COURT OF APPEALS
DECISION
DATED AND FILED

March 13, 2007

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP1847-CR **Cir. Ct. No. 2005CF37**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONALD W. JORGENSEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Shawano County: JAMES R. HABECK, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PETERSON, J. Donald Jorgensen appeals a judgment of conviction and an order denying his postconviction motion. Jorgensen was convicted of bail jumping, operating while intoxicated, fifth offense, and operating after revocation. Jorgensen argues he was denied the effective assistance of counsel or, in the

alternative, deserves a new trial for plain error or in the interest of justice. We disagree and affirm the judgment and order.

BACKGROUND

¶2 On November 10, 2004, Jorgensen appeared in Shawano County Circuit Court before Judge James Habeck on an unrelated traffic matter. The assistant district attorney assigned to the case, Catharine White, informed the court she smelled a strong odor of intoxicants on Jorgensen. White asked the court to order Jorgensen to submit to a preliminary breath test. The court did so, and the test showed a blood alcohol concentration (BAC) of .12%. White then asked the court to revoke Jorgensen's bond and order a blood draw for evidence of bail jumping. The court did so. The BAC of the sample was .174%

¶3 After the blood draw, deputy Christopher Miller interrogated Jorgensen. Jorgensen's attorney had stated Jorgensen drove a red Nissan to the courthouse. Jorgensen denied owning a red Nissan and claimed Pamela Faehling drove him to the courthouse. Sergeant George Lenzner discovered the Nissan was registered to Dorothy Kempen, who stated she had sold the vehicle to Jorgensen. Jorgensen had a set of keys to the Nissan in his pocket.

¶4 Jorgensen was charged with bail jumping, operating a motor vehicle while intoxicated, fifth offense, and operating a motor vehicle after revocation. The case proceeded to a jury trial on August 31, 2005. Judge Habeck presided over the trial and Catharine White prosecuted the case.

¶5 White introduced the transcript of the November 10 hearing into evidence, and Judge Habeck read it aloud to the jury at the beginning of the trial. Deputy Miller testified that he smelled a strong odor of intoxicants on Jorgensen.

Thomas Neuser, a chemist with the State Laboratory of Hygiene, testified that Jorgensen's BAC was .174%. Faehling testified she did not drive Jorgensen to court but, instead, Jorgensen had driven himself in a red Nissan. Faehling also admitted telling sergeant Lenzner that Jorgensen drank a quart of Peppermint Schnapps before leaving for court.

¶6 Jorgensen testified Faehling drove him to court on November 10. He denied drinking before he left home, but instead claimed he arrived early and ate lunch at a tavern, where he had two alcoholic drinks. Jorgensen said he also drank an entire bottle of Nyquil at lunch on the advice of his doctor to treat emphysema.

¶7 In her closing argument, White reminded the jury she had been present at the November 10 hearing and recounted her role at the hearing, including her opinion that Jorgensen had been drunk at the hearing. In his closing argument, Jorgensen's attorney admitted Jorgensen had drunk alcohol prior to the hearing, but argued Jorgensen had either had someone else drive him to the courthouse or had drunk alcohol after he drove to the courthouse. The jury convicted Jorgensen on all charges. Jorgensen's motion for postconviction relief was denied.

DISCUSSION

I. Ineffective assistance of counsel

¶8 We review ineffective assistance of counsel claims as a mixed question of fact and law. ***State v. Johnson***, 153 Wis. 2d 121, 127-28, 449 N.W.2d 845 (1990). We will only overturn the circuit court's findings of fact if they are

clearly erroneous. ***Id.*** However, whether those facts constitute ineffective assistance is a question of law we review without deference. ***Id.***

¶9 To prevail on a claim of ineffective assistance a defendant must show counsel's performance was deficient and the deficient performance prejudiced his or her defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We may avoid the deficient performance analysis if the defendant fails to show prejudice. *See* ***Johnson***, 153 Wis. 2d at 128. A defendant is prejudiced when there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland***, 466 U.S. at 694.

¶10 Jorgensen argues his counsel was ineffective because counsel: (1) did not move to disqualify White; (2) did not object to White's unsworn "testimony" during her closing argument; (3) did not object to admission of the transcript of the November 10 hearing; and (4) did not attempt to have Judge Habeck's name redacted from the hearing transcript. We conclude none of these errors prejudiced Jorgensen, and therefore reject his arguments.

A. The prosecutor's involvement as a witness

¶11 White summed up her involvement in the case during her closing argument:

> [U]sually when I come before a jury to do my closing argument or my summing up, what I tell the jury is, I didn't get to see any of it either. I have to learn about what happened from the witnesses, the same as you do. In this case, I was there for some of it.
>
> ….

> And as you know, I informed the Court that I could smell that [Jorgensen] had been drinking when I talked to him briefly in the hallway with his attorney.
>
> ….
>
> All I know is when he was in court he was drunk. And when he had the blood drawn that he was drunk. And he said that afternoon, while he was still drunk and before he had time to think and come up with a better lie that he had nothing to drink after he left home.

¶12 There is no dispute that these comments were highly inappropriate, and that had Jorgensen's counsel objected, the objection would have been sustained. *See* ***State v. Smith***, 2003 WI App 234, ¶23, 268 Wis. 2d 138, 671 N.W.2d 854. There also is no question that had counsel named White as a witness and moved to disqualify her, his motion would have been granted. *See* SCR 20:3.7(a) (2006) (with limited exceptions, a lawyer may not be advocate at a trial where the lawyer is likely to be a necessary witness). The question, however, is whether there is "a reasonable probability" that the result of the proceeding would have been different had counsel taken those actions. ***Strickland***, 466 U.S. at 694.

¶13 No such probability exists here. As the circuit court pointed out, if White had been disqualified, she simply would have served as an additional witness to Jorgensen's intoxication at the hearing. However, Jorgensen's intoxication at the hearing was undisputed. He had breath and blood tests in which he had a BAC of .12% and .174% respectively. In his own testimony, Jorgensen admitted he had two alcoholic drinks and a bottle of Nyquil before the hearing.

¶14 In addition, in his closing argument Jorgensen never disputed that he had been drinking prior to the hearing. As part of that argument, counsel asked the jury to accept Jorgensen's testimony as true, stating:

> So even if you believe that [Jorgensen] drove the vehicle here, there is no proof that when he drove the vehicle here there was alcohol in his system at the time. He told you when he drank, he told you that he drank over lunch hour.

Counsel asked the jury to conclude Jorgensen had either not driven at all or had begun drinking after he drove to court.

¶15 Jorgensen argues that "if [White] had been a sworn witness, trial counsel could have tested her memory of the incident, probing whether she was confusing Jorgensen with another defendant." He also argues the prosecutor's closing remarks "argued a key fact that was not in evidence: that she herself had seen Jorgensen in court that day" and knew he was drunk. However, both of these claimed errors go only to the proof that Jorgensen was intoxicated at the November 10 hearing. As noted above, that issue was conclusively proven by the State and in fact conceded by the defense.

¶16 There is no question that the prosecutor's conduct was inappropriate and violated Jorgensen's rights. However, as with every trial error, we must ask if the error made any difference. Here, we are convinced there is no probability that the outcome of the trial would have been different absent counsel's errors. Therefore, Jorgensen was not prejudiced.

B. The hearing transcript

¶17 Jorgensen next argues trial counsel was ineffective for not objecting to admission of the November 10 hearing transcript and not attempting to have Judge Habeck's name redacted from the transcript. The hearing transcript shows

White told the court she "could smell a strong odor of intoxicants coming from" Jorgensen and asked the court to order Jorgensen to take a breath test. Judge Habeck ordered the test. A sheriff's deputy administered a breath test and stated Jorgensen's BAC was .12%. Judge Habeck then revoked Jorgensen's bond.

¶18 Jorgensen argues counsel should have objected to admission of the transcript on hearsay grounds, since it was offered to prove "that Jorgensen came to court smelling of alcohol, was tested for alcohol, and indeed was proven to have consumed alcohol." *See* WIS. STAT. § 908.01(3).[1] He also argues the failure to redact Judge Habeck's name showed the judge "was suspicious enough to order Jorgensen to submit to a test for alcohol," and this would "be persuasive to the jury that Jorgensen was indeed guilty as charged."

¶19 These alleged errors did not prejudice Jorgensen.[2] Jorgensen's arguments ignore the fact that Jorgensen's intoxication at the hearing was not in dispute at the trial. The hearsay in the transcript only established Jorgensen's intoxication at the hearing. Judge Habeck's choice to order Jorgensen to submit to a blood test showed at most that he was "suspicious" that Jorgensen was in fact intoxicated at the hearing.[3]

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[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] Jorgensen argues the court denied his postconviction motion based on its belief that Jorgensen was guilty because the court said, "I don't see how anybody could really have disputed that." The court's comment referred to Jorgensen's intoxication at the hearing, not Jorgensen's guilt on all charges. It simply explained that Jorgensen was not prejudiced because his intoxication at the hearing was not a contested issue at trial.

[3] Jorgensen also argues the transcript contained inadmissible evidence that he had a prior conviction for operating while intoxicated. Jorgensen does not explain how this alleged error prejudiced his defense. Jorgensen cannot ask this court to speculate on whether prejudice exists; (continued)

II. Plain error and the interest of justice

¶20 Finally, Jorgensen contends he is entitled to a new trial either under the plain error doctrine or in the interest of justice. Jorgensen argues his counsel's failure to object to Judge Habeck's involvement was plain error because Judge Habeck's involvement in the November 10 hearing gave the appearance of bias, in violation of his due process rights. *See* ***Franklin v. McCaughtry***, 398 F.3d 955 (7th Cir. 2005).

¶21 Bias exists when a court has "a direct, personal, substantial, or pecuniary interest" in the outcome of a case, or when the court prejudges a defendant's guilt prior to trial. ***Id.*** at 961. Both actual bias and the appearance of bias by the court violate a defendant's right to due process. ***Id.***

¶22 Judge Habeck's involvement here does not give the appearance of bias. The fact that the November 10 hearing took place in his courtroom does not lead to any inference that Judge Habeck had formed an opinion on the merits of the case against Jorgensen or had any interest in the outcome of the case against him. And while the court's decision to order a breath test might lead the jury to infer that Judge Habeck believed Jorgensen was intoxicated at the hearing, Jorgensen's defense did not rest in whole or in part on contesting that fact. Therefore, nothing in the court's involvement gave the appearance that Judge Habeck had any opinion on any disputed facts relevant to guilt or innocence, much less that he had prejudged the ultimate issue of Jorgensen's guilt or innocence.

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he must affirmatively show prejudice. *See* ***State v. Wirts***, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993).

¶23 Finally, Jorgensen claims he is entitled to a new trial in the interest of justice because the real controversy was not fully tried. *See* WIS. STAT. § 752.35. However, the real controversy in this case involved whether Jorgensen in fact drove to court and, if so, whether he began drinking before or after he drove to court. That controversy was fully tried.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

¶24 CANE, C.J. (*dissenting*). I respectfully dissent. Because the prosecutor improperly "testified" in her closing argument to the jury about her personal observations of Donald Jorgensen being drunk at the earlier court proceedings, I would reverse the OWI conviction and require a new trial.

¶25 At trial, the burden was on the State to prove Jorgensen was intoxicated when driving to the courthouse at the earlier proceeding. The prosecutor told the jury at closing argument:

> All of these offenses happened back on November 10, 2004 and I think that you've all, through the testimony and exhibits that have been entered into evidence, been given a fairly clear picture of what went on that day. And it's unusual because what went on that day went on in this very room. This is where it all happened. And usually when I come before a jury to do my closing argument or my summing up, what I tell the jury is, I didn't get to see any of it either. I have to learn about what happened from the witnesses, the same as you do. In this case, I was there for some of it.

Later, the prosecutor told the jury:

> Now, you were here this morning and you know that courts frequently don't run on time. That's what happened that afternoon. It's what happened today, and that's what was happening then and Mr. Jorgensen showed up and he had been drinking and it was obvious he had been drinking. And as you know, I informed the Court that I could smell that he had been drinking when I talked to him briefly in the hallway with his attorney. And we called over for a deputy to come with preliminary breath test device, because it was a condition of his bond that he not drink.

The prosecutor continued:

> All I know is when he was in court he was drunk. And when he had the blood drawn that he was drunk. And he

> said that afternoon, while he was still drunk and before he had time to think and come up with a better lie that he had nothing to drink after he left home.

Finally, near the end of her closing argument, the prosecutor stated:

> I don't know what he drank at home. [Pamela Faehling] showed a bottle to Officer Lenzner, a bottle of Peppermint Schnapps, and said he drank it that morning before he left. I don't know, I wasn't there.
>
> All I know is when he was in court he was drunk. And when he had the blood drawn that he was drunk.

¶26 Jorgensen's attorney did not object to this closing argument. Although Jorgensen's primary defense was that he had not operated the vehicle when going to the earlier court proceeding, the burden was still on the State to prove his intoxication as one of the elements of the OWI charge. Jorgensen never admitted to being intoxicated. Nonetheless, the prosecutor went unchallenged in "testifying" to the jury as to her personal observations of Jorgensen being drunk at the earlier court proceeding when he appeared in the hallway and courtroom. Consequently, the prosecutor was allowed to testify to factual assertions without being placed under oath and subject to cross-examination. This violates a fundamental constitutional right to confront one's accuser, resulting in the denial of a fair trial.

¶27 Additionally, prosecutors are prohibited from acting as an advocate at trial in which they are a witness. *See* SCR 20:3.7 (2006). Worse yet, a prosecutor should never be permitted to act at trial both as a prosecutor and a witness against the defendant. Prosecutors are considered quasi-judicial officers and must not convey to the jury that they have information outside of that

presented to the jury supporting a guilt finding. ***United States v. Labarbera***, 581 F.2d 107, 109-10 (5th Cir. 1978).

¶28 This error in my opinion warrants a new trial on the OWI conviction because of the prosecutor's improper argument, whether it is under the plain error rule or discretionary reversal. *See* WIS. STAT. § 901.03(4) ("Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the judge."); and WIS. STAT. § 752.35 ("[I]t is probable that justice has for any reason miscarried."); *see also* ***State v. Kruzycki***, 192 Wis. 2d 509, 527, 531 N.W.2d 429 (Ct. App. 1995) ("The plain-error rule is reserved for cases in which it is likely that the error denied the defendant a basic constitutional right."). Because I would require a new trial on the OWI charge due to the prosecutor's improper "testimony," I do not address Jorgensen's other arguments contending he was denied a fair trial.