COURT OF APPEALS
DECISION
DATED AND FILED

June 27, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP704-CR **Cir. Ct. No. 2012CF1408**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID E. SIERRA-LOPEZ,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. David Sierra-Lopez appeals two judgments of conviction, entered upon jury verdicts, on multiple charges related to a residential burglary and the robbery and sexual assault of the occupant. He also appeals an order denying his motion for postconviction relief. We reject Sierra-Lopez's

argument that his statements during an interview with law enforcement, as well his consent to provide a DNA sample, were not knowingly, intelligently and voluntarily given. We also reject his arguments that he received ineffective assistance of trial counsel and that he is entitled to reversal in the interest of justice. Accordingly, we affirm.

BACKGROUND

¶2 An amended criminal complaint charged Sierra-Lopez with six offenses, all as a party to the crime: (1) armed burglary; (2) armed robbery; (3) false imprisonment; (4) first-degree sexual assault; (5) fraudulent use of a credit card; and (6) misdemeanor theft.

¶3 At trial, Olivia[1] (who lived alone) testified through an interpreter that a noise woke her shortly before 5:00 a.m. on November 17, 2012. She discovered two men in her apartment wearing masks and gloves. One of the men placed a gun to her head while the other held a knife to her abdomen. The assailants spoke to her in Spanish but talked to one another in English. They threatened Olivia and took her cell phone. Olivia gave them some money, but one of the assailants took her bank card, demanded her personal identification number, and then left to retrieve money from a bank.

¶4 When he returned, the men demanded that Olivia take off her clothes. They then sexually assaulted Olivia at gunpoint. The assailants left after

[1] In accordance with the policy underlying WIS. STAT. RULE 809.86(1) (2015-16), we refer to the victim using a pseudonym.

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

Olivia told them someone would be coming to check on her. They told Olivia they would come back to kill her if she called the police or yelled. The assailants took some of Olivia's personal effects with them, including Olivia's social security card and a DVD player, as well as a red plastic box. After they left, Olivia borrowed a neighbor's phone to call the police.

¶5 Olivia was transported to a hospital for a sexual assault examination. Police were able to determine that Olivia's phone was being used to contact a juvenile female. The female said her boyfriend, who lived in a nearby apartment, had been using the phone to call and text her. On the evening of November17, officers went to that apartment and spoke with the occupants. While performing a consensual search, officers discovered items resembling those used during the commission of the offenses, as well as items taken from Olivia's residence. Police obtained a search warrant and found clothes matching those Olivia said her assailants were wearing, Olivia's cell phone, and a red plastic box containing a DVD player. One of the apartment's occupants, Miguel Baez-Rios, was taken into custody.

¶6 The apartment's other occupant told police that Baez-Rios's "friend," later identified as Sierra-Lopez, had been in the apartment earlier that day. Sierra-Lopez believed he was in danger from people following him and called 911 from a laundromat early in the morning on November 18, 2012. Police took Sierra-Lopez into custody and booked him at the Brown County Jail at approximately 3:30 a.m. on November 18. At 6:48 p.m., detective Stephanie Thomas interviewed him at the jail. During the interview, Sierra-Lopez was

advised of his ***Miranda***[2] rights and agreed to give a written statement, wherein he confessed to his involvement in the crimes. At approximately 6:20 p.m. the next day, while still in the jail, Sierra-Lopez consented to detective Lee Kingston taking a DNA sample from him via a buccal swab.

¶7 Sierra-Lopez filed a motion to suppress the statements he made during the interview on the basis that he was not competent to waive his ***Miranda*** rights because he was under the influence of street drugs.[3] He also sought to suppress the DNA specimen taken at the Brown County Jail. The circuit court denied the motion, finding that Sierra-Lopez voluntarily waived his ***Miranda*** rights and consented to give a DNA sample. The case proceeded to trial, after which a jury returned guilty verdicts on all counts.[4]

¶8 Sierra-Lopez then filed a postconviction motion in which he again challenged the voluntariness of his statements and the DNA sample taken on November 18 and 19, 2012, respectively. He also filed a supplemental postconviction motion in which he argued his attorney was ineffective for failing

[2] ***Miranda v. Arizona***, 384 U.S. 436, 444-45 (1966).

[3] On appeal, Sierra-Lopez contends his statements themselves, as opposed to his waiver of his ***Miranda*** rights, were not given knowingly or voluntarily. Because the standards governing both claims are virtually identical, and because Sierra-Lopez asserts the same facts he argued below support his new appellate argument (namely, that he was intoxicated and English was not his primary language), we consider together both the voluntariness of his confession and the voluntariness of his ***Miranda*** waiver. *Compare* ***State v. Hoppe***, 2003 WI 43, ¶36, 261 Wis. 2d 294, 661 N.W.2d 407 (holding a defendant's statements are voluntary if they are the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by the state exceeds the defendant's ability to resist), *with* ***State v. Hambly***, 2008 WI 10, ¶91, 307 Wis. 2d 98, 745 N.W.2d 48 (holding a ***Miranda*** waiver is voluntary if it is the product of free and deliberate choice rather than intimidation, coercion or deception).

[4] Two judgments of conviction were entered in this case, one pertaining to the misdemeanor charges and one pertaining to the felony charges.

to request a voluntary intoxication jury instruction. The circuit court denied these motions following an evidentiary hearing. Sierra-Lopez now appeals.

DISCUSSION

*I. Voluntariness of **Miranda** waiver/statements and consent to give DNA sample*

¶9 The circuit court denied Sierra-Lopez's motion to suppress in a fifteen-page written decision, after having both heard live testimony and viewed an audiovisual recording of the interview. Sierra-Lopez has not argued his ***Miranda*** waiver, statements, or consent to give a DNA sample were the result of improper pressure, coercion, or threats by law enforcement, and the circuit court found no such conduct occurred. Rather, Sierra-Lopez contends his waiver, statements, and consent to provide a DNA sample were involuntary because he was under the influence of drugs at all relevant times. He additionally claims the November 18 interrogation and November 19 buccal swab were obtained involuntarily given that he "primarily speaks Spanish."

¶10 The circuit court acknowledged Sierra-Lopez exhibited signs of drug use, including droopy eyes and shaking, when he was booked at the jail in the early morning hours on November 18. He was placed in the detox unit at that time. During the interview with detective Thomas, Sierra-Lopez described his having been chased by dozens of men who had the devil inside of them upon leaving Olivia's apartment. He also claimed that, around the time of the crimes, he saw spirit people, the devil, and two men who told him they were God and Jesus.

¶11 However, the interview with detective Thomas began approximately fifteen hours after Sierra-Lopez was booked into the Brown County Jail. The

circuit court specifically found the hallucinogenic experiences Sierra-Lopez described during the interview occurred prior to his booking, but after the crimes had taken place. Moreover, the court observed that Sierra-Lopez was able to recount his memories during the interview "in a calm, coherent, and lucid manner as though it was part of the larger series of events that occurred." At the suppression hearing, Sierra-Lopez could not testify for certain whether he had even taken any drugs.[5] The court concluded "Sierra-Lopez's evidence regarding symptoms of intoxication at the time he was booked into jail is insufficient to persuade the Court that he was intoxicated at the time of the interview."

¶12 The circuit court also found Sierra-Lopez was not intoxicated at the time he consented to allow detective Kingston to take a DNA sample. The only evidence of intoxication Sierra-Lopez presented related to the time period prior to his booking at 3:30 a.m. on November 18, 2012. The court found this evidence had no persuasive value in light of Kingston's testimony that Sierra-Lopez: (1) did not appear to be under the influence of drugs; (2) was able to communicate with him in English effectively without an interpreter; (3) stated that he understood Kingston's explanation regarding the purpose for the DNA swabbing; and (4) signed the consent form and cooperated during the swabbing.

¶13 On appeal, Sierra-Lopez does not challenge the circuit court's factual findings as being clearly erroneous (at least, not until his reply brief, which

[5] Sierra-Lopez testified that, based on his street knowledge of the effects of certain drugs, "the only drug that could have affected my system … implicating me in a critical intoxication were pills that contained the substance like heroin." Sierra-Lopez speculated it "had to be a lot," an "extremely serious amount to where the substance was trying to escape through the most sensitive part of my body, which was my lips."

is too late).[6] *See* ***State v. Walli***, 2011 WI App 86, ¶1, 334 Wis. 2d 402, 799 N.W.2d 898 (holding "clearly erroneous" standard applies to factual findings made from a combination of live testimony and evidence preserved on a video recording). The parameters of his appellate argument challenging the circuit court's "no intoxication" finding are unclear; he simply recites the evidence that might have supported a contrary finding, including his own testimony that he must have taken "a lot, a very extreme amount" of drugs. "It is the function of the trier of fact, and not of an appellate court, to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990).

¶14 Proof of intoxication does not affect the admissibility of evidence where there is no proof the confessor was irrational, unable to understand the questions or his or her responses, was otherwise incapable of giving a voluntary response, or reluctant to answer the questions posed by authorities. ***State v. Clappes***, 136 Wis. 2d 222, 241-42, 410 N.W.2d 759 (1987). In the absence of evidence suggesting one of those situations, the intoxication of the accused goes to the weight of the evidence, not its admissibility. ***Id.*** at 242. Ultimately, Sierra-Lopez's only response to the circuit court's observation that his potentially drug-induced hallucinations occurred prior to his jail booking is his assertion that the circuit court "discount[ed]" his argument regarding his limited English-speaking ability.

[6] Moreover, even assuming the argument had been properly made in Sierra-Lopez's brief-in-chief, we would reject it. In light of the record evidence, the circuit court's factual findings are not clearly erroneous.

¶15 Yet, Sierra-Lopez offers no basis to conclude the circuit court erred when it determined there were no language-related issues that affected the voluntariness of Sierra-Lopez's ***Miranda*** waiver, confession, or consent to give a DNA sample, either. Again, Sierra-Lopez simply argues the circuit court should have reached the opposite conclusion. The court found Sierra-Lopez credible to the extent he asserted Thomas never asked if he required a translator. However, Sierra-Lopez does not present any compelling argument or evidence that undermines the circuit court's findings that he: (1) never requested a translator; (2) never expressed difficulty understanding English; (3) and was able to converse with Thomas in English, providing contextually appropriate responses and asking contextually appropriate questions.[7] The fact that an interpreter assisted Sierra-Lopez throughout the legal proceedings does not establish that Sierra-Lopez was unable to understand or communicate in English during the November 18 interview or the November 19 DNA swabbing.

II. Ineffective assistance of counsel

¶16 Sierra-Lopez next argues that his defense attorney provided ineffective assistance of counsel by failing to request a jury instruction on voluntary intoxication. To demonstrate ineffective assistance of counsel, a defendant must establish that counsel's performance was constitutionally deficient and that the deficient performance prejudiced the defense. ***State v. Ambuehl***, 145 Wis. 2d 343, 351, 425 N.W.2d 649 (Ct. App. 1988). We review the circuit court's determination using a two-step approach. We will affirm the circuit court's

[7] Sierra-Lopez emphasizes that Thomas testified there were a "couple words" that Sierra-Lopez did not understand. However, Thomas also stated that he appeared to understand her when she rephrased her statement.

factual findings unless they are clearly erroneous, but we independently determine whether the facts as found establish the defendant received ineffective assistance. ***Id.***

¶17 At the time of the crimes at issue, an intoxicated or drugged condition was a defense if such condition "negative[d] the existence of a state of mind essential to the crime." WIS. STAT. § 393.42(2) (2011-12).[8] This principle was the basis for WIS JI—CRIMINAL 765 (2010). That jury instruction was not warranted, however, merely because there was evidence that the defendant was intoxicated. ***State v. Strege***, 116 Wis. 2d 477, 484, 343 N.W.2d 100 (1984). Rather, according to our supreme court:

> [I]n order to qualify for an instruction on the defense of voluntary intoxication, the defendant must produce evidence sufficient to raise intoxication as an issue. To do this he must come forward with some evidence of the degree of intoxication which constitutes the defense. An abundance of evidence which does not meet the legal standard for the defense will not suffice. There must 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. A bald statement that the defendant had been drinking or was drunk is insufficient—insufficient not because it falls short of the quantum of evidence necessary, but because it is not evidence of the right thing.

Id.

¶18 Ultimately, Sierra-Lopez never comes to grips with ***Strege***'s requirements. His brief emphasizes trial evidence that he had taken drugs, was placed in detox when booked at the jail, and could not recall any events between

[8] The legislature eliminated the voluntary intoxication defense effective April 18, 2014. *See* 2013 Wis. Act 307.

November 16-18, 2012. Sierra-Lopez testified at trial only that he had taken some ecstasy pills and did not think he had intentionally overdosed. Because it was not clear Sierra-Lopez would have been entitled to a voluntary intoxication instruction had it been requested, he has failed to show his trial counsel performed deficiently. *See* ***Ambuehl***, 145 Wis. 2d at 352.

¶19 We also conclude Sierra-Lopez has failed to demonstrate prejudice stemming from the alleged deficiency. As the State argues, "even if the court had given the instruction, the likelihood that the jury would have found that Sierra-Lopez lacked the requisite intent because he was high on drugs is exceedingly small." It is necessary for a defendant to show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. Here, there was compelling evidence of intent in the form of the victim's testimony regarding the perpetrators' acts and words, all of which appeared, both in nature and sequence, to be the acts and instructions of men who knew what they were doing. That evidence, taken together with the relatively weak intoxication evidence, precludes any assertion of prejudice here.

III. Reversal in the interest of justice

¶20 Finally, Sierra-Lopez argues he is entitled to a new trial in the interest of justice. We may order a new trial in the interest of justice on either of two grounds: "that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." ***State v. Cleveland***, 2000 WI App 142, ¶21, 237 Wis. 2d 558, 614 N.W.2d 543. Sierra-Lopez does not specify under which of these standards he seeks relief, but he again argues his attorney "would have been prudent to request the [voluntary intoxication] instruction."

¶21 When a defendant's "interest of justice" argument rests on his or her counsel's alleged deficiencies, the proper framework to apply is that of ineffective assistance of counsel. ***State v. Mayo***, 2007 WI 78, ¶60, 301 Wis. 2d 642, 734 N.W.2d 115. We have already rejected Sierra-Lopez's argument using that more appropriate standard. Our power of discretionary reversal is reserved for "exceptional cases." *See* ***State v. Kucharski***, 2015 WI 64, ¶5, 363 Wis. 2d 658, 866 N.W.2d 697. Sierra-Lopez has not presented a compelling argument that this is such a case.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited except as provided under RULE 809.23(3).