.
>
> QUESTION: Officer, in your experience, in your education, does that apply to everybody?
>
> THE COURT: Does what apply to everybody?
>
> THE DEFENDANT: The things that he just indicated. I mean, in your experience, can you tell this jury that the same thing -- everybody reacts the same way, or how much quantity one person has to have to become incapacitated to the point the definition that you gave, or descriptions that you gave?
>
> [PROSECUTOR]: Your Honor, I object to the form of that question.
>
> THE COURT: Sustained.
>
> ….

[6] Quinn asserts this ruling was on the court's own initiative. However, as we explain later, this quoted portion was immediately preceded by an objection that the court did not rule on; instead, it gave Quinn the chance to complete the question.

> QUESTION: I have to ask this again. I don't think I am. You said what education you had or experience that you had. You didn't -- you don't claim to be an expert, do you?
>
> [PROSECUTOR]: Objection. He's asked this question before, and the witness answered what his experience was and his educational background.
>
> THE DEFENDANT: I asked him before if he was an expert. That's what I asked him.
>
> THE COURT: The issue isn't whether this witness thinks he's an expert. He's told us his training and experience. The jury will decide what weight to give to his testimony.

Third, the court denied the requested jury instruction for the intoxication defense.

These errors, Quinn contends, deprived him of his right to present a defense, which is grounded in the confrontation and compulsory process clauses of the Sixth Amendment to the United States Constitution and Article 1, Section 7 of the Wisconsin Constitution. *See* ***State v. Pulizzano***, 155 Wis.2d 633, 645, 456 N.W.2d 325, 330 (1990). Quinn also contends that we should exercise our discretionary powers of reversal under § 752.35, STATS., and remand for a new trial because, by virtue of these trial court errors, the real controversy was not tried. Although Quinn treats the argument on his constitutional right to present a defense as part of his argument for a discretionary reversal, we view them as distinct and alternative arguments. We address the constitutional claim first.

Whether the trial court's rulings excluding evidence deprived Quinn of his constitutional right to present a defense is a question of law, which we review de novo. *See* ***State v. Dodson***, 219 Wis.2d 65, 69-70, 580 N.W.2d 181, 185 (1998). The constitutional right to present evidence is not absolute, but grants a defendant the right to present only relevant evidence that is not substantially outweighed by its prejudicial value. ***Pulizzano***, 155 Wis.2d at 646, 456 N.W.2d at 330. Similarly, a defendant is entitled to a requested instruction on his or her

theory of defense only if it is supported by some evidence. ***Turner v. State***, 64 Wis.2d 45, 51, 218 N.W.2d 502, 505 (1974). We conclude that Quinn's constitutional right to present a defense was not violated, because the court's rulings did not exclude relevant evidence and there was no evidence to support the voluntary intoxication instruction.

With respect to Scott's testimony, the court ruled that "what the arguments on other occasions were about" was not relevant. The court did not rule, as Quinn suggests, that questions of prior instances of his blackouts were irrelevant. As we read the transcript, which we have gone over carefully, the trial court apparently thought that Quinn was trying to question Scott on prior arguments to make other points about their relationship and her credibility; the court did not perceive that Quinn wanted to get from there to a question about his not being able to recall what happened in those prior arguments. We read the transcript in this way because, just preceding the questions to Scott that we have quoted above, Quinn asked two questions concerning prior arguments with her, which the State objected to—the first on the ground that it was repetitious, which the court sustained, and the second on the ground that the question misstated Scott's testimony, which the court did not rule on, instead allowing Quinn to finish the question. In neither of the prior questions, nor those quoted above, does Quinn refer to "blackouts." He does, in the quoted questions, eventually get to the question of whether he had done or said something on those prior occasions that he did not remember. However, we are persuaded that the court's ruling on relevancy was directed to the substance of the prior arguments, not prior instances of blackouts. As such, it was correct.

If Quinn felt that he needed to establish the substance of prior arguments to make his point about prior blackouts, he should have explained that

to the court. In any event, the court's ruling did not prevent Quinn from asking about prior blackouts, as along as he did not go into "what the arguments on other occasions were about."[7]

Similarly, the court's rulings with respect to Officer Armstrong's testimony did not exclude relevant evidence. The first objection the court sustained was "to the form of that question." That was a proper ruling because the question was a compound one. Quinn did not attempt to rephrase the question, but the court's ruling did not prevent him from doing so. The second ruling challenged—to the question whether Officer Armstrong claimed to be an expert—was also correct. The trial court rules on whether a witness is qualified either by training or experience to testify as an expert. *See* ***Wester v. Bruggink***, 190 Wis.2d 308, 317, 527 N.W.2d 373, 377 (Ct. App. 1994). If the trial court determines that a witness is qualified, the jury decides how much weight to accord that testimony. *See* ***State v. Peters***, 192 Wis.2d 674, 688, 534 N.W.2d 867, 872 (Ct. App. 1995). The witness's own opinion on whether he or she is an expert is not relevant because it does not tend to make a fact of consequence more or less probable. *See* § 904.01, STATS. The court allowed Quinn to ask Armstrong about his training and experience and to examine the basis for his observation that Quinn was not incapacitated the night he was arrested. Quinn argues that treatises recommend that, in laying a foundation for expert testimony, the attorney ask the witness whether he or she has previously testified as an expert in the particular area. However, that is not the question Quinn asked.

[7] The State also contends that testimony on prior blackouts was irrelevant because it was not probative of whether he blacked out on this particular evening. We need not address that contention.

We also conclude the trial court correctly denied the requested instruction on voluntary intoxication. We do not agree with Quinn that the following statements, considered together, warrant the instruction: counsel's statement at the pretrial hearing on the intended defense and need for an expert,[8] the "suggestion" in Quinn's cross-examination of Scott that he did not remember what happened that night, his closing argument that he "still [didn't] know what happened," and Scott's testimony that Quinn "went crazy." The first three are not evidence and the last falls far short of the evidence needed for the instruction.

The trial court considered the standard for giving the instruction as explained in ***Strege***, 116 Wis.2d at 485-86, 343 N.W.2d at 105. The court correctly concluded that there was even less evidence to support the instruction in this case than in ***Strege***, where the court held the evidence was insufficient to warrant the instruction. In ***Strege***, there was testimony that the defendant had consumed ten to fifteen beers and an unspecified amount of valium before the incident and was "well up there" or "pretty high." However, the court pointed out there was no testimony over what period of time the beer was consumed, and no expert testimony on the likely effect of the beer or drug on a person of Strege's size and with his history of use. The ***Strege*** court then concluded that the evidence fell short of "the evidence of impairment necessary to warrant an instruction on voluntary intoxication." ***Id.*** at 487, 343 N.W.2d at 105. In this case Officer Armstrong testified that Quinn was not impaired. Scott's and Stettenbenz's testimony established that Quinn was angry and violent but did not establish that he was mentally impaired. Quinn could have asked whether they observed him to

[8] The minutes of the pretrial hearing include the statement, "Need expert—defense is intoxication." Although it is not clear from the record who raised this issue, we assume for purposes of this opinion that Quinn's counsel made the statement as Quinn asserts.

be impaired, but he did not. And, although there was testimony that the three ingested cocaine and consumed a liter of vodka (or, according to Pierce, not all of a liter of vodka), there was no testimony on how much of either Quinn ingested. Quinn could have asked Scott or Pierce how much he himself had of the alcohol and drugs, but he did not.

We now turn to Quinn's contention that we should exercise our discretionary power under § 752.35, STATS., to reverse and remand for a new trial because the real controversy has not been tried.[9] Reversal for this reason does not require a finding of the probability of a different result on retrial. ***Vollmer v. Luety***, 156 Wis.2d 1, 19, 456 N.W.2d 797, 805 (1990). Cases ordering a new trial because the real controversy has not been tried include but are not limited to these situations: (1) the jury was erroneously not given the opportunity to hear important testimony; (2) the jury had before it evidence that should not have been admitted; (3) there was an error in the jury instructions or verdict questions on a significant issue (even if the error was waived); and (4) due to error of counsel or the trial court, a significant legal issue was not properly tried. *See* ***id.*** 19-20, 456 N.W.2d at 805-06. Quinn makes his argument under the first and third line of cases. However, we have already determined that the court did not erroneously

[9] Section 752.35, STATS., provides:

> **Discretionary reversal**. In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

exclude any evidence and did not erroneously decline to give the voluntary intoxication instruction. The lack of evidence to support the requested instruction was not due to trial court error in excluding evidence: Quinn simply did not present such evidence.

Although the failure to present evidence might, in the right circumstances, be an appropriate basis for the exercise of our discretionary power of reversal, we conclude that is not the case here. Because Quinn did not bring a postconviction motion, we have no record of what evidence of impairment Quinn would present that he did not present. Therefore, we have no basis on which to conclude that there is important evidence that the jury did not hear. This fact distinguishes this case from ***Garcia v. State***, 73 Wis.2d 651, 245 N.W.2d 654 (1976), in which the supreme court used its statutory discretionary power of reversal[10] to reverse a conviction and remand for a new trial when a defendant chose not to have a friend testify that he (the friend) had participated in the crime and the defendant was not there and had not participated in any way. In ***Garcia***, the court was able to evaluate the evidence that had not been presented, and determine that it was important to the central issue in the case.[11] In contrast, here

[10] Our discretionary power of reversal under § 752.35, STATS., is identical to the discretionary power of reversal of the supreme court under § 751.06, STATS. ***Vollmer v. Luety***, 156 Wis.2d 1, 19, 456 N.W.2d 797, 805 (1990).

[11] Although it is perhaps not entirely clear that the reversal in ***Garcia v. State***, 73 Wis.2d 651, 245 N.W.2d 654 (1976), was based on the ground that the real controversy was not tried, that is the supreme court's recent characterization of ***Garcia*** in ***State v. Hicks***, 202 Wis.2d 150, 162-63, 549 N.W.2d 435, 440-41 (1996). Our purpose in considering whether Quinn has evidence he would present at a new trial is not to determine if a different result is probable: that consideration is not necessary for reversal on the ground that the real controversy has not been tried. Rather, our purpose, consistent with the court's analysis in ***Garcia***, is to determine whether important evidence was not presented to the jury.

we have no basis for concluding that evidence not presented to the jury is important to the issue of intent.

By the Court.—Judgment affirmed.

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