COURT OF APPEALS
DECISION
DATED AND RELEASED

December 13, 1995

No. 95-1511-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EUGENE A. PAGOIS,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

SNYDER, J. Eugene A. Pagois appeals from a judgment convicting him of two counts of misdemeanor battery under § 940.19(1), STATS., and from an order denying him postconviction relief. On appeal, Pagois seeks to have his conviction vacated and remanded for a new trial. Pagois argues that the trial court erred in refusing his request for the voluntary intoxication jury instruction and in its response to the jury's question regarding Pagois' intoxication relative to his intent. We conclude that the trial court acted within

its discretion in refusing Pagois' request for the voluntary intoxication instruction and that he was not prejudiced by the explanatory instruction given to the jury. Therefore, we affirm.

The battery charges stemmed from an incident which occurred early on New Year's Day. Pagois and his friend Joseph Jucius began drinking beer in a tavern around 1:00 p.m. on December 31, 1993. They moved to a second tavern and had consumed more than twelve cans of beer and approximately seven to nine "shots" prior to leaving at approximately 7:00 p.m. to have dinner at Jucius' cottage. Around 8:30 p.m., Pagois and Jucius returned to the second tavern and resumed their drinking.

Sometime after midnight there was an argument over a pool game involving a number of persons, including Pagois and Jucius. Jucius said that as he left the tavern after the argument, Pagois pushed him down a flight of stairs and proceeded to punch and kick him.[1] Jucius also indicated that Pagois told him never to return to the apartment that the two men shared in Chicago. Pagois then left the scene, stating that he was going to go to Chicago.

A few blocks from the tavern, Pagois encountered Frank Jorgensen in a parking lot. Pagois asked Jorgensen for directions to the train station. Jorgensen stated that Pagois appeared "like a normal person out in the night. I mean he wasn't stumbling drunk or anything." Jorgensen was unable to give

[1] Pagois related a markedly different chain of events than did Jucius. Pagois testified in great detail that a person who had been involved in the earlier altercation over the pool game was actually the person responsible for Jucius' injuries.

Pagois directions and the two men parted, Pagois purportedly headed to Chicago and Jorgensen towards his daughter's home.

About 100 yards from where he encountered Pagois, Jorgensen came upon Jucius and two men who were helping Jucius up. At that point, Pagois ran up to the group of men and began hitting Jucius. Pagois also struck Jorgensen, who had attempted to pull Pagois away from Jucius. Pagois walked off after striking Jorgensen. Shortly thereafter, Pagois was picked up by Sergeant Ide of the Kenosha County Sheriff's Department.

Ide returned Pagois to the parking lot and Jucius identified Pagois as the person who had beaten him. Pagois was hostile and uncooperative from the time he was returned to the scene by Ide until Deputy Nobles transferred him to the county jail. Both Nobles and another officer testified that Pagois appeared intoxicated but that he was fully aware of his surroundings and his predicament.

Nobles testified that Pagois had a "strong odor of alcohol [and] slurred speech." Ide stated that he noticed the odor of intoxicants on Pagois' breath as soon as he began to converse with him but that Pagois' ability to walk was not impaired. Nobles also testified that on a number of occasions Pagois asked to be allowed to see Jucius in order to talk him out of filing charges for the beating.

After Pagois was placed in the back of the rescue squad for transfer to the hospital, he repeatedly gestured obscenely at Nobles. This

behavior was also directed at another officer, Sergeant Gallo, who accompanied Pagois while he was being treated at the hospital. While handcuffed to a gurney, Pagois threatened Gallo. Gallo observed that Pagois had "glassy eyes, slurred speech, [and] the odor of intoxicant[s]" about him.

Pagois was convicted of two counts of battery. After denial of his motion for postconviction relief, this appeal followed.

Pagois first argues that the trial court erred in refusing to give the jury an instruction regarding a defense of voluntary intoxication. The initial determination of whether an instruction is sufficiently supported by the evidence is a question of law. ***State v. Holt,*** 128 Wis.2d 110, 126, 382 N.W.2d 679, 687 (Ct. App. 1985). We therefore owe no deference to the trial court's determination of the question. ***Id.*** at 127, 382 N.W.2d at 687.

The Wisconsin criminal jury instructions enunciate a three-pronged test to determine whether a special defense jury instruction should be given. The instruction must be granted when:

a) it relates to the legal theory of a defense as opposed to the interpretation of the evidence urged by the defense, and

b) it is supported by the evidence, and

c) it is not adequately covered by the other instructions in the case.

WIS J I—CRIMINAL 700 (law note); *see* ***State v. Davidson***, 44 Wis.2d 177, 191-92, 170 N.W.2d 755, 763 (1969). If the three elements have been satisfied, then the instruction must be given. The trial court determined that the instruction was

not warranted because the evidence of Pagois' intoxication was not sufficient to require the giving of the instruction. Our independent review of this issue will focus on this determination.

Larson v. State, 86 Wis.2d 187, 271 N.W.2d 647 (1978), defines the amount of evidence needed to warrant an instruction to the jury. In ***Larson,*** the court stated that the "instruction is proper only where, viewing the evidence in the light most favorable to the defendant, a jury could reasonably have found that he was so intoxicated that he lacked the intent to [commit the charged crime]." ***Id.*** at 195, 271 N.W.2d at 650.

It is important to note that not just any evidence of intoxication is relevant to a determination of whether the defendant was incapable of forming the requisite intent. In ***State v. Guiden,*** 46 Wis.2d 328, 331, 174 N.W.2d 488, 490 (1970), the court made it clear that:

> The "intoxicated or drugged condition" to which the statute [§ 939.42, STATS.] refers is not the condition of alcohol-induced incandescence or being well-lit that lowers the threshold of inhibitions or stirs the impulse to criminal adventures. It is that degree of complete drunkenness which makes a person incapable of forming intent to perform an act or commit a crime. To be relieved from responsibility for criminal acts it is not enough for a defendant to establish that he was under the influence of intoxicating beverages. He must establish that degree of intoxication that means he was utterly incapable of forming the intent requisite to the commission of the crime charged.

Therefore, the evidence presented by the defendant must be proof of intoxication beyond statements such as "'I suppose kind of tipsy,' 'I was feeling kind of high,' 'I was sort of half intoxicated.'" ***Id.***

The standard to be applied by the trial court in determining whether the evidence is sufficient to warrant an intoxication defense instruction was given in ***State v. Schulz,*** 102 Wis.2d 423, 307 N.W.2d 151 (1981). There the court stated that "[t]he test which the trial court must apply is whether, construing all the evidence produced most favorably to the defendant, a reasonable juror could conclude that the defendant's state of intoxication—in the words of the statute—'negative[d] the existence of a state of mind essential to the crime.'" ***Id.*** at 430, 307 N.W.2d at 156.

Here, the trial court concluded that the evidence introduced as to Pagois' intoxication was not sufficient to warrant the giving of the instruction. Although there was evidence submitted which showed that Pagois was intoxicated, it was tempered by evidence that Pagois knew what he was doing. Pagois displayed a clear memory of the events of the evening, he was able to comprehend his predicament, and his physical appearance did not betray a state of intoxication so profound as to prevent him from forming an intent to act.

Pagois' account of the evening, though differing from that of Jucius and Jorgensen, was highly detailed and complete. Pagois realized that he might be charged with battery and reacted quickly, requesting to speak with Jucius to talk him out of pressing charges.

The testimony of the officers present indicates that Pagois was intoxicated but that he was coherent and aware of his situation. He was able to walk without stumbling and to speak clearly. Testimony supported Pagois being in control of his faculties and being able to form intent. We conclude that the trial court properly exercised its discretion in determining that the intoxication defense instruction was not appropriate.

Pagois also argues that the trial court erred in its response to the jury's request for clarification on the issue of a defense of intoxication. A trial court has wide discretion in the giving of instructions. ***State v. Pruitt,*** 95 Wis.2d 69, 80, 289 N.W.2d 343, 348 (Ct. App. 1980). If the court's instructions adequately cover the applicable law, the refusal to give special instructions will not be considered error. ***Id.*** at 80-81, 289 N.W.2d at 348. This court will sustain a discretionary decision if the trial court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a reasonable conclusion. ***Loy v. Bunderson,*** 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982).

During its deliberations, the jury sent the trial judge a question which asked, "[D]oes the law take into consideration alcohol intoxication relative to intent? And if so, what are the guidelines?" After discussion with counsel, the trial court responded:

> The fact of intoxication alone does not relieve one of responsibility for acts otherwise criminal. Please read again the instruction which has been submitted to you describing the elements of the crimes charged. You are to determine whether the elements of the charges have been proved by the State beyond a reasonable

> doubt. If the elements have been proved beyond a reasonable doubt, you should find the defendant guilty. If not, then you must find the defendant not guilty.

We conclude that this response to the jury was in line with the trial court's initial determination that the intoxication defense instruction was not warranted by the evidence. Read in conjunction with the trial court's previous ruling that there was insufficient evidence to support the giving of the instruction, this statement served only to remove the issue of a defense of intoxication from the jury's consideration. Having determined that the evidence presented did not warrant the giving of the intoxication defense instruction, the trial court's subsequent response to the jury's question was proper and did not prejudice Pagois.

By the Court.—Judgment and order affirmed.

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